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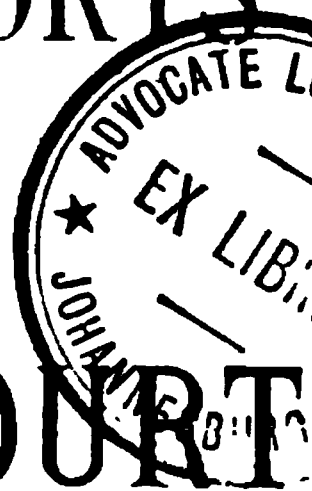
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File of Good Hope Supreme Court 25

"CAPE TIMES" LAW REPORTS
OF ALL CASES DECIDED
IN THE SUPREME COURT



OF THE
CAPE OF GOOD HOPE,
DURING THE YEAR 1902
(WITH INDEX OF CASES AND DIGEST).

REPORTED BY
S. H. ROWSON, B.A., LL.B.,
ADVOCATE OF THE SUPREME COURT.

VOL. XII.

CAPE TOWN :
PRINTED AND PUBLISHED BY THE CAPE TIMES LTD, KEEROM STREET.
1903.

**JUDGES OF THE SUPREME COURT DURING THE
YEAR 1902.**

DE VILLIERS, RIGHT HON. SIR J. H., P.C., K.C.M.G., LL.D. (Chief Justice).
from February 9th till the end of the year.

BUCHANAN, THE HON. SIR E. J., Knt. (Senior Puisne Judge).

MAASDORP, THE HON. C. J. (Junior Puisne Judge).

**HOPLEY, THE HON. W. M. (Puisne Judge of the High Court) from May 13th
to June 19th.**

ATTORNEYS-GENERAL :

THE HON. SIR JAMES ROSE INNES, K.C., to February 18th.

THE HON. T. L. GRAHAM, from February 19th.

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"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1902.
 } Jan. 13th.

Mr. Buchanan moved for the admission of John McMullen Bombie Williamson as an advocate.

Order granted and the oaths administered.

Mr. Schreiner, K.C., moved for the admission of Albert Joseph Wallach as an advocate.

Order granted, and leave given for the oaths to be taken before the Registrar of the High Court, Kimberley.

Mr. Buchanan moved for the admission of William Peter Thwaits as a conveyancer.

Order granted and the oaths administered.

PROVISIONAL ROLL.

HERMANN V. BERNSTEIN.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment to which a return of *nulla bona* had been made.

The defendant appeared in person, and after he had been examined on oath, the Court granted a decree as prayed, but with stay of execution pending payment of the debt by instalments of £2 per month, the first payment to be made on the 15th instant and subsequent payments on the 15th of each month, with leave reserved to either party to again approach the Court.

B

BATES V. ZACKS.

Mr. Bisset moved for provisional sentence for £800 due on a mortgage bond, with interest at the rate of 6 per cent. from January 1, 1901, and costs of suit; also that the property hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence granted as prayed, and the property specially hypothecated declared executable.

COLONIAL GOVERNMENT V. DIPPENAAR.

This was an application for provisional sentence for the sum of £34 14s. 6d., being interest due on a mortgage bond for £384 at 4 per cent. from the 1st January, 1900, to 31st December, 1901.

Mr. Sheil, K.C., moved.

Provisional sentence was granted as prayed, with costs.

COHEN V. ANDREW J. MULLER.

Mr. De Waal moved for provisional sentence for £28 5s. due on a promissory note, with interest from December 21, 1901, and costs of suit.

Provisional sentence granted as prayed.

LOUW V. CAREL TODT.

Mr. Benjamin moved for the final sequestration of insolvent's estate.

Final sequestration adjudicated.

VAN HÛERDEN V. VAN HÛERDEN.

Mr. De Villiers asked that this matter be postponed until February 1, the summons not having been served.

Postponement granted.

BOWE V. GOTTHELF.

Sir Henry Juta, K.C., moved for a decree of civil imprisonment upon an unsatisfied judgment of the Court, a return of *nulla bona* having been made.

The defendant appeared in person, and stated on oath that he had no money. He was a plumber by trade. He offered to pay the debt (over £100) by instalments of £2 per month. He was married to his wife by ante-nuptial contract, and his wife did not bring him any money. During the last four years his wife had kept a boarding-house. He had bought property for his wife. That was with her own money. Witness had had big contracts. At present he had two contracts, one for £290 and the other for £140. On his last contract, he had lost £80.

Sir Henry Juta said that the defendant had already made an offer to pay the debt by instalments of £10 per month, and that had not gone through, simply because the plaintiff's attorneys had insisted upon his making the first payment £20, to cover out-of-pocket expenses.

Decree of civil imprisonment was granted as prayed, but execution stayed pending payment of instalments of £10 per month, the first instalment to be paid on the 15th inst., and the subsequent instalments on the 15th of each succeeding month.

TOPPE V. BRUMM.

Mr. Gardiner moved for a decree of civil imprisonment on an unsatisfied judgment for £56 6s., a return of *nulla bona* having been made. The debt arose through an action brought by defendant for wrongful dismissal, in which he was unsuccessful, and the amount was for costs.

Defendant stated on oath that he had no money or effects. He was out of employment. He had tried to get employment at several places in Cape Town, but could not succeed. He offered to pay instalments of 10s. per month, commencing on March 1.

Decree of civil imprisonment granted, but execution stayed pending payment of the debt by instalments of 10s. per month, the first payment to be made on March 1.

LOUW V. RADZIWILL.

Mr. Searle, K.C., said that this was an application for a decree of civil imprisonment against the defendant, but an affidavit had just been served upon them by the defendant. The defendant was not in court, so that he would not have an opportunity of cross-examining her, and he therefore asked that the matter be postponed, so that it might be seen whether her affidavit required an answering affidavit.

Mr. Gardiner, who appeared for the defendant, consented to the postponement.

The matter was accordingly postponed until February 1.

MARKS V. S. PHILLIPS.

Mr. Close moved for provisional sentence for £28 14s. 9d., due on a promissory note, less certain payments made on account.

Provisional sentence granted as prayed.

HAZELL V. A. COHEN.

Mr. Russell asked that this matter be allowed to stand over until February 1.

Postponement allowed.

MARAIS V. H. MEIRING.

Mr. Howel Jones moved for provisional judgment upon a mortgage bond for £650, with 5 per cent. interest from January 1, 1900, and also for judgment for £2 4s. 2d., insurance premium; further, that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence and judgment as prayed, and the property specially hypothecated declared executable.

GOURLAY V. NEEZER.

Mr. Gardiner moved for provisional sentence on two promissory notes for £130 and £117 2s. respectively, with interest; further, for judgment for £61 3s. 9d., for goods sold and delivered, with costs of suit and interest *a tempore morae*.

Provisional sentence and judgment as prayed.

REID AND NEPHEW V. DE VILLIERS.

Mr. De Villiers moved for provisional sentence on a cheque for £8 15s. 1d.
Provisional sentence granted.

ILLIQUID ROLL.

SHAW V. FLETCHER.

Mr. Alexander moved for judgment for £21 17s. in terms of a certain consent paper.

Judgment granted as prayed.

TENNANT V. FLETCHER.

Mr. Alexander moved for judgment for £22 19s. 3d., being the costs in the above matter.

His Lordship pointed out that the previous judgment was in favour of the plaintiff, and not of his attorney, and the latter could not now sue for the costs. No judgment could therefore be given in this matter.

GOLDMAN V. JACK BENNETT.

Mr. Wilkinson moved for judgment in the above matter, the principal having been paid since the issue of summons.

Judgment granted as prayed.

DESFORGES V. BUD OF HOPE LODGE.

Mr. Searle, K.C., moved for judgment for costs in the above matter.

Judgment granted as prayed.

GINSBERG V. W. L. CHURCH.

Mr. De Villiers moved for judgment for sums of £8 15s., £11 13s. 9d., £16 15s., and £9 10s., moneys advanced on behalf of defendant, and goods sold and delivered.

Judgment granted as prayed.

SEARIGHT AND CO. V. O. WEIDNER.

Mr. Benjamin moved for judgment, under Rule 329d, for the sum of £117 8s. 9d., for goods sold and delivered.

Judgment granted as prayed.

COLONIAL GOVERNMENT V. HAVENGA.

This was an application for judgment under Rule 329d for (a) payment of the two sums of £33 12s. and £7 11s. each, together with interest at 4 per cent. per annum from September 9, 1898, being

the balance of the purchase price of lots 59 and 60, Daniel's Kuil, Barkly West, purchased by the defendant on the 9th September, 1898. (b) An order declaring that if payment is not made within one month after judgment the sale of the said lots of ground shall be null and void, and the payments already made forfeited in terms of section 2 of Act 15 of 1887, as amended by section 4 of Act 40 of 1895. (c) Costs of suit.

Mr. Sheil, K.C., moved for judgment.

The Court granted judgment as prayed, with costs.

COLONIAL GOVERNMENT V. DE KLERK.

This was a similar application to the last, the amounts sued for being £32 and £7 11s., £42 and £7 11s., with interest at 4 per cent. and costs.

Mr. Sheil, K.C., moved for judgment.

The Court granted judgment as prayed, with costs.

COLONIAL GOVERNMENT V. GROBBELAAR.

This was a similar application to the two foregoing, the amounts sued for being £29 12s. and £7 11s., with interest and costs.

Mr. Sheil, K.C., moved for judgment.

The Court granted judgment as prayed, with costs.

ITALIAN MARBLE COMPANY V. C. D. WELLS.

Mr. Bisset moved for judgment, under Rule 329d, for £30, being balance of account, with interest *a tempore morae* and costs of suit.

Judgment granted as prayed.

COLONIAL GOVERNMENT V. THE SOUTHERN LANDS CO. (LIMITED).

This was an application for judgment, under Rule 329d, for payment of the sum of £3,795 7s. 6d., being three years' quit-rent and stamp duty due in respect of certain farms in the district of Vryburg.

Service of process was effected on the company's manager, Mr. Percy Addison Hayward Gethin.

The Deputy-Sheriff made the following return: The within-named defendant, Percy Addison Hayward Gethin, having refused to accept service of the within summons, I have, on this the 7th of

December, 1901, in my office at Vryburg, duly served the within summons upon him (the said defendant), by touching him on his arm with a copy thereof, at the same time informing him of the nature and exigency thereof, and dropping the said copy on the floor in front of him. The reason of the defendant for refusing to accept service is that he holds no instructions from the Southern Lands Co. (Limited) to accept service of process.

Mr. Sheil, K.C., moved for judgment.

The Court granted judgment as prayed, with costs.

R. V. NORMAN.

1902.
} Jan. 13th.

Sentence—Irregularity.

Where an Assistant Resident Magistrate had convicted a prisoner and pronounced the following sentence "reprimanded and discharged."

Held that such sentence was irregular inasmuch as it deprived the prisoner of his right to appeal to a superior Court, and that as the Crown refused to consent to the whole finding being set aside the matter must be remitted to the Magistrate to pass a sentence from which an appeal could be heard.

This was a matter brought up, under Rule 190, for review of the proceedings of the Assistant Resident Magistrate of Stellenbosch sitting at Somerset West.

The summons called upon the said Assistant Magistrate to appear before the Supreme Court on Monday, January 13, 1902, and also to return and certify to the said Court a true copy of the summons, records, and all proceedings in the case of *R. v. Thomas Robert Norman*, charged before the said A.R.M., at Somerset West, on November 14 and 18, with contravening sub-section 1 of section 73 of Act 28 of 1883. The summons further called upon the Attorney-General to appear and to show cause why the judgment and proceedings in the said case should not be reviewed, set aside, or corrected on the ground that

the said proceedings were grossly irregular and contrary to law in that the finding or judgment thereon of the said A.R.M. as evidenced by the said records and proceedings, to wit, "guilty, reprimanded, and discharged," was a finding wholly bad in law.

The appellant had been charged under the Act aforesaid with wrongfully and unlawfully permitting drunkenness, violent, riotous, or quarrelsome conduct to take place upon his licensed premises, to wit, the Central Hotel at Somerset West. He had pleaded "not guilty." The judgment was "guilty," and the sentence "reprimanded and discharged." The facts held proved by the Court below were disputed by the applicant, but these were not brought forward in the present application.

Mr. Schreiner, K.C. (for applicant): Norman is the lessee of certain licensed premises at Somerset West. His lease contains the clause that should he be convicted of any infringement of the Liquor Acts his lease is thereby forfeited *ipso facto*, and the landlord acquires thereby an immediate right of re-entry on the premises. On the King's birthday certain members of the defence forces called at applicant's premises and contrary to martial law regulations were served with liquor. The Magistrate found Norman guilty as charged, and instead of inflicting a penalty reprimanded and discharged him. In such a case there is no appeal. *Q. v. Erfurt* (5 Shiel, 432, and 12 S.C.R., 427). In virtue of this conviction Norman might be deprived of his licence. The case should be remitted to the Magistrate with liberty to find him guilty or not guilty, and if guilty to pronounce a sentence from which we may appeal. *Q. v. Erfurt* (12 S.C.R., 427). In *Ohlsson v. Parsons* (11 Shiel, 233), it was held that the lease granted under conditions similar to those of the present lease, was forfeited by any conviction under the Liquor Acts. The consequences of this conviction would be most serious to Norman.

Mr. Jones (for the Crown): I admit the force of the argument for applicant and admit that there may have been some irregularity in the case, but I contend it was not gross. I have no objection to the record being sent back to the Magistrate that he may pronounce a

sentence, but there is no precedent for his reconsidering his judgment. The effect of this conviction on the licence is quite immaterial.

Mr. Schreiner (in reply) cited *Q. v. Smith* (Buch., 1869, p. 176). If it is held that the Court must pass some sentence sounding in imprisonment or fine, and the Court would not have found the man guilty had it adverted to the serious consequences of its finding, it should have an opportunity of revising its finding.

His Lordship, in giving judgment, said: The defendant was tried before the Assistant Resident Magistrate of Stellenbosch sitting at Somerset West for contravening the Liquor Licensing Act, and he was found guilty, reprimanded, and discharged. A sentence of that kind, it had been laid down by the Supreme Court in *Regina v. Erfurt*, (5 Sheil, 432) did not give the person so found guilty, reprimanded, and discharged a right of appeal, there being no sentence of fine or imprisonment, and in the case referred to it was pointed out that any person so convicted wishing to bring the matter under appeal might come into court, and apply that the Magistrate be required to pass some sentence to entitle him to appeal. The Court is, of course, entitled to set aside the whole proceedings where it finds gross irregularity, but in this case the only irregularity alleged in the summons is that the finding or judgment of the Magistrate was irregular, viz.: "Guilty, reprimanded, and discharged." Being found guilty or not guilty was not an irregularity in any way. The irregularity was in the part of the judgment "reprimanded and discharged." If the Crown had consented the Court might have set aside the whole finding, and allowed the Magistrate to go again into the matter. That, however, was objected to. The matter will be remitted to the Magistrate to pass a sentence, and when he has passed a sentence, from which an appeal can be heard the appeal will come on, and the Court will then decide whether the conviction was justified. The application will therefore be granted and the case remitted to the Magistrate to pass such a sentence as he may consider to be proper.

[Applicant's Attorneys, Walker and Jacobsohn.]

GENERAL MOTIONS.

Petition of the Executrix of the Estate of the Late Gerhardus Johannes Pryra.

Mr. Benjamin moved that the rule nisi under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

Ex parte ROOS.

(1902.
(Jan. 13th.

Mr. Benjamin said that this was an application for the making absolute of a rule nisi, granted under the Derelict Lands Act. Certain facts had been placed before the Court in a previous case (*Hoogendoorn v. Roos*), and this matter arose out of that case, it appearing that there was a certain piece of land not covered by applicant's title-deeds. This was the return day of the rule nisi which had been granted, and now the Town Council appeared to oppose its being made absolute. The facts of the case were very complicated, and his Lordship did not consider that they could be decided on motion.

Mr. Benjamin for applicant.

Sir Henry Juta, K.C., appeared on behalf of the Town Council to oppose the rule being made absolute.

His Lordship decided that the matter must be decided by way of action, to be instituted forthwith, the Town Council being the defendants, the notice in this application to stand as summons.

LINWOOD V. LINWOOD.

Mr. Wilkinson moved that the rule nisi granted, calling upon defendant to restore to plaintiff her conjugal rights, failing which, to show cause why a decree of divorce should not be granted, be made absolute. The defendant had failed to return to plaintiff.

Rule made absolute as prayed.

MANN V. MANN.

Mr. Upington moved that the rule nisi calling upon defendant to return to plaintiff, failing which, to show cause why a decree of divorce should not be granted, be made absolute.

Rule made absolute as prayed.

EXECUTORS ESTATE OF GABRIEL S. DE KOCK V. JOSIAS SERVAAS DE KOCK.

Mr. De Waal moved that the rule *nisi*, calling upon respondent to show cause why he should not be removed from his office as one of the executors of the said estate, be made absolute.

Rule made absolute as prayed.

PETITION OF ISIDORE SUTTNER.

Mr. Gardiner moved that the rule *nisi* authorising the Registrar of Deeds to amend certain deed of transfer be made absolute.

Rule made absolute as prayed.

PETITION OF THE EXECUTRIX OF THE ESTATE OF THE LATE CORNELIUS DERKSEN.

Mr. De Waal moved that the rule *nisi* authorising the Registrar of Deeds to issue a certified copy of certain mortgage bond be made absolute.

Rule made absolute as prayed.

STEYTLER V. COWLING.

Mr. Schreiner, K.C., moved that the rule *nisi* calling upon respondent to show cause why she should not be ordered to give up possession of certain property be made absolute.

Rule made absolute as prayed.

DE JOND V. ADLER. { 1902.
{ Jan. 13th.

Trade Mark—Rival claimants—
Registration—Duty of Registrar.

Where two trade-marks closely resembling each other are tendered for registration it is the duty of the registrar to determine which of the marks he will register, leaving it to the party aggrieved to apply to the court for relief if so advised.

This was an application for an order calling upon the respondent to show cause why an order should not issue from the Court directing the Registrar of Deeds to register the applicant as the proprietor of a certain trade mark, and to refuse the application submitted

by respondent to the Registrar of Deeds for the registration in his name of a certain trade mark.

The affidavit of William Siegmund Schott stated:

(1) I am the agent in South Africa for Julien de Jond, of Antwerp, Belgium, merchant.

(2) In November, 1899, I was traveller for the firm of De Jond, Son and Co. (Limited), in which capacity I sold various goods, including cement. Among different kinds of cement sold by me was one known as the "Tiger Brand." It was sold in casks, the bottom of which were covered by a label similar to that annexed and marked A.

(3) The said label was registered in Belgium in August, 1898, in the name of De Jond, Son and Co. (Limited), and shortly thereafter the said brand was introduced into South Africa, and has remained on the South African market ever since, always under cover of the label marked A, by which label it has now become thoroughly known in South Africa, and through which considerable and extensive sales of the cement are and have been affected.

(4) In October, 1900, De Jond, Son and Co. (Limited) went into voluntary liquidation.

(5) All the valuable assets of the said firm were purchased by Julien de Jond. These assets included a large stock of Tiger Brand cement, and all right, title, and interest of the liquidated company in and to the trade mark under which it was sold. After the liquidation of the company I was appointed agent in South Africa for Julien de Jond, and continued selling Tiger Brand cement under the label marked A. The average sales of this cement in South Africa amount to 10,000 cases annually.

(6) The trade mark for the Tiger Brand cement has not been registered in the Cape Colony on account of the belief that the same protection was accorded to trade marks used here, and registered in Belgium, as is extended to trade marks used in England, and registered in Belgium by virtue of the International Convention for the protection of industrial property.

(7) The respondent, Paul Adler, was the buying agent for De Jong, Son and Co. (Limited) in Hamburg for goods manufactured in Germany from shortly after my connection with the company up to its liquidation.

(8) In January, 1901, Mr. Julien de Jond received a letter from respondent requesting to be furnished with quotations for Tiger Brand cement, and the label under which it was sold. At this time Mr. J. de Jond had not received a duly registered assignment of the trade mark. The quotations were duly sent to respondent, but no label was forwarded.

(9) In March, 1901, I called on respondent in Hamburg, when he informed me that our quotations were too high and that he would not buy the cement without seeing the label. I then showed him a label which he wished to keep. I demurred. I, however, allowed him to show the label to his manager. Still no order was placed with us.

(10) In May, 1901, on arriving here from Europe I observed from the newspaper that respondent was applying for the registration of a trade mark for goods in class 17, cement. The trade mark so sought to be registered resembled the one we have used since 1898, and I instructed my attorneys to object to the registration of the respondent's trade mark, and to apply for the registration of the applicant's mark.

(11) I verily believe that respondent's mark was expressly designed for the purpose of imitating the applicants' mark, and of reaping the benefit of the market created by the applicant by means of his mark.

(12) Respondent has only sold cement under the Tiger Brand since the beginning of this year. Our cement has been sold under our brand in South Africa since 1898.

(13) If respondent has a trade mark registered in Belgium, such registration has been effected since applicant objected to the registration of respondent's mark here.

(14) Applicant's Tiger Brand cement has gained a wide reputation in South Africa, of which respondent seeks to avail himself by reason of applicant's brand, not being registered here applicant omitted to register here owing to his misapprehension of the local law on the subject.

(15) If respondent's mark be registered here applicant will be deprived of the reputation he has earned and of the benefits accruing therefrom.

(16) My attorneys objected to the registration of respondent's trade mark on June 25, 1901, on the ground that it so

closely resembled that of applicant as to be calculated to deceive.

(17) On July 31, 1901, the Registrar of Deeds called a meeting for the purpose of considering objections, and after hearing parties' attorneys, adjourned the meeting to enable applicant to produce proof of his title.

(18) Such proof arrived from Belgium on August 28, 1901, and consisted of a registered certificate of assignment from the liquidators of De Jond, Son and Co. (Limited) to the applicant, and the original certificate of registration in favour of De Jond, Son and Co. (Limited).

(19) On September 3 applicant's attorneys wrote to respondent's attorneys advising them that applicant's title had arrived, and requesting them to withdraw their application.

(20) Applicant advertised his intention to apply for registration of his trade mark in the "Government Gazette" of October 15 and 22, 1901.

(21) On October 30, 1901, respondent objected to the registration of applicant's trade mark.

(22) On November 18, 1901, the Registrar of Deeds issued a report on the applications of applicant and respondent, and refused to register either trade mark until the rights of the parties had been determined by the Court on the ground that the marks, though not identical, bore a resemblance to each other, which both parties contended, and he agreed, was calculated to deceive, and each party opposed the other's application.

(23) Applicant's attorneys wrote to the Registrar requesting him to reconsider his report, and decide on the rival applications. As he declined to do this, applicant has no alternative but to approach this Honourable Court on the subject.

(24) Deponent submitted that applicant was entitled to be registered as proprietor of the trade mark in respect of which he had filed his application, and craved an order directing the Registrar to so register him, with costs against respondent.

The affidavit of Henry Schultz, the representative in South Africa of the respondent, Paul Adler, a merchant in Hamburg, stated that he had taken steps to have certain trade marks used by Paul Adler in Europe (among them the Tiger) registered in the various colonies of South Africa. He had no knowledge of a number of allegations contained in Schott's affidavit, and denied paragraph 5. There

were no sales of cement under applicant's brand in South Africa during the year 1901, with the exception of one parcel of about 1,000 casks which were delivered by applicant to a customer who had ordered a different brand and who objected to take applicant's when the goods were produced. With regard to paragraph 7. Respondent, Paul Adler, was the buying agent for De Jond and Co. for only a few months prior to its liquidation. Deponent had no knowledge of the allegations in paragraphs 8, 9, and 11. He had written to Germany for certified copies of the registration of their cement brand in Germany and Belgium, but had not yet received the same. Before leaving Europe, deponent had made arrangements with a number of houses and factories to sell large quantities of cement out here, and on his arrival arranged accordingly to sell the cement obtained from a certain German house under the Tiger label (exhibited), and in that manner to fulfil his contract with that house. He would be much inconvenienced and would suffer loss should he be now prevented from giving effect to the arrangements made by him whilst in Germany with regard to the sales of cement under this trade mark.

Mr. Schreiner, K.C. (for applicant) moved for the aforesaid order.

Mr. Searle, K.C.: It is for the Registrar of Deeds to decide whether these trade marks are so similar as to lead to fraud, and the proper course would have been to ask the Court for a mandamus to compel him to decide this point. It is only when the trade marks are absolutely identical that the Registrar can refer to the Court for a decision. *Louis v. Lazarus* (6 Sheil, 429, and 13 S.C.R., 420). These trade marks are similar, but not identical. This case is not on precisely the same footing with *Louis v. Lazarus*, because here both parties claim to register. The Registrar wishes to refer the matter to the Court, but he has no right to do that. If the Court is against me on that point I would ask for a postponement till certain affidavits arrive from Belgium. In conclusion, I would refer to *Koch and Dixie v. Arenarius and Another* (15 S.C.R., 200).

Mr. Schreiner (in reply): In previous cases the Court referred the matter to the Registrar, but in each case a trade mark had been registered and infringed by somebody. Here two people claim simi-

lar trade marks, and each objects to the other being registered. To have come to the Court for a mandamus would have involved considerable expense, so we only come to the Court to ask for a direction to the Registrar. We are practically quite at one on that point. Until the Registrar has decided we cannot go into the merits before the Court. The whole question now is as to the costs of the present motion.

Buchanan, A.C.J.: In a case like the present the Registrar has to decide whether or not he will register one of the trade marks, leaving it to the person aggrieved to move the Court under Act 20 of 1877. Here the Registrar of Deeds has referred the matter to the Court without having come to a decision. The only dispute now really is as to costs, and while the matter will be referred back to the Registrar, the question of costs will stand over.

THOMAS BROS. V. PIENAAR.

Mr. Buchanan moved that the rule nisi authorising the attachment of certain property be made absolute.

Rule made absolute as prayed.

THOMSON V. PIENAAR.

This was practically a motion for the applicant to join as one of the applicants in the previous motion. It was stated that there were sufficient funds attached to meet both claims.

Mr. Close moved in the matter.

The application was granted.

IN THE MATTER OF THE MINOR RACHEL SUSANNA DU PLESSIS.

Mr. Benjamin moved for an order authorising the Master to pay out certain moneys for the maintenance and education of the said minor.

Order granted in terms of the Master's report.

HOESCH V. HOESCH.

Mr. Searle, K.C., moved that the rule nisi calling upon respondent to show cause why he should not be interdicted from parting with any of the assets of the joint estate of himself and applicant be made absolute.

Rule made absolute.

SIMS V. ARGUS COMPANY.

Mr. Wilkinson moved the Court to fix a day for trial of this cause by a jury.

The Court fixed Monday, February 24, as the day for the trial.

Ex parte TYLER (BORN 1902.
PALM.) (Jan. 13th.

Church Register of Baptisms.

Applicant had been erroneously entered in the register of S. George's Church as the child of A. and B. She now applied for an order calling upon the authorities of the aforesaid church to rectify this error.

Held that as the authorities of the said church were not before the Court, and as the register preserved in the said church was a mere private document, the Court could not grant the order as prayed.

This was an application for an order authorising the amendment of a certain entry in the baptismal register of S. George's Protestant Episcopal Church, Cape Town.

The petition set forth that petitioner was baptised in the aforesaid church on June 1, 1864, and that in the register of baptisms there preserved Hendrick Heydenrych and Johanna Francina Heydenrych were stated to be petitioner's parents. At the time of petitioner's birth her mother, Sinah Cecilia Wiepner, was a spinster, and was living in the same house with the said Hendrick Heydenrych, and she arranged with them that they should stand as father and mother at petitioner's christening, which they agreed to do. Petitioner's mother, the said Sinah Cecilia Wiepner, was subsequently married to petitioner's father, Abraham Robert Palm, and consequently petitioner and the other children born before the marriage was legitimatised. Petitioner was married in community of property to Alexander Michael Tyler at S. John's Church, Cape Town, on January 1, 1884, and it was subsequently discovered that her surname was incorrectly

stated in the baptismal register of S. George's aforesaid to be Heydenrych instead of Palm. Petitioner now asked for an order authorising the amendment of the said register by substituting the name of Palm for Heydenrych.

Mr. Risset (for petitioner): This register is a public document, and might be the only proof that Mrs. Tyler was the issue of Palm and not of Heydenrych. In *Richards v. Nash* (1 Juta, 312) the Court ordered an error in a deed of transfer to be amended—a public document—so in the present case this Court is the only place where the applicant can get relief. This register would be accepted as evidence in any court; so there can be no doubt as to its being a public document. Orders similar to that now applied for have been granted in England.

[Buchanan, J.: In England you have a church which is recognised by the State, here you have not. S. George's Church is not before the Court.]

I would respectfully suggest that the Court should grant a rule *nisi* calling upon any persons interested to show cause why this petition should not be granted. In *Sowerby v. Colonial Secretary* (11 Sheil 377) the Court ordered that an incomplete marriage registr should be registered in the Colonial Secretary's Office.

His lordship said that this was an application to the Court to order an amendment of the register kept in S. George's Cathedral of baptisms solemnised in that church. The authorities of the church were not before the Court, and this register was simply a record kept by the church for its own information. There was in this colony a register of births kept under an Act of Parliament, and it was quite possible that the Court might deal with that registry in the same way as it dealt with the Registry of Deeds, but it was a most unprecedented application to call upon church authorities to amend records kept by them of what took place in their own church. His lordship also pointed out that it was not alleged that the register was wrong as to the representations made by the parties at the time of the baptism; what appeared in it being simply what was represented to the church authorities at the time. It might be inconvenient for the parties to have that register kept, but it was not a matter over which the Court could exercise any control. It was not a public register. He did not see that

the Court should make any order, and the application would therefore be refused.

[Applicant's Attorney Scanlen and Syfret.]

Ex parte STEYTLER N.O. } 1902.
Jan. 13th.

Robbery—Insolvency of Robber.

One Goldstein had been convicted of robbing one Glass of a watch, chain, &c., and of certain moneys. Meanwhile Goldstein's estate had been sequestrated as insolvent. Glass now claimed the property of which he had been robbed, and the Colonial Orphan Chamber, as trustee of the insolvent estate, also laid claim thereto. Glass asked for a postponement of the case in order that further affidavits might be filed.

Held that certain effects then in the hands of the gaoler, Cape Town, which had been stolen from Glass must be re-restored to him, and that the rest of the application must stand over for further affidavits.

This was an application for an order authorizing the Civil Commissioner of the Cape and others to deliver to the Applicant such assets of the Insolvent Estate of Lewis Goldstein as might be in their hands.

The affidavit of Edward Price Hughes, an attorney of the Court, stated that he was the duly authorised representative of Aaron Glass, of 6, Parkin Street, Cape Town, claimant to a certain sum of money then in the hands of the Civil Commissioner of the Cape. That in or about April last the said Aaron Glass was robbed of £234 10s. by one Lewis Goldstein and another, and that the said insolvent (Goldstein) was arrested in May, 1901, and since convicted of the theft. Notice of the application was only served on deponent at 12.45 on January 10, 1902, and he alleged that time did not admit of the preparation of the necessary affi-

davits to oppose the said application to be made on January 12, 1902, or to make counter application in respect of the said moneys. In the interest of the said Aaron Glass, deponent asked for a postponement.

In reply to a letter received from Messrs. Silberbauer, Wahl and Fuller, asking for information as to the names of all the persons who had laid claim to the money taken from Goldstein and then in the hands of the Chief of the Cape Town Police, Lieut.-Col. Robinson informed them that the Secretary of the Colonial Orphan Chamber had claimed the same as an asset belonging to the Insolvent Estate.

It appeared that Goldstein was convicted at the last Criminal Sessions, and his estate being then insolvent, the present applicant was appointed trustee. Glass was a man whom Goldstein had robbed of a sum of money, and his claim was that the money which the trustee now claimed was that which had been stolen from him. For the applicant, it was pointed out that Goldstein had had some lucrative Government contracts, and the money might be from that source. It was also pointed out that there were certain assets, such as a watch and chain, etc., which could not possibly be claimed by Glass.

Sir H. Juta, K.C., appeared for the applicant, and Mr. Benjamin for Aaron Glass.

Mr. Benjamin applied for a postponement of the case.

Sir H. Juta (for applicant) objected. Goldstein has been convicted of theft from Glass and is also an insolvent. There are other assets in his Estate in addition to the moneys stolen from Glass.

[Buchanan, A. C. J. The trustee can have no better claim to these moneys than the insolvent himself.]

No, and therefore we only ask for the assets other than the money stolen from Glass.

The application was granted so far as concerned the goods specially mentioned (watch and chain, etc.), which were in the hands of the Gaoler of the Cape Town gaol, and as regards the money claimed by Glass, the matter was allowed to stand over pending the filing of affidavits.

[Applicant's Attorneys, Silberbauer, Wahl and Fuller.]

Ex parte PARTRIDGE AND OTHERS. { 1902.
{ Jan. 13th.

This was an application for an order authorising the Transfer of certain property. The Petitioners were Bessie Partridge, Marion O'Hare (born Partridge), married in community of property and assisted, as far as need be by James C. O'Hare, Astley Cooper Partridge, and George William Steytler in his capacity as Trustee under an order of Court dated June 14, 1899. The Petition set forth that the above named Bessie Partridge was married to Richard J. Partridge, and that in 1889 the Court had granted a decree of Judicial Separation in the following terms of a Consent Paper which has been filed.

The plaintiff and defendant to separate *a mensu et thoro*.

The landed property known as "The Heathers" registered in defendant's name to be transferred to G. W. Steytler or the Secretary for the time being of the Colonial Orphan Chamber in trust for the benefit of the three children of plaintiff and defendant, subject to an existing mortgage of £150 and a further mortgage to be raised of £125.

The Trustee was to let or lease the property as he should deem most advisable, and to apply the rent to the extinction of the debt of £175. Thereafter he was to pay to the plaintiff £2 10s. a month, should the funds permit, for the term of her natural life, and to apply the balance for the benefit of the children. At the death of plaintiff the said property was to become the absolute property of the said children so soon as the youngest child should attain his legal majority. The said youngest child was to be educated and supported at the mutual charge of the parties until he should have attained his majority, or earn his own living at an earlier date. The petition of the aforesaid petitioners proceeded to state that on November 12, 1899, transfer of the property aforesaid was passed in favour of the petitioner, G. W. Steytler, N.O. The petitioners, M. O'Hare, A. C. Partridge, and W. P. Partridge stated that they had all attained the age of majority, and that Bessie Partridge was desirous of relinquishing all right, title, and interest she had in and to the said property, to and in favour of her said three children jointly. Petitioners therefore craved an order authorising transfer of the said

property to be passed by G. W. Steytler aforesaid in favour of M. O'Hare, A. C. Partridge, and W. P. Partridge.

From a supplementary affidavit of Bessie Partridge it appeared that her husband died in Natal on July 1, 1899.

On the motion of Mr. Buchanan the Court granted an order as prayed.

Ex parte GREENBERG. { 1902.
{ Jan. 13th.

This was an application for an order authorising petitioner to pass transfer of certain property without the assistance of her husband.

Mr. Benjamin moved and the circumstances which rendered this application necessary fully appear from another application made by the same petitioner and reported (11 Sheil, 808).

In this case the Court granted an order as prayed.

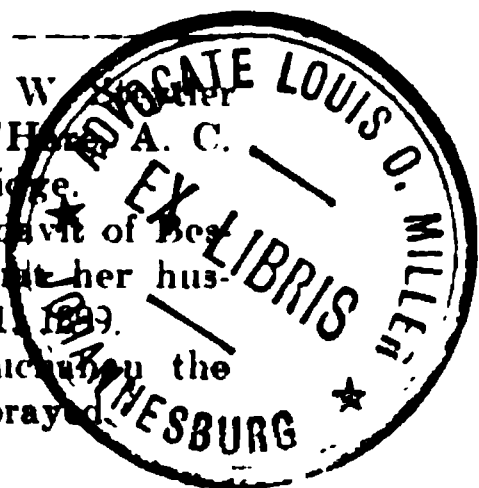
Ex parte CONOLLY AND ANOTHER. { 1902.
{ Jan. 13th.

Antenuptial Contract—Registration.

The Court granted an order authorizing the Registrar of Deeds to register a certain antenuptial contract into which the spouses had entered previous to their marriage, but which, owing to the default of the notary before whom they had contracted, had not been presented for registration within the time prescribed by Ord. 27 of 1846, Sec. 1 and Sec. 7 of Act 21 of 1875.

This was an application for an order authorising the Registrar of Deeds to register a certain antenuptial contract.

The Petition of Harold Conolly and Mabel Margaret Conolly (born Moxham) set forth that the said petitioners were married at Reuben, District of Mount Currie, E. Griqualand, on November 14, 1901, and that previous to the said marriage, viz.: on October 7, 1901, petitioners entered into an antenuptial contract before the Notary Public, William B. Lovemore, of Kokstad (copy whereof was annexed).



That petitioners had been informed by the said Notary that Registration of the said antenuptial contract by the Registrar of Deeds had been refused; on the grounds that the same was not presented for Registration within the time provided by law for that purpose. That petitioners were further informed by the said Notary that the omission on his part to register the said antenuptial contract in time arose entirely from an oversight and appeared from his affidavit annexed. Petitioners therefore prayed for an order directing the Registrar of Deeds to register the said antenuptial contract.

On the motion of Mr. Bisset the Court granted an order as prayed, subject to any rights which might have accrued to creditors prior to the registration of the said contract.

[Applicant's Attorney, Harsant.]

BEGG V. BEGG.

Mr. Buchanan moved that the rule nisi, operating as an interim interdict, restraining respondent from withdrawing certain moneys from the Post-office Savings Bank, be made absolute.

Rule made absolute as prayed.

TOWN COUNCIL V. DE SMIDT.

Mr. Schreiner, K.C., applied for an order restraining respondent from using or occupying certain premises. Counsel said that the premises were situated in Helliger-lane, and had been certified some time ago by the late Medical Officer of Cape Town (Dr. Fuller) to be unfit for human habitation. The Council had ordered them to be closed, but as late as December 31 last they were occupied.

The Court granted the usual order.

TOWN COUNCIL V. ATKINS.

Mr. Schreiner, K.C., for the applicants, asked that this matter be allowed to stand over until February 13.

Postponement granted until February 13.

VAN DER MESCHT V. GRAND JUNCTION RAILWAYS.

ESTATE VAN DER MESCHT V. GRAND JUNCTION RAILWAYS.

STRYDOM V. GRAND JUNCTION RAILWAYS.

LAMPRECHT V. GRAND JUNCTION RAILWAYS.

BUCKLEY V. GRAND JUNCTION RAILWAYS.

Mr. Upington moved in the above matters, which were all applications to have certain awards of an arbitrator made a rule of Court.

The orders were granted in each case.

RHODES V. LOUW.

IN re LOUW V. RHODES AND { 1902.
RADZIWILL. { Jan. 13th.

Provisional sentence—Signature denied.

Applicant had been summoned for provisional sentence on a promissory note, the summons being returnable on 13th October, 1901. The case was postponed till November 1, 1901, when defendant's signature was denied, and proof of the signature was fixed for February 1, 1902. The first defendant now asked for further postponement and for the appointment of a Commission to take evidence in England.

Held, that no reasons had been given for the above application, and no intimation made as to what these witnesses in England were to prove: and further, that as only provisional sentence could be granted against defendant on February 1, the application must be refused with costs.

This was an application for the postponement of the day for hearing proof of signature in the above provisional case. On the 12th October, 1901, defendant had been summoned to admit or deny his signature to a certain promissory note made in favour of plaintiff, and to show cause why provisional sentence should

not be given against him for the amount of the said note. Defendant's representative had on the authority of defendant denied the signature. The case was postponed till November 1, 1902, and was then duly set down for trial and argument on February 1, 1902.

The affidavit of Lewis Loyd Michell stated that he was General Manager of the Standard Bank in South Africa, and held defendant's general power of attorney. That he had reported to defendant the proceedings in this Court and asked him to arrange to be in attendance on February 1, 1902, for the hearing of the suit. That he had received the following cablegram in reply from B. F. Hawksley, defendant's London solicitor: "Referring to your cable of January 6th, application must be made for postponement until Sittings after Easter, say 8th of April, and for open commission to examine Mr. Rhodes and other material witnesses in London in support of the contention that signature forged."

That both from this cablegram and from defendant's affidavit, already filed, it would appear that there is evidence in London which it is desirable to obtain on commission.

The answering affidavit of John F. E. Bernard, plaintiff's attorney, pointed out that neither the notice of motion nor the above affidavit stated that defendant was in bad or indifferent health, or that he did not intend to return to this Colony, or that his material witnesses, if any, are resident in London; and, furthermore, that the said notice of motion and affidavits did not show, disclose, or allege any cause or reason whatever why the evidence of the defendant, or any one of his witnesses, should not be taken on commission in London.

Deponent further stated that he was informed, and verily believed, that the defendant was and had been in good health since the early part of November, 1901. That the case had already been postponed from October 12, 1901, at defendant's instance, to November 1, 1901, and again till February 1, 1902, and that on the 30th December, 1901, one of defendant's attorneys informed deponent that defendant would be in Cape Town on the 1st February to defend the present suit.

Sir H. Juta, K.C. (for defendant—the present applicant): It is now impossible

for defendant to be here by February 1. Besides, there are witnesses to be examined in England, and since plaintiff is a wealthy man, and there is no doubt about defendant's solvency, plaintiff cannot be prejudiced by a little delay.

[Buchanan, J.: When can you go to trial?]

Possibly by March 12.

[Buchanan, J.: It should be by then at the latest.]

Mr. Searle, K.C. (for plaintiff the present respondent): I am instructed to oppose the granting of a commission. The trial has been definitely fixed for February, and there is nothing on the record to show any need of a commission. Let the trial be postponed to the end of February, and Rhodes will be here by that time.

[Buchanan, J.: Of course, this is only a question of provisional sentence.]

I submit it is a principal case. The defendant disputes his signature.

[Buchanan, J.: Well, if you oppose provisional sentence, and judgment is given against you, that is only a provisional judgment.]

In any case, the Court fixed a day and directed that Rhodes should make timely application if he wanted a commission.

[Buchanan, J.: That was only for proving his signature.]

The only defence is that he denies his signature. It would be curious if a man could set up some other defence months after his signature had been proved. My point, however, is this: Can the Court grant a commission unless some grounds for the application are shown? The applicant does not say that he is in bad health, or that he does not intend to return to South Africa. Nothing, again, is said as to who these witnesses are, or as to what they are to prove. Why did not applicant mention these other material witnesses in his affidavit of the 12th of last October? These commissions are not granted as a matter of course. Why cannot defendant consent to provisional sentence on February 1, pay under security *de restituendo*, and afterwards go into the principal case?

Sir H. Juta (in reply): No reason has even been alleged why this application should not be granted. If provisional sentence were given to-morrow, we should still ask for a commission.

[Buchanan, J.: In a provisional case affidavits are quite sufficient; you can not go into the whole case on a motion for provisional sentence.]

That, of course, is so, but I can only submit that there is no suggestion of any prejudice which would arise to plaintiff from delay; and in such a case the Court surely will not give judgment against an absent defendant. I would ask that the matter may stand over till the 12th of March.

In giving judgment, his lordship said that the summons for provisional sentence was returnable on the 13th October, when the case was postponed until the 1st November. When the matter then came on, an affidavit was filed by the defendant denying his signature to the note. The usual procedure was then followed, and a day was fixed for the plaintiff to prove the signature, the date being February 1. This gave three months for the defendant to appear, but now, within a fortnight of the case coming on, an application was made on affidavit for the postponement of the action, and the appointment of a commission to take evidence of witnesses in England. The sole ground upon which that application was made was a cable from defendant's London solicitor, which was as follows: "Referring to your cable of the 6th of January, application must be made for postponement until sitting after Easter, say, 8th April, and for open commission to examine Mr. Rhodes and other material witnesses in London in support of contention that signature is a forgery." It was not stated that the defendant would not be able to be here in person on the date fixed, or any cause stated for his absence. No reason was given for the postponement, and there was no intimation as to what the witnesses who were to be examined on commission were to prove. After the delay which had already taken place, the application must be refused, but on February 1 it would be open to the defendant, if he could show good cause, to apply for a further postponement; or even if judgment was given against him, it would only be provisional sentence, and by paying the amount, and taking security from the plaintiff, he could go into the principal case. For the present, the application would have to be refused, especially seeing the defend-

ant would not be without remedy, even if provisional sentence were given against him

[Defendant's Attorneys, Messrs. Van Zyl and Buissinne; Plaintiff's Attorney, John F. D. Bernard.]

PETITION OF HESTER H. C. BOTHA AND OTHERS.

Mr. Benjamin applied for an order authorising the transfer of certain erven. Order granted as prayed.

BOWERS V. JONES.

Mr. Howel Jones applied for the removal of bar in this case, and leave to defendant to plead.

Mr. Benjamin appeared for the respondent.

An order was granted as prayed, bar being removed, and plea to be filed within four days after discovery of certain documents by plaintiff.

Ex parte BOTHA { 1902.
{ Jan. 13th.

Married woman—Husband—Absence from the Colony—Inheritance.

The Court ordered half the amount of an inheritance to be paid to a woman married in community whose husband had left the Colony for German West Africa, and as to the other half granted a rule nisi calling upon him to show cause why it should not be paid to his wife for her maintenance and that of the children of the marriage.

This was an application for an order authorising the Master to pay over certain moneys to the applicant.

The affidavit of Johanna M. Botha showed that she was at present residing in the Refugee Camp at Bethulie, O.R.C., with her six children. That her husband Gideon Daniel Botha was at present residing in German West Africa; that it was extremely difficult to communicate with him, and that he had no present intention of returning. That on October 12, 1900, several sums of

money had been deposited to her credit, as inheritances due to her—in all, £102 9s. 9d. That she had applied to the Master for payment of the said inheritances, but had been informed that payment could not be made without the assistance of her husband. That she was entirely without means and dependent upon charity for the necessities of life. She therefore prayed for an order authorising the Master to pay over to her the amount due to her as inheritances aforesaid, or such portion thereof as to their lordships might seem meet.

On the motion of Mr. Buchanan, the Court ordered that half of the inheritances aforesaid be paid to applicant; that a rule *nisi* issue, calling on her husband to show cause on March 12, 1902, why the remaining half shall not be paid for the maintenance and support of the petitioner and the children of the marriage.

His lordship said there was no difficulty, the parties being married in community of property, in ordering half the amount to be paid over to applicant. An order would be made accordingly, and as for the remainder, a rule *nisi* would be granted, calling upon the husband to show cause why the remainder of the money should not be paid to applicant for the maintenance of herself and children; rule to be returnable March 12, and to be published once in the "Government Gazette" and once in a Colesberg paper.

On the return day the rule was made absolute.

[Applicant's Attorneys, Messrs. Innes and Hutton.]

WATSON V. MAIN.

Mr. Benjamin said this was an application for an order releasing applicant from curatorship, but he understood that affidavits had just been filed by respondent, and he therefore asked that the matter be allowed to stand over until the end of the roll.

The matter was allowed to stand over.

ROGERS. V. ROGERS.

1902.
{ Jan. 13th.

This was an application for the direction of the Court with regard to a certain order granted November 30 last in a

suit for nullity, removing the case from the Supreme Court to the Eastern Districts Court. When the order was made it was expected that personal service would be effected, the respondent being in prison at the Breakwater Convict-station; but he had been released therefrom on the day the order was made, and his whereabouts were now unknown.

The affidavit of plaintiff's attorney stated that inquiries had been made at the Breakwater Convict-station, and also of the police, but without avail, and that plaintiff therefore prayed that the Court would order service of the aforesaid order of November 30, 1901, to be effected by publication.

Upon the motion of Mr. Upington (counsel for plaintiff), the Court ordered service of the order aforesaid to be made by publication once in the "Gazette" and once in the "Cape Times."

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn.]

IN THE ESTATE OF THE LATE BAKFA, ALIAS ROKEA ABRAHAMSE.

Mr. Schreiner, K.C., applied for an order authorising the Master to accept an account in terms of certain agreement.

Order granted as prayed.

JOSE V. JOSE.

Mr. Benjamin moved for an extension of the return day in this matter.

The return day was extended until April 12, personal service to be effected.

SEALE V. SEALE.

Mr. De Villiers moved for leave to Mrs. Seale to sue her husband, *in forma pauperis* for divorce, on the ground of his adultery.

The Court appointed Mr. De Villiers to take the reference.

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P. C., K.C.M.G. (Chief Justice), and the Hon. Sir John Buchanan.]

ADMISSION. { 1902
Jan. 14th.

Mr. Benjamin applied for the admission of Mr. Rupert Claud Marais as an attorney, notary, and conveyancer.

The application was granted.

TOWN COUNCIL V. THE HARBOUR BOARD AND ANOTHER.

This was an application by the Town Council of Cape Town for an order calling upon the Harbour Board and the General Manager of the Railways, as representing the Colonial Government, to show cause why they should not be restrained from trespassing upon or opening up the Dock-road, and from laying down any lines of railway in the Dock-road, excepting certain two lines of railway, or from running or working any such lines of railway except for the purposes of through traffic, from the Docks. The Town Council had made certain arrangements with the Tramway Company for the extension of the tramway to the Docks, and they contended that it was impossible to run the tramway to the Docks if the prospective lines were laid by the Harbour Board.

Mr. Searle, K.C. (for applicants): The Government purported to come in at the last moment and gave notice of expropriation after notice of motion had been given, but even now they have not actually expropriated. The Harbour Board provide the greater part of the land and the Government control the Harbour Board.

[De Villiers, C.J.: How can we grant this order, when Government may have a right to expropriate?]

They do not intend to expropriate. See Mr. McEwen's affidavit.

[De Villiers, C.J.: Are you prepared to question the powers of the Government to expropriate?]

No; it is hardly necessary; they say on affidavit that they do not intend to expropriate. Now they have served notice of expropriation, and they may

under Act 19 of 1874 have a right to expropriate, but they must say that they intend to expropriate.

[Buchanan, J.: Does all the land belong to the Government, except the fish market?]

Yes, but both fish markets were given to us by Government. Now the Harbour Board want to take away the old fish market and to infringe on our rights as to the new market. Neither the Harbour Board nor the Government can take land for a temporary purpose without expropriating. We deny the right of the Harbour Board because there was an agreement between ourselves and the Government that things should go on in a certain way. I am not prepared to say that Government cannot expropriate, but as no notice of expropriation appears in the affidavits we are at all events entitled to costs.

[De Villiers, C.J.: Do you, then, abandon the claim to an interdict, and say it is merely a question of costs?]

Yes.

Mr. Schreiner, K.C. (for respondents): I would suggest that each party should pay their own costs, and that the applicants should withdraw their application.

Mr. Searle: I could not consent to that without consulting my clients, and I would ask that the matter be allowed to stand over.

[This was agreed to.]

NEL V. OLIVER AND ANOTHER. { 1902
Jan 14th.
., 23rd

Antenuptial Contract—Trustees.

It being clear that the object of an ante nuptial contract in appointing trustees for the administration of the wife's property was to protect the wife from the husband's influence, and not to debar her from administering her own property after his death, the Court, on her application after her husband's death, allowed her to administer the property free from the trustee's control.

This was an application by Sarah Petronella Nel (born Tiran), upon notice

calling upon Gert Cornelius Olivier and Advocate Buchanan (as *curator ad litem* of the applicant's minor children) to show cause why the trustee mentioned in the petition should not be authorised to make transfer and delivery to the applicant of all her property, and why the same should not be declared to be vested in the applicant as her own absolute property, free from the restrictions imposed by the ante-nuptial contract mentioned in the said petition, and why the said trustee should not be released from his office of trustee, and the trust imposed by the said contract declared to be null and void and of no effect.

The petition of the applicant was as follows:

1. That your petitioner was the daughter of the late Jean Pierre Tiran, who died on the 5th November, 1882, and Hermina Catherina Tiran (born Keyter), who died on the 2nd April, 1879.

2. That by the last will of the petitioner's parent the said late Jean Pierre Tiran, dated the 31st October, 1881, Camille Frederick Tiran and Christian Michael Lind were appointed guardians to your petitioner.

3. That during or about the month of July, 1888, your petitioner, being then under age, was desirous of contracting a marriage with one Louis Nel, of Oudtshoorn.

4. That the guardians, before giving their consent to the marriage, desired to be contracted by your petitioner, demanded that your said petitioner and her said intended husband should execute the annexed ante-nuptial contract.

5. That in order to obtain such requisite consent your petitioner, with the assistance of her said guardians, executed the said contract with her husband, whereby her said guardians were appointed trustees to her property possessed at the time or to be acquired in future, for the period of the natural life of your petitioner, and that provision was therein made for the devolution of such property after the death of your petitioner.

6. That thereupon, on or about the 7th August, 1888, the marriage was duly solemnised between your petitioner and the said Louis Nel.

7. That the said marriage was on the 6th October, 1898, dissolved by the death of the said Louis Nel.

8. That the liquidation account of the estate of the said Louis Nel, filed in the office of the Master of this Hon. Court, shows the assets were £257 11s. 1d. sterling, while the liabilities amounted to £601 2s. 1d. sterling, there being a deficiency of £343 11s. sterling after deducting costs of administration of the estate.

9. That there are five children, lawful issue of the said marriage between your petitioner and the said Louis Nel, viz., Eugene de Montys Pierre Tiran Nel, born 16th September, 1889; Hermine Tiran Nel, born 1st December, 1890; Josephine Mileta Tiran Nel, born 22nd December, 1892; Adele Tiran Nel, born 11th May, 1895, and Eileen Louise Tiran Nel, born 30th May, 1897, all minors, the eldest now twelve years of age.

10. That the said Camille Frederick Tiran and Christian Michael Lind were thereafter succeeded in the trusteeship by Gert Cornelius Olivier, of Oudtshoorn, who since then has been and is now the sole trustee.

11. That your petitioner being advised and believing that the restrictions upon the free disposition of her property imposed by the said ante-nuptial contract were not valid or binding, or that if valid and binding during the subsistence of the said marriage, are not valid and binding after its dissolution, demanded from the said trustee, Gert Cornelius Olivier, transfer and delivery to her in full ownership of all her property, so that the same hereafter be under her exclusive control and at her free disposition.

12. That the said Gert Cornelius Olivier expressed himself willing to comply with the said demand, provided he did not thereby prejudice any lawful rights that might be deemed to have been his duty as such trustee to protect.

Wherefore your petitioner prays (a) that your lordships may be pleased to appoint some fit and proper person as *curator ad litem* on behalf of the said minor children for the purposes of this application; (b) that your lordships may be pleased to authorise the said trustee to make delivery and transfer to your petitioner of all her property, and to declare that the same shall thereupon be

and become vested in your petitioner.

and free from the restrictions imposed by the said ante-nuptial contract; (c) that your lordships may be pleased to release the said Gert Cornelius Olivier from his office of trustee, and to declare the trust imposed by the said ante-nuptial contract to be void and of no effect; (d) that your lordships may be pleased to grant your petitioner such alternative relief as to your lordships may seem meet.

The matter was previously before the Court, on January 14, 1900, when Mr. Advocate Buchanan was appointed *curator ad litem* for the minor children, in accordance with prayer (a) of the petition.

In reply to the petition, there was the following affidavit by the respondent Olivier: "Gert Cornelius Olivier, the above-named respondent maketh oath and saith: (1) That the petition with verifying affidavit made by the applicant has been read and explained to deponent. (2) That in so far as deponent is concerned he has no desire to oppose the application, and submits to such decision as this Hon. Court may give. Deponent desires, however, to be relieved from any responsibility, and to be indemnified and discharged from any possible claims or the costs of this application."

The following were the restrictions imposed by the ante-nuptial contract referred to: "That the whole of the estate, property, goods, effects, and things of which the said Sarah Petronella Tiran is already possessed, or which may hereafter be or become possessed, of whatever nature or kind, and however acquired, shall be and remain vested in the hands of Camille Frederick Tiran and Christian Michael Lind, or the survivor of them, as the trustees under this contract, or the trustee or trustees to be appointed as hereinafter directed upon trust and to and for the intents and purposes hereinafter mentioned, that is to say, upon trust to keep, lay out, and invest the same upon good and approved security, and to pay over to the said Sarah Petronella Tiran all interests, rents, and profits derivable from the same half-yearly, as a provision for her during the term of her natural life, and for which her receipt alone shall be a sufficient discharge, and upon the death of the said Sarah Petronella

Tiran, then upon further trust to pay out and divide the whole of the said trust property to and amongst the lawful issue of the said Sarah Petronella Tiran in equal shares and proportions, share and share alike, or failing such issue, to pay and hand over the same to such person or persons as the said Sarah Petronella Tiran may in her last will and testament direct, and in the absence of any such direction, then to pay and hand over the same to her next-of-kin." There were similar provisions in the ante-nuptial contract with regard to a policy for £200 on the life of Louis Nel.

Mr. Schreiner, K.C., appeared for the applicant; Mr. Buchanan for the *curator ad litem*, and Mr. Benjamin for Cornelius Oliver.

Mr. Buchanan: This stipulation of the Antenuptial Contract was one with regard to future succession, and looks to the death of the parties. Such stipulations in Antenuptial Contracts are on the same footing as Wills, and like them may be revoked.

[De Villiers, C.J.: Was not this a contract on behalf of the children?]

The children were not then born.

[De Villiers, C.J.: The Court has always upheld these contracts.]

A cancellation of an Antenuptial Contract *inter vivos* would be equivalent to a gift between husband and wife.

[De Villiers, C.J.: But is it not binding as between parents and children?]

In this case the children were uncertain persons; a gift cannot be made to uncertain persons.

[Buchanan, J.: The property was transferred to trustees; surely such a trust can be formed?]

[De Villiers, C.J.: This is not a will but a contract which affects the property during the wife's lifetime.]

It was not intended to make a donation, the object of transferring the property to trustees was not so much to protect the children as to keep the property from the husband. There was no thought of protecting the children against their mother.

Mr. Schreiner (for applicant): Tiran and Lind had no power to make contracts on behalf of the grandchildren, the children of their ward.

[De Villiers, C.J.: But when the children are born may they not protect their interests?]

Only by a *fidci commissum*. The only case in which a joint will cannot be revoked is where the estate, or a part of it, has been massed and the survivor has adiated under the will. An Antenuptial Contract is on the same footing as a joint will. The guardians of the wife were at most mandatory, and the whole object of the contract was to protect the wife during the subsistence of the marriage. Had she survived her husband the guardians would have been bound to have handed over her property unless she had made a donation to the children, or joined in executing a will massing and had adiated thereunder. The guardians were right in protecting her against her husband, but they could not have kept her own property from her after his death. She got nothing from Louis Nel; he left nothing to her but all to the children. With his death the mandate given to the trustees expired.

[De Villiers, C.J.: Must not the father be looked upon as a trustee of the children to be born, and in such capacity as having transferred certain rights to the trustees appointed under the contract?]

The only way in which that could be done would be by a mutual will massing: else a testator's Will might be irrevocable. See *Marshall v. Marshall's Trustees* (5 Searle, 144). There the order was given during the subsistence of the marriage. See also *Buissinné and Another v. Mulder and Uxor* (1 Menz. 162). At page 166 it is stated that in that case relief was given: for the Court as upper guardian will not relieve a woman from an engagement she has entered into for her own protection against her husband. Our Courts, however, have never adopted the trust law of England. Our general rule is that a mutual will and a mutual Antenuptial Contract bind the parties: a separate will and a separate Antenuptial Contract are revocable.

[Buchanan, J.: Take the converse case and suppose the husband had settled a policy on the children?]

He could have done what he liked with it after his wife's death.

[Buchanan, J.: Then anything agreed upon by an Antenuptial Contract binds only during the life of both parties?]

I would not say that of Antenuptial Contracts in general; I only speak of this particular contract; it gives the wife full liberty of testation, and what rights

then could the children have? See *Van Leeuwen* (Vol. 2, pp. 204 and 205).

[De Villiers, C.J.: Suppose the husband had settled £2,000 on the wife on condition of her subscribing this Antenuptial Contract, would she not have been bound by it?]

She would have been put to her election. See also *Van Leeuwen's "Censura Forensis"* (1, 12, 16) as to the revocability of Antenuptial Contracts. Here the trustee was only the wife's mandatory for the wife, she could have revoked his mandate at any time. The Court no doubt would have refused to interfere, because had she done so she would not have been protected against her husband. See *Van der Keessel* (Th. 283). *Voet* (23, 4, 60 to 63). If it be contended that this is a mere contract it cannot stand, for you cannot give an inheritance by contract, *Sande-Decis. Frisc.* (2, 2, 7). *Van Leeuwen* (Vol. i, Bk. 3. Ch. 2, Sec. 18). *Großius* (2, 15, 9), and *Schröder's* Note (No. 114).

Mr. Buchanan (in reply): All authorities treat a stipulation like this as a mutual Will and not as a real contract. *Van der Keessel* (Th., 233). I am not prepared to admit that the stipulations only hold during the marriage. Like the provisions of a Will they look forward to the time of death. After her husband's death, however, the wife could revoke the provisions of the Ante-nuptial Contract, *Van der Keessel* (Th., 235, 239, 240, 264, and 265); *Van der Linden* (1, 3, 5); *Van Leeuwen* (Vol. ii., p. 205, Sec. 12); *Voet* (23, 4, 62 to 64, specially 62); *De Roozboom Costum. Amsterdam* (42, Ch. 7, Sec. 9); *Loenius Decisiones* (num. 137); *Carpzorius* (pars 2, 45, Def. 14, note 5); *Voet* (39, 5, 10, and 12).

Cur. ad. vult.

Postea, January 23.

De Villiers, C.J., gave judgment in this case. His Lordship said that the Court had considered the application, and upon the whole came to the conclusion that the application ought to be granted. Under the fourth clause of the ante-nuptial contract it was provided that each of the spouses shall be at full liberty to dispose of property. Then came the fifth clause, by which certain limitations were placed upon the power of Mrs. Nel, one of the spouses. In the opinion of the Court it was not intended by these limitations that Mrs. Nel should

be deprived of the right of testamentary disposition after the death of her husband. The fifth clause should be read by the light of the fourth clause, and, if so read, it was clear that it was not intended that she should be deprived of the right of disposing of her property after the death of her intended husband. Under these circumstances the Court thought the application should be granted. But at the same time the Court wished it clearly understood that if the applicant had, for valuable consideration, relinquished certain rights in favour of the children, she would not be allowed after her husband's death to enjoy the benefit of such considerations without a corresponding obligation to observe the stipulation in favour of the children.

[Applicant's Attorneys, Tredgold, McIntyre and Bissett. Respondent's Attorney, G. Trollip.]

IN CAMERA.

[Before DE VILLIERS, C.J., and BUCHANAN, J.]

NAESS V. WARD. } 1902.
 } Jan. 20th.

Civil imprisonment—No Funds.

Where an applicant who had been civilly imprisoned in consequence of her default in making payment of such instalments of a judgment debt as she was bound by order of Court to make, deposed on oath that she was destitute of means: the Court ordered that the said applicant should be released on her undertaking not to leave the country and that execution of the decree of imprisonment be suspended until further order.

This was an application upon notice of motion calling upon Florence Maud Ward, married in community of property to Reuben J. Ward, of Cape Town, and duly assisted by him as far as needs be), to show cause why applicant should not be discharged from Civil Imprisonment upon payment to respondent of £1, being the first instalment due on Janu-

ary 1st, 1902, in terms of an order of Court dated November 21st, 1901, together with £1 14s. 0d. costs incurred in connection with the arrest of applicant.

Or in the alternative, to show cause why applicant should not be forthwith released from custody upon the grounds that she is devoid of means and unable to pay the amount due by her to you.

The affidavit of Astrid Naess, the applicant stated that she was indebted to respondent in the sum of £37 1s. 0d., for which the Court had granted an order of Civil Imprisonment on November 21st, 1901, execution whereof was to be stayed pending payment of £1 per month from December 1st, 1901. Applicant made default in the said payment on January 1st, 1902, and on the 15th of the said month was arrested and detained in gaol under a writ of Court issued at the instance of Respondent. That she had tendered payment of the arrear instalment together with costs of arrest, but that Respondent refused to accept the tender and to grant an order for applicant's release from gaol. That applicant was devoid of means and totally unable to discharge the amount of the above debt either in whole or part.

The affidavit of Reuben John Ward stated that he was the husband of Respondent, and that on January 15th, 1902, he witnessed the arrest of Applicant on board the "Saxon" when she was about to leave for England. That he had ascertained that she had booked a second-class passage but that shortly before deponent arrived on board of the "Saxon" aforesaid applicant had transferred her second-class passage to first.

Mr. B. Upington (for applicant): There are two grounds on which applicant is entitled to her release. In the first place she tenders to pay instalments and the costs of her arrest. The Chief Justice granted the decree of civil imprisonment but suspended execution on payment of £1 a month.

[Buchanan, J.: Have you any affidavits, Mr. Benjamin, as to her means? She ought to be cross-examined as to means. What is her position?]

I believe she has been employed by the Government.

Mr. Benjamin (for respondent): She booked a second-class passage to England

and then changed it for a first. The debt is only £15, and the difference between the two fares would have been fully sufficient to have paid it.

[Buchanan, J.: I do not see that any order can be made on the facts in evidence. Can you produce the prisoner. Mr. Upington by 12 noon?]

[Mr. Upington replied in the affirmative, and the prisoner was produced when the sitting was resumed at the said hour.]

Mr. Upington cited Sec. 6 of Act 8, 1879, and *H. v. Bossi* (4 Juta, 72). See also *Forde's* case (decided November 20th, 1885, not reported but cited by Van Zyl, p. 239, and *Re Hartill* (decided November 27th, 1885. Not reported but cited by Van Zyl, p. 239. In these cases an extensive interpretation was given to the above Section 6.

Mr. Benjamin: We do not object to the decree being suspended, if the applicant undertakes not to leave the Colony.

[The Court thereupon suspended execution of the Writ till further order, and ordered the release of applicant from Civil Imprisonment on her undertaking not to leave the country.]

[Applicant's Attorneys, Fairbridge, Arderne, and Lawton. Respondent's Attorneys, Silberbauer, Wahl, and Fuller.]

MARTIN V. MARTIN.

Mr. Close appeared for the applicant, Mrs. Wilhelmina Hendrina Martin, who applied for a rule *nisi* calling upon her husband, Jno. Martin, blacksmith, of Mossel Bay, to show cause why an order should not be granted restraining him from dealing with the property of the joint estate of himself and the petitioner, pending the result of an action instituted by the latter for judicial separation. In her petition applicant alleged that her husband was a habitual drunkard, and had been guilty of acts of cruelty towards her. He had been three times convicted of and fined for drunkenness, and had once been found guilty of assaulting her.

An order was granted calling upon respondent to show cause why an order should not be granted in terms of the petition, the rule to operate as an interim interdict restraining him from dealing with the landed property of the estate,

OHLSOON'S BREWERIES V. WATSON.

Mr. Gardiner appeared for the applicants.

This was an application to attach certain moneys in the Standard Bank, belonging to respondent, and a sum owed him by the Field Force Canteen. Applicants alleged that respondent was indebted to them in the sum of £844 on a promissory note and for goods sold and delivered, and summons had been issued in respect thereof. They said they had reason to believe that he intended to leave the Colony, and attached to the petition a letter written by him to the manager of the Field Force Canteen, in which he stated that he had been granted an indulgence passage to England, and had been warned that he might go at any time.

His Lordship said that the Court would not, as a rule, make an order for the attachment of any money before judgment was obtained, but where there was reason to believe that a person was about to leave the jurisdiction, the Court would make such an order. A rule *nisi* would be granted calling on respondent to show cause why the money should not be attached, the rule to operate as an interim interdict restraining the Standard Bank and the district manager of the Field Force Canteen from paying to respondent any money in their possession belonging to him.

SUPREME COURT IN CAMERA.

[Before the CHIEF JUSTICE and Sir JOHN BUCHANAN, J.]

Ex parte WIESE. } 1902.
} Jan. 28th.

This was an application upon notice given to the attorneys of the consignees of the cargo of the German barque Marga, now lying at Port Elizabeth, and also the Sub-Collector of Customs, calling on them to show cause why the prayer of the petition should not be granted. The petition set forth that the petitioner is the master of the German barque Marga, and as such represents the owners. In terms of charter party

(annexed and marked A) entered into at Hamburg, the vessel received on board a cargo of general merchandise for Port Elizabeth and Natal in accordance with the option exercised by the said charterer, for which cargo petitioners signed bills of lading in the form and upon the terms of the copy of the Bill of Lading annexed and marked B. Thereafter the said vessel arrived at the Port of Algoa Bay on October 3rd, 1901, and the day following petitioner gave notice to the firm of Edward Searle and Co., merchants of Port Elizabeth (to whom the said vessel was consigned by the charterer under the said Charter Party) that he was ready to discharge the Port Elizabeth portion of his said cargo. That thereafter the consignees of the said cargo did not commence to take delivery of their goods until on or about December 14th, 1901, and since that date have only taken delivery thereof on occasional days, but that the discharge of the said cargo has not been completed up to the present. That on December 5th, 1901, petitioner made and executed a Notarial Protest, copy of which was on December 7th, 1901, duly served upon the said firm of E. Searle and Co. That petitioner has at all times since the arrival of his vessel at this Port and up to January 7, 1902, been ready and willing to deliver the said cargo to the said consignees with all reasonable despatch. That petitioner has a claim against the consignees for demurrage by virtue of the terms of the said Bills of Lading, and is about to institute an action for the recovery of his said claim in this Honourable Court. That petitioner has a lien constituted by the express stipulation both of the Charter party and the Bills of Lading upon the cargo still remaining on board for demurrage and all charges and expenses connected therewith. That of the Port Elizabeth portion of the said cargo, there still remains on board the goods set forth in a schedule hereunto annexed for the several consignees whose names are set forth in the said list. That on January 7th, 1902, petitioner, through his attorneys, gave notice to the said firm of E. Searle and Co., for themselves and the other Port Elizabeth consignees of his intention to retain the Port Elizabeth cargo then remaining on board his said vessel in pursuance of his lien for demurrage, his claim for

which on that day amounted to the sum of £677 6s. 8d., and has continued at the rate of £16 18s. 8d. per day (4d. per ton nett register), and that thereupon ensued the correspondence (copies annexed and marked E) between the respective attorneys of petitioner and the said consignees. That thereafter by virtue of such lien, petitioner refused to deliver the goods remaining on board to the consignees, but had endeavoured to discharge and store the same in his own name at the expense and risk of the owners, but the Sub-Collector of Customs, by reason of the consignees having already passed the Customs entries, refused to allow the Port Elizabeth Harbour Board to land and deliver the goods to petitioner. Wherefore petitioner now prays for an order for the attachment of the goods, and confirming their retention by petitioner by virtue of his lien, for his claim for demurrage and all charges and expenses, and authorising the Sub-Collector of Customs to allow the goods to be discharged and stored by petitioner in his own name, at the risk and expense of the consignees, pending the result of an action to be instituted by petitioner in this Honourable Court against the consignees for the recovery of the said claim.

The various provisions of the Charter Party bearing on this application were as follows: The ship being loaded shall proceed with her cargo to Cape Town and (or) Port Elizabeth, and (or) East London, and (or) Port Natal and (or) Delagoa Bay--Lorenzo Marques, one or two ports as ordered on signing B. Ldg. in rotation from South to North, but if ordered to East London this to be the last discharging port if desired by charterer, or so near thereunto as she may safely get and deliver her cargo in the usual and customary manner at such wharves or berths as Charterer or Consignee may appoint (if more than one wharf be used for discharging and loading, consignees to pay shifting expenses) agreeably to Bills of Lading, but not exceeding 35 working days to commence 48 hours after ship's arrival at the respective port, and so end the voyage. Days for loading and discharging to be reversible; 30 working days are to be allowed the Charterer for loading the said vessel (if not sooner despatched), the said days to commence 48 hours

after receipt of customary written notice that the vessel is in her loading berth with a completely clear hold, etc. Should the vessel be detained beyond the aforesaid time by the said Charterer, demurrage to be paid by him at the rate of 2d. per ton nett register per day for the first 10 days, and 4d. for all further days (Sundays and holidays excepted), but causes beyond the control of the freighter which may prevent or delay the loading of the vessel are not to be computed as part of the aforesaid loading time. As much of the freight as is payable abroad according to Bills of Lading in cash at port of discharge on right and true delivery of the cargo, and the balance, but in no case less than one-half to be paid in Hamburg after final departure of the vessel from the Elbe, on receipt of which payment Charterer's responsibility concerning this charter to cease. The Captain to have a lien on the cargo for all freight, dead freight and demurrage.

(On the indorsement.)

The ship has in all 67 days for loading and discharging, of these days, 22 have been used in Hamburg; thus 45 days are left for discharging to be counted as per this Charter Party. In the Bill of Lading, it was stated: all goods are subject to an absolute lien for freight until paid, and for all charges including dead freight, demurrage, forwarding charges, etc. Consignees are to be ready to receive their goods free from alongside when at hand, and to take delivery as quickly as the goods are delivered in ship's slings by the ship. Otherwise the Master or Agent may discharge and store them at the expense and risk of the owners of the goods, or in his option charge demurrage for the ship at the rate of 4d. per ton nett Register per day, the Captain to have a lien on the goods for all these charges and expenses.

The affidavit of William E. Clift, Marine Superintendent of Port Elizabeth Harbour Board, stated that the Marga arrived at that port on October 3rd, and that on the following day permission for her to come alongside the jetty was refused. That between October 4th and December 14th it was impossible, according to Harbour Board Regulations to have worked the vessel by any means. Her discharge was regulated strictly ac-

cording to the custom of the Port. This last allegation was supported by the affidavit of William MacIntosh.

[Mr. Schreiner, K.C., appeared for the petitioner, and Mr. Searle, K.C., for the respondents.]

[De Villiers, C.J.: Is this motion opposed?]

Mr. Searle, K.C. (for Respondent): Yes; we have offered security, but they want costs.

Mr. Schreiner, K.C. (for Applicant): The real question is, are we entitled to demurrage as per Charter Party, or only according to the custom of the Port? I would suggest that the whole question should be gone into now so as to save further litigation. As to security, we have some hesitation in accepting that lest we should lose our lien.

[De Villiers, C.J.: The effect of security would be to preserve the lien.]

In that case we should not object. If the case went to trial the Court could have nothing more before it than it has now.

Mr. Searle: The affidavits are conflicting. The lien given by the Charter Party is more extensive than that given by the Bill of Lading.

Mr. Schreiner: The central point of the case is in our favour since we have a lien on the goods a *jus in rem*, and we need not come upon the charterer by an action *in personam*. We hold that we have not lost our demurrage right.

[De Villiers, C. J.: Will you withdraw your statement as to the knowledge of the consignees?]

We cannot do that.

[De Villiers, C. J.: Then is there not a question of fact in dispute?]

[Buchanan, J.: If security is given it stands in the same position as goods?]

Yes; but the deed of security would have to express this very clearly.

Mr. Searle: They have already consented to accept security, and the only question now is as to costs.

[Mr. Schreiner put in the correspondence between parties' Attorneys.] The point seems to be that they offer security without prejudice to their rights. If the goods are parted with the lien dies.

Mr. Searle: They are foreigners, and should give security for costs before they begin their action. We are quite willing to give security to obey the judgment of the Court.

Mr. Schreiner: The whole question is, from when does demurrage run? From the expiry of the lay days, or according to the custom of the Port?

We consent to give security for costs.

After further argument the Chief Justice said that no order would be made, respondent undertaking forthwith to give security for any sum that might be awarded to the plaintiff by judgment of this Court, the delivery of the goods not to prejudice any right of the applicant in respect to the goods, which were to be judged as if no delivery had been made, the applicant to give security for costs in case of his proceeding further by action; all costs heretofore to be costs in the cause.

[Applicant's Attorneys, Findlay and Tait. Respondents' Attorneys, Van Zyl and Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G. (Chief Justice), and the Hon. Sir John Buchanan.]

ADMISSION. { 1902
Feb. 1st.

Mr. Currey moved for the admission, as a conveyancer of Frederick van de Sandt Centlivres.

Granted, applicant taking the customary oaths.

PROVISIONAL CASES.

LOUW V. RHODES AND ANOTHER.

Mr. Searle, K.C. (with him Mr. Gardiner), appeared for the plaintiff; Mr. Benjamin for the defendant.

Mr. Benjamin asked that the case should be allowed to stand over until the 6th inst. Defendant was expected to arrive by the following week.

There was no objection, and the application was granted.

VAN HEERDEN V. VAN HEERDEN.

Mr. C. de Villiers applied that this matter should stand over until the last day of term.

Granted.

JAGGER AND OTHERS V. LEWIN.

Mr. Bisset moved for the discharge of the provisional order for sequestration granted on the 16th December last.

Granted.

LONG V. HAYWARD.

Mr. Buchanan moved for provisional sentence for £100 due on a certain mortgage bond, with interest at the rate of 6 per cent., and for certain specially hypothecated property to be declared executable.

Granted.

LUCKE V. BIERSTECKER.

Mr. Buchanan moved for provisional sentence on a mortgage bond for the sum of £1,375, with interest at 6 per cent., and for specially mortgaged property to be declared executable.

Defendant appeared, and asked for a fortnight wherein to make arrangements to meet the bond.

Provisional sentence was granted, and the property declared executable, stay of execution being granted for a period of three weeks.

DIX V. VAN DER MERWE.

Mr. Alexander moved for the final adjudication of the defendant's estate.

Granted.

FOULGER V. LIEBERMANN { 1902.
BELLSTEDT AND CO. { Feb. 1st.

Rent—Beneficial occupation.

Defendants had hired certain hotel premises situate in the Orange Free State from plaintiff, subsequent to the outbreak of hostilities between that State and Great Britain. Defendant's tenant of said premises having been deported, without any fault of his own, by the British Military Authorities, defendants now denied that they were liable for the rent of the said premises under the lease aforesaid.

Held, that as defendants had leased the said premises with full knowledge of the risk they

were running owing to military operations, the Roman Dutch authorities as to want of beneficial occupation did not apply.

This was a motion for provisional sentence in respect to a sum of £30, alleged to be due, as rent of certain premises for the month of December, 1901, in terms of a lease, executed on the 7th September, 1900, whereby plaintiff let to the defendants a property known as the Commercial Hotel in Boshof, Orange River Colony, at a monthly rental of £30.

The summons called upon Wilhelm H. Liebermann, Johan C. Bellstedt, and Dirk E. Vreede, trading as Liebermann, Bellstedt, and Co., to pay William Conrad Foulger, lately of Boschof, O.R.C., but at present of Cape Town, the sum of £30 8s. under and by virtue of a certain agreement of Lease bearing date the 7th of September, 1900, entered into between the above-named plaintiff as lessor, and defendant as lessees, together with the interest thereon from December 31st, 1901, to date of summons.

The affidavit of Wilhelm H. Liebermann stated that his firm had entered into the agreement of lease of September 7th, 1900, which was now sued on. The said lease was to continue to defendant's firm the tenancy of the land, building, and premises thereby let known as the "Commercial Hotel, Boschof," for a further period of five years from January 1st, 1901. Defendant's firm were, at the time the lease was executed, domiciled at Port Elizabeth, plaintiff was domiciled at Boschof in the O.R.C., where the premises were situate. At the end of November, 1901, the inhabitants of Boschof were by order of the British Military Authorities ordered to vacate their premises at a moment's notice, and to proceed thence to this Colony. Among such inhabitants one E. Prior, who held the said leased "Commercial Hotel" premises as sublessee under and as agent for deponent's firm was ordered to leave and did leave the said leased premises to which he has not since been allowed to return. He was not ordered to leave in consequence of any misconduct on his, or his firm's part. Since the events referred to the firm have not had the occupation of the said premises. Deponent believes that

his agreement of lease is governed by the law of the O.R.C., and that under such law his firm is, under the circumstances, not liable for rent. In a replying affidavit plaintiff stated that at the date the aforesaid lease was entered into hostilities between the forces of the Orange Free State and those of His Britannic Majesty had been in progress for eleven months. He denied any knowledge of the expulsion of defendant's tenant by the British forces, and also that he was deprived of the right to recover rent under the lease either by Common Law or by special proclamation of the British Military Authorities.

[Mr. Schreiner, K.C., for the plaintiff; Mr. Searle, K.C., for the respondent.]

Mr. Searle said that the defence was that there had been no beneficial occupation of the property, the military authorities having entered the place, and compelled the lessees to leave.

Mr. Schreiner contended that the defendants entered into the lease with full knowledge of the conditions existing in the country. At the date the lease was executed hostilities had been in progress for eleven months or thereabouts. Where knowledge of the circumstances existed, a person could not, he argued, claim exemption for want of beneficial occupation.

[De Villiers, C.J.: There was knowledge of the country being in a state of war, but there was no knowledge that the lessee would be prevented from having beneficial occupation.]

The lessees took the risk. They must have known that the military exigencies might be such that they would be prevented from having occupation. Probably the conditions of the country and the risks to the lessee were taken into consideration in determining the amount of the rent. *Voet* (19—2—24), *The United Mines of Bultfontein v. De Berr's Consolidated Mines* (10 Sheil 665), *The Treasurer-General v. Lockstone* (1 Juta, p. 304), *Wheeler v. Van Rencen* (2 Juta, p. 269).

Mr. Searle in reply.

In giving judgment, the Chief Justice that he was of opinion that provisional sentence must be granted. It might be taken for certain that if the lease had been entered into before the commencement of hostilities the defence would be a good one. The affidavit of the defendants stated that at the end of November,

1901, the inhabitants of Boshof were ordered by the British military authorities to vacate at a month's notice and proceed to Cape Colony, as the town and houses were required for military purposes. Among such inhabitants was one E. Prior, who as sub-lessee held the Commercial Hotel. He was ordered to leave and did leave. The circumstances were such as to debar the lessee from having beneficial occupation. But it was admitted that the lease was entered into after the commencement of hostilities, and one might take it that the rent was estimated according to the risk. Both parties must have known that there was a considerable risk when the lease was entered into. Under such circumstances, *Voet*, in the passage quoted, was clearly of opinion that the general rule relieving the lessee from payment of rent where he has been unable owing to war to have beneficial occupation does not apply. The Court had not been able to verify the authorities cited by him, but there appeared to me to be sound sense in the distinction drawn by him. The Court considered that provisional sentence should be granted with costs.

Buchanan, J., concurred.

[Plaintiff's Attorneys, Silberbauer, Wahl and Fuller; Defendants', Scanlan and Syfret.]

ALIWE V. ABDOL HADDIE. { 1902.
Feb. 1st.

Arrest—8th Rule of Court—
Security.

This was an application for discharge of a writ of arrest under the 8th Rule of Court.

The writ of arrest issued January 16, 1902, called upon the Sheriff of the Colony to arrest Abdol Haddie, of 60, Hanover-street, Cape Town, and safely to keep him so that the said Sheriff might produce him before the Supreme Court on February 1, 1902, to answer Said Abdoola Aliwe, and show cause why he had not paid him £61 balance of account rendered and also £3,000 damages for slander. The former sum (of £61) was stated to be balance of an account for maintenance of defendant's wife while in Mecca. The damages were claimed in respect of certain defamatory expressions used by defendant against plaintiff which resulted in plaintiff's dis-

missal from an important post in Mecca.

Defendant was arrested and lodged in gaol on January 16, 1902.

The affidavit of the plaintiff stated that he was a priest from Mecca, presently residing in Cape Town. That the said defendant was indebted to deponent in the sum of £61 sterling, balance of account. That deponent had sustained damages to the sum of £3,000 owing to defendant's having falsely and maliciously uttered certain defamatory statements concerning deponent, thereby causing deponent to be removed from his office as a priest at Mecca. That he had heard and verily believed that the said defendant was about to quit the Colony to proceed to Mecca. That deponent had no mortgage, pledge, or security for the said amounts claimed by him, and that from inquiries instituted in the Deeds Office he had ascertained that defendant's immovable property was so heavily mortgaged as to leave a balance of no consequence.

There were two affidavits in support of the allegation that defendant intended to leave the Colony on January 16. One of the said affidavits also stated that only a very small margin would remain after deducting defendant's liabilities from the value of his properties.

The affidavit of Hadje Abdol Haddie, the defendant, (now applicant,) admitted that he was indebted to Said A. Aliwe in the sum of £49, but stated that he (Haddie) had a counter claim against him for the sum of £100 on an acknowledgment of debt signed by him, and at present in the hands of deponent's agent at Mecca. He denied that plaintiff had sustained damage, and that he had any intention of proceeding to Mecca. Deponent also said that his Cape Town property was worth more than £3,100, and was bonded only to the extent of £1,950. He deposed that he had been grossly insulted by Aliwe and his friends, and that his arrest was due to malice.

In his answering affidavit, Said Abdoola Aliwe denied that he owed applicant £100, and said that the whole of the said sum which had been left in his custody by applicant's wife on her arrival in Mecca had been paid over to her for her maintenance there. This allegation was supported by her receipt and by her affidavit. Deponent denied

that he had either assaulted applicant or induced any other person to do so, or that the arrest was malicious.

Mr. Schreiner, K.C., for applicant, and Mr. Searle, K.C. (with him Mr. Benjamin), for respondent.

Mr. Schreiner said that the applicant alleged that the slander was contained in a letter written by defendant to the Governor of Mecca, in consequence of which he (applicant) was dismissed from his position as chief priest and pilgrim guide to the Temple of Mecca. Counsel said that the property referred to by defendant only represented a net amount of £750, after the amount of the bonds had been deducted.

De Villiers, C.J., said that the object was to secure the defendant's presence here. He thought £700 was sufficient for that.

Mr. Schreiner said that the costs would be heavy. There would probably have to be a commission to take evidence at Mecca.

The Court confirmed the writ, the amount of the security being reduced to £500, costs to be costs in the cause.

[Applicant's Attorney, A. Steer; Respondent's Attorneys, Messrs. Van Zyl and Buissinné.]

FRIEDMAN V. ROBERTSON.

Mr. Benjamin applied for provisional sentence or a promissory note for £26 6s.

Granted.

OHLSSON V. WATSON.

Mr. Gardiner applied for provisional sentence for £600, balance of a promissory note for £1,300, for interest, and for judgment, under Rule 329d, for £244 15s. 2d., goods sold and delivered, with costs.

Granted.

TONKIN, N. O. V. CORTIS. } 1902.
Feb. 1st.

This was an application for provisional sentence for £955 due to plaintiff upon certain conditions of sale, with regard to land sold at Woodstock.

The summons called upon Antonio Cortis to render to Samuel Tonkin in his capacity as seller and receiver duly authorised by order of the Honourable the Supreme Court, dated October 14,

1901, to sell the undermentioned property of which Arthur E. Hunter (a minor), John T. Hunter, Charles H. Hunter, and James M. Hunter are the owners the sum of £955 with interest thereon at six per cent., from October 22, 1901, due and payable by the said Cortis to the said Tonkin upon certain conditions of sale signed by the said Cortis on October 22, 1901, for the purchase price of landed property situate at Woodstock aforesaid, and which purchase price the said Cortis agreed to pay in three equal instalments, namely, on January 22, 1902, April 22, and October 22, 1902, and which amount has become payable in full through non-payment of the first instalment.

The affidavit of defendant stated that on the 22nd October he attended a sale of ground and buildings thereon, situated in the Lower Main-road at Woodstock. He alleged that plaintiff informed him that the ground had a frontage of 64 feet and a depth of 100 feet, and that half of a certain yard was included in the ground sold.

On this understanding defendant bought the ground pointed out by plaintiff for £955, payable in instalments due at 3, 6, and 12 months from date of sale. On a survey of the aforesaid ground being made, the surveyor ascertained that no portion of the yard at the back of the house belonged to the principals for whom plaintiff is agent. At the back of the said yard there is a cottage which is on the ground bought by defendant, and as this cottage has its entrance through the said yard, it (the cottage aforesaid which brings in a rental of £2 per month) would be useless to him as there will be no entrance to it. As transfer was now tendered of much less ground than defendant bought, he refused to take such transfer. Defendant's affidavit was supported by those of Marks Cohen and Solomon Schach.

Plaintiff in his affidavit denied that he showed to defendant the exact boundary of the property. He represented the frontage as 40 feet, less an existing road, and the depth at 100 feet, less the portion deducted to one Lewis. Plaintiff never pointed out to defendant that half the yard aforesaid was included in the ground being sold. Plaintiff sold the ground according to the diagram produced, and defendant purchased for £955.

Plaintiff had tendered transfer to defendant of the property with a new diagram, giving him an additional small piece of land sufficient to give him a frontage of 64 feet, less the existing road. Defendant had taken possession of the property from the date of sale and was still in possession.

Mr. Close for Plaintiff; Mr. Benjamin for Defendant.

Provisional sentence was granted, execution being stayed in order to enable defendant to bring an action. The Chief Justice said that provisional sentence would, of course, be with costs, but defendant could reclaim the costs if he succeeded in his claim in reconvention or action for cancellation of the sale.

[Plaintiff's Attorney, J. Ayliff; Defendant's Attorney, C. W. Herold.]

RICARDI V. FALKOW.

Mr. Gardiner applied for a writ of civil imprisonment. Defendant had failed to comply with a judgment of the Court for payment of costs amounting to £32 2s. 7d.

Defendant gave evidence, and said that he had no work. He offered to pay 10s. a month until he was in a position to pay more.

The Court granted a decree of civil imprisonment, with costs, but ordered execution to be stayed on payment of 10s. a month, leave being reserved to plaintiff to apply for increase.

ALEXANDER V. JONES.

Mr. Benjamin applied for a decree of civil imprisonment in respect to a debt of £686 and costs, for which judgment was given by the Supreme Court on the 15th August, 1900.

Granted.

STEYTLER V. VAN ZYL.

Mr. Rowson moved for provisional sentence for a sum of £36, being interest on a mortgage bond, with interest and costs.

Granted.

RITSON V. SIERADZKI. { 1902.
Feb. 1st.

Pactum de non petendo.

S. had signed a certain acknowledgment of debt in

favour of R. The defence was that R. had by a contemporaneous document engaged not to press for payment until two months after a certain future event should have happened.

Held, that as the event in question had not yet happened plaintiff was bound by his pactum de non petendo, even though there was some evidence that defendant was not without funds and that provisional sentence must be refused.

This was an application for provisional sentence for money alleged to be due under a deed of dissolution of partnership, by which defendant in May, 1900, undertook to pay £263 17s. 1d. within three months.

The summons, dated January 22, 1902, called upon defendant to pay the above sum with interest thereon at the rate of six per cent. per annum reckoned from September 13, 1901, which defendant owed upon and by virtue of a certain agreement and acknowledgment of debt bearing date May 13, 1900. Also to pay the moneys disbursed by plaintiff in pursuance of the said agreement and acknowledgment of debt for the storage and care of certain goods scheduled and set forth in the said agreement, and pledged by defendant to plaintiff as security for the aforesaid debt, being at the rate of £1 10s. per month from September 1, 1900, i. e., £1 per month as rent and 10s. per month for care and attention. The summons further called upon defendant, should he deny the reasonableness of the said claim of £1 10s. per month, within two days after service of summons to cause appearance to be entered in the Supreme Court to answer to plaintiff in an action wherein he claimed to be entitled to be reimbursed all moneys already expended by him or which might hereafter be spent for the storage and preservation of the pledged goods, until such time as they should have been realized, and the proceeds thereof appropriated in payment of the said debt.

The affidavit of Koppel Sieradzki stated *inter alia* that prior to the aforesaid agreement and acknowledgment of debt

being signed, it was agreed between the parties thereto to vary the terms thereof as to when payment was to be made of the balance due by defendant to plaintiff: and it was agreed by plaintiff that he would not claim or press for payment of the said balance till two clear months had elapsed after the opening of civilian traffic to Johannesburg, so as to enable defendant to proceed there and at the same time when the said agreement was signed plaintiff signed a letter (annexed) addressed to defendant embodying the said variation of terms. Defendant further said that civilian traffic to Johannesburg had not yet been opened, and that he had several times attempted, without success, to obtain a permit to proceed thither.

The aforesaid letter was as follows:

CAPE TOWN,

May 18, 1900.

Mr. K. Sieradzki.

SIR,—Referring to Deed of Dissolution of partnership executed by us this day, I agree to allow you two clear months after Johannesburg is open for civilians to enable you to proceed there, before pressing for payment of the balance due to me by you in regard of our late partnership.

I shall, of course, retain possession of the assets pledged until my claim in full with interest is paid.

(Signed) H. RITSON.

In an answering affidavit plaintiff stated that the goods pledged were of a perishable nature and were being depreciated in value, that some of them had been given up to defendant and sold by him at a good price, and that Johannesburg was now open to civilians, but that defendant was not anxious to go there as he was doing a good business in Cape Town.

Mr. Schreiner, K. C., for plaintiff; Mr. Searle, K.C., for defendant.

Mr. Schreiner argued that evidence of a contemporaneous agreement was not admissible, and quoted *Orsmond v. Steyn* (10 Sheil, 763).

Mr. Searle was not called upon.

De Villiers, C.J., the decision in the case cited by Mr. Schreiner was founded entirely upon the fact that a collateral agreement was relied upon, with no writing whatever to prove its existence. In the present case the agreement, which was not exactly collateral, being made subsequently, was in writing. Therein plaintiff agreed to allow de-

fendant two clear months after Johannesburg was open for civilian traffic so as to enable him to proceed there before he pressed for payment. In my opinion, if the defendant could satisfy the Court that Johannesburg was not open for civilian traffic, and that he could not proceed there, the plaintiff could not sue for payment. Upon this point defendant's affidavit is clear. He says that though he has applied for a permit on several occasions he has not, as yet, succeeded in obtaining one. In my opinion the defence, at all events to a provisional claim, is a valid one, and provisional sentence must be refused with costs. This will not debar plaintiff from going into the principal case, and in such case he can claim the costs.

[Plaintiff's Attorney, Messrs. Van Zyl and Buissinné; Defendant's Messrs. Minchin and Sonnenberg.]

ILLIQUID ROLL.

BYWORTH V. STEVENSON. { 1902.
Feb. 1st

Donation—Charitable institution.

S. had undertaken to pay certain moneys to B. in consideration of B. foregoing an action for slander against S. S. had also on the same consideration promised to pay £10 towards the funds of a certain charitable institution. None of the above named moneys had been paid and B. now sued for payment.

Held, that final judgment must be entered against S. for the moneys due to B. but that with respect to the money promised to the said charitable institution no order could be made save on application by the trustees.

This was a motion under Rule 319 by which plaintiff claimed £65 4s. 9d. expenses unpaid in regard to an action for slander contemplated by said plaintiff against said respondent. Respondent had undertaken to pay the said costs and also

£10 towards the funds of the Somerset Hospital, in consideration of plaintiff's contemplated action being withdrawn. Applicant now asked for judgment for £65 4s. 9d., and for an order on defendant to pay £10 to the hospital aforesaid.

The plaintiff's declaration set forth that on or about January 27, 1899, defendant at a meeting of ratepayers in Cape Town, spoke the following words concerning plaintiff: "Mr. Byworth (meaning plaintiff) was a vestry clerk in the town from which I (meaning defendant) hail, namely, Battersea, and Mr. Byworth was precious glad to get out of that town. The ratepayers' association drove him out of that town. If we formed an association here Mr. Byworth would not be so comfortable." Plaintiff by his attorney informed defendant of his intention to institute an action against him for defamation in respect of the words above set forth. On, or about February 1, 1901, defendant signed a written apology to plaintiff in respect of the said words, and agreed in consideration of plaintiff abandoning the said action to pay expenses incurred therein by plaintiff in respect of advocate's and attorney's fees and the cost of the insertion of the said apology in two issues of certain eight newspapers, and to pay the sum of £10 to the funds of the New Somerset Hospital. The legal expenses, etc., incurred amounted to £90 4s. 9d. Of this defendant had paid only £25 on account, leaving a balance of £65 4s. 9d. together with the £10 aforesaid. Plaintiff now claimed judgment for the first named sum and an order compelling defendant to pay to the fund of the said hospital the sum of £10.

On December 16 defendant was barred.

The Court, without hearing any evidence, on the motion of Mr Gardiner, granted leave to plaintiff to enter final judgment for £65 4s. 9d. with costs. In respect of the £10 promised to the hospital the Court held that no order could be made save on application by party.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorney, J. J. Michau.]

MOWBRAY MUNICIPALITY V. HAYWARD.

Mr. Buchanan applied for judgment under Rule 329d for £40, landlord's rates, and £9 12s., tenant's rates, with interest and costs.

Granted.

DIVINE, GATES AND CO. V. BROMLEY BROS.

Mr. Alexander moved under Rule 329d. for judgment for the sum of £23 8s. 11d.. for work done and money disbursed.

Granted.

ESTATE MARQUARD V. LEVI.

Mr. Rowson moved under Rule 329d, for judgment for £40 6s. 1d., balance of account for goods sold and delivered, with interest and costs.

Granted.

ESTATE MARQUARD V. KOPELIUS.

Mr. De Waal moved for judgment under Rule 329d for £153 6s. 5d., for goods sold, less the sum of £6 15s. paid.

Granted.

LOWRY V. MACFARLANE.

Mr. J. de Villiers moved under Rule 329d for judgment for the delivery of certain shares, or for payment of £650 in lieu thereof, with costs.

Granted.

GABRIEL V. HOFFMAN.

Mr. Benjamin moved for judgment under Rule 319 for £25 on a lost promissory note, in respect of which defendant had undertaken to indemnify plaintiff against any claims.

Granted.

MILIS V. LAMBERT.

Mr. Buchanan moved under Rule 329d for judgment for £25, money lent, less £5 paid since issue of summons, with costs.

Granted.

ROOS V. TOWN COUNCIL.

Mr. Benjamin moved for judgment for the transfer of certain property in terms of a consent paper filed.

Granted.

REHABILITATIONS.

On the motion of Mr. Benjamin, the Court made an order for the rehabilitation of Charles Augustine Wagner.

Mr. C. de Villiers moved for the rehabilitation of Adriaan Johannes Louw Versfeld.

Granted.

Mr. Gardiner moved for the rehalitation of George Oliver Moorhead. Counsel said that there were two joint trustees in the estate. They made separate reports, one favourable, the other adverse to the insolvent. One trustee alleged that there was a fictitious partnership between insolvent and another doctor; the other said the partnership was a real one. On other points the trustees differed, and the one said he was investigating matters, and subsequently proposed to ask for a resolution from the creditors as to taking proceedings. The estate was surrendered in November, 1896, and the trustee who reported unfavourably said that the favourable trustee had been acting for insolvent in his examination.

The Chief Justice said that applicant had been insolvent for six years, and no proceedings had been taken against him. No creditor came forward to support the one trustee, and under the circumstances the Court would order applicant's rehabilitation.

On the application of Mr. Gardiner, the Court granted an order for the rehabilitation of James Dold Morgan.

Mr. Buchanan moved for the rehabilitation of Edward John Wreyford.

Granted.

GENERAL MOTIONS.

MASTER OF THE POLITICIAN AND MESINA BROS. AND OTHERS V. MASTER OF THE CROMARTYSHIRE.

Mr. Schreiner, K.C., appeared for the master of the Politician; Mr. Benjamin for the second plaintiffs; and Mr. Searle, K.C., for the defendant.

Mr. Searle said that separate actions had been instituted against the defendant by the plaintiffs for salvage. One was set down for Tuesday next, and the other for the 26th. He asked that both should be set down for the latter date.

There was no opposition, and the cases were accordingly set down for the 26th inst. Leave was given to take the evidence of Captain Palmer on commission, Mr. Howel Jones being appointed commissioner. Costs were ordered to be costs in the cause.

Mr. Benjamin applied for the appointment of a commission to take evidence at Port Elizabeth.

Mr. Schreiner said that no notice had been given.

The Chief Justice said that notice must be given.

IN THE MATTER OF THE PETITION OF WILLIAM PRESTON BUCHANAN.

Mr. Close moved for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF WILLIAM HARE.

Mr. C. de Villiers applied for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

ENDLEY V. WARD AND CO.

This was an application for release from civil imprisonment.

The application was made on the ground that the arrest was wholly illegal. The affidavit of Christiana Endley, wife of George John Endley, the applicant, stated that in July, 1900, respondents obtained judgment against her husband, and subsequently obtained a decree of imprisonment. This decree was never executed. Before it could be executed applicant surrendered his estate, which was ordered to be sequestered. On January 29, this year, deponent received a message from the Deputy Sheriff, stating that her husband had been lodged in gaol. The arrest was effected at the Paarl on a writ obtained by respondents.

Mr. Buchanan for applicant; Mr. Schreiner, K.C., for respondents.

Mr. Buchanan said that according to the Insolvent Ordinance, when once an order for sequestration was granted, all proceedings against the estate were stayed.

Mr. Schreiner said he did not oppose the application. The arrest was made in ignorance of the insolvency. He said this in order that his position should be understood in view of the proceedings applicant said he would institute for illegal imprisonment.

The Chief Justice said that the Court had nothing to do with future proceedings. It was quite clear that there was

no right to arrest applicant. The arrest was wholly illegal, and must be discharged, with costs.

ROBERTSON V. ROBERTSON.

Mr. Close moved to make absolute a rule nisi granted for a decree of divorce. Granted.

PAY V. DAY.

Mr. Wilkinson moved to make absolute a rule for a decree of divorce. Granted.

ARMSTRONG V. ARMSTRONG.

Mr. Russell moved for a decree of divorce, with the custody of the minor child. Counsel said that a rule nisi had been attained, but there had been no service.

The Court granted leave for substituted service by publication once in the "Gazette" and once in the "Cape Times," defendant to return before the 28th February, the rule being returnable on the 12th March.

MABERLEY V. WOODSTOCK MUNICIPAL COUNCIL.

This was an application to have a rule nisi, restraining respondent from paying the interest on certain debentures, made absolute.

Mr. Benjamin appeared for applicant; Mr. Searle, K.C., for the respondent Council.

Mr. Benjamin asked that the matter should stand over to the end of the roll. The brief had only just been handed to him.

Mr. Searle said he had no objection, and the matter was ordered to stand over.

TWIGG V. MEYER.

Mr. Searle, K.C., appeared for applicant, and Mr. Benjamin for respondent.

The application was for removal of trial from the Supreme Court. Applicant (plaintiff) wanted it removed to the Circuit Court at George; respondent applied for removal to Mossel Bay.

After hearing the affidavits and argument, the Chief Justice said that the balance of convenience was in favour of George, to the Circuit Court, at which

place the Court would order the trial to be removed. Costs of the application would be costs in the cause.

PROSSER V. PROSSER.

Mr. Solomon asked that this case should stand over until the first day of next term. Applicant had been called away, and was unable to give the further evidence necessary.

Granted.

MASTER OF THE BEIRA V. SLEIGH.

Mr. Searle, K.C., who appeared for the plaintiff, said that the defendant had been barred. The action was for the sums of £929 and £82, money supplied to enable the vessel to go on from East London to this port. The coal on board the ship caught fire at East London and plaintiff supplied the amount stated to the vessel. The charterers were sued by edict, and service had been duly made upon them. The sum of £455 5s. 8d. was in the hands of Dunn and Co. on behalf of the ship, and this had been paid through the Sheriff to the plaintiff. Judgment was asked for the amount claimed, less this sum.

The Court gave judgment accordingly.

MASTER OF THE POLITICIAN AND MESSINA BROS. AND OTHERS V. MASTER OF THE CROMARTYSHIRE.

Mr. Benjamin, who appeared for the second plaintiffs, applied for a joint commission on behalf of Messina Brothers and the defendant to take evidence at Port Elizabeth, and for the appointment as commissioner of the Resident Magistrate of Port Elizabeth. The consent of the plaintiffs in the consolidated action had been obtained.

Granted.

TOWN COUNCIL OF KIMBERLEY V. KIMBERLEY WATER WORKS CO. { 1912 Feb. 3rd.

Interdict—Application to Parliament—Construction of agreement.

By agreement between a Municipal Corporation and a Waterworks Company it was provided that the latter should construct certain waterworks

to supply the inhabitants with water, that after the completion of the works the former should have the right to purchase them at a price to be mutually agreed upon and that should no such purchase be made, the company should have the sole right to supply the inhabitants with water from rivers for a period of twenty-five years and the Council "bind themselves and their successors in office during the subsistence of the contract and until the works shall be purchased and paid for by them, not to construct or promote or assist in the construction or promotion of waterworks, or permit any other waterworks having for its object the introduction or supply of water to the township." No purchase was effected, and four years before the expiration of the period of twenty-five years agreed upon, the Corporation being advised that the construction of new waterworks would require not less than four years, gave notice to the ratepayers of a meeting for taking steps to obtain authority by a private bill to construct such works; but not with the intention of supplying the township with water before the expiration of the twenty-five years.

Held, that it was not a case for an interdict to restrain the taking of such steps by the Council.

This was an appeal from the decision of the High Court of Kimberley.

The appellants were respondents in the Court below, where the proceedings were upon the following notice of motion addressed to the Mayor, Coun-

cillors, and Burgesses of the Borough of Kimberley: Please take notice that application will be made to the Hon. the High Court of Griqualand on Saturday, the 14th day of December, 1901, at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, for an order restraining the Borough Council from carrying out its declared intention of promoting and constructing waterworks having for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal River, in breach of clause 6 of an agreement dated the 20th day of May, 1880, a copy whereof is annexed to the affidavit of Frank Stewart Lynch hereto attached, pending an action to be instituted in respect of such breach of agreement, or for such further and other relief in the premises as to the said Hon. Court shall seem meet, as also an order for the costs of this application.

The following affidavit was read in the Court below: Frank Stewart Lynch made oath and said:

1. I am the general manager of the Kimberley Waterworks Company (Ltd.).

2. By an agreement dated the 20th day of May, 1880, made and entered into by and between the Mayor, Councillors, and ratepayers of Kimberley (hereinafter called the Council), of the one part, and Thomas Lynch, acting for and on behalf of the Griqualand West Railway and Waterworks Company, Limited (hereinafter called the company), of the other part, a true copy of which agreement is hereunto annexed, the said company acquired the sole and exclusive right to supply the township of Kimberley with water from the Vaal or other rivers for a period of twenty-five years reckoned from the date of the said agreement, viz., the 20th day of May, 1880.

3. It is also in the said agreement by clause 4 thereof: Provided that the said Council shall be at liberty to purchase and take over the said works at any time after the completion of the same at a price to be mutually agreed upon, provided six clear months' notice in writing is given of their intention to so purchase the said works.

4. By the said agreement (clause 6) the said Council bound themselves and their successors in office during the subsistence of the said contract, and until the works shall be purchased and paid for under the

provision of clause 4 thereof, not to construct or promote or assist in the construction or promotion of waterworks, or permit any other waterworks having for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal River or other rivers in the province of Griqualand West.

5. The said agreement of the 20th May, 1880, contains other provisions, to which it is not necessary to refer for the purpose of this application, but I crave leave to refer this Hon. Court to the full text of the said agreement where necessary.

6. The Kimberley Waterworks Company (Limited) acquired the said agreement from the said Griqualand West Railway and Waterworks Company (Limited), together with all the benefits and privileges arising thereunder or thereby secured, and also took over all the burdens thereof with the knowledge and approval of the Council, and the said Kimberley Waterworks Company (Ltd.) thereupon proceeded to carry out, and did carry out, and fulfil all the obligations thereby imposed on the said Griqualand West Railway and Waterworks Company (Limited).

7. On or about the 11th day of April, 1883, the Kimberley Waterworks Company (Limited) notified the Kimberley Borough Council that the works were completed and in operation, and their undertaking is now, and has been since the year 1883, in full working order.

8. The said agreement of the 20th May, 1880, has not in any way been modified or amended, and is still in full force and effect.

9. It having been recently brought to my notice through a public advertisement in the "Diamond-fields Advertiser," a copy of which notice is hereunto annexed, that the Borough Council of Kimberley were taking steps forthwith to construct waterworks for the purpose of supplying the township of Kimberley and the inhabitants with water, in breach of clause 6 of the agreement aforesaid, I caused the letter, dated 27th November, 1901, a copy whereof is hereunto annexed, to be delivered to the Mayor, Councillors, and burgesses of the said borough, giving them notice that the action being taken by them constituted a breach of clause 6 of the agreement aforesaid, and that action would forthwith be taken by the Kimberley Waterworks

Company (Limited) to restrain the Council from continuing any such breach, and, in reply, I received the letter dated the 4th day of December, 1901, also hereunto annexed, wherein the said Council declared their intention to proceed with the construction of the waterworks, and to continue the action complained of. I crave leave that the letter aforesaid be taken and read as part of this affidavit.

10. The Mayor of Kimberley has also publicly declared that it is the intention of the Council to take steps to arrange for obtaining a supply of water from the Vaal River for the inhabitants of the Municipality in order that a new waterworks scheme might be inaugurated, and to proceed with the construction of the necessary works therefor forthwith, and in a report of a committee of the Council it was also declared that with that object in view the Council had recently secured from Messrs. Dold and Childs, the owners of the farm Nooitgedacht, and also from one John Bisset, the owner of the farm Wildebeeste Kuil, both in the district of Kimberley, concessions which will enable the Council to obtain the requisite supply of water from the Vaal River to Kimberley.

11. Any rights the Council may have acquired from the said John Bisset were acquired with the knowledge that similar and exclusive rights had been granted by the said John Bisset and acquired by the applicants, who then held and now hold the same.

12. An action, in which judgment has not yet been delivered, was recently instituted in this Hon. Court by the applicants against the said John Bisset for specific performance of a certain paragraph in the instrument by which such rights were granted, and the said John Bisset gave evidence in such action to the effect that the same was being defended at the expense of the respondents. In case of necessity I crave leave to refer to the records of the said action.

13. The Borough Council of Kimberley has not purchased or taken over the aforesaid agreement or concession, dated the 20th day of May, 1880, now held by the Kimberley Waterworks Company (Limited), nor have they given any notice of their intention so to do, and they are therefore not entitled to promote or construct waterworks having

for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal or other rivers in the Province of Griqualand West.

14. Unless the Council is restrained by order of this Hon. Court from carrying out its declared intention of promoting and constructing such waterworks, the Kimberley Waterworks Company (Limited) will suffer irreparable damage.

The material clauses in the agreement referred to were the following:

Memorandum of an agreement made and entered into by and between the Mayor, Councillors, and Ratepayers of Kimberley, in the Province of Griqualand West, of the first part, and Thomas Lynch, of Kimberley, for and on behalf of the Griqualand West Railway and Waterworks Company (Limited), of No. 2, Suffolk-lane, Cannon-street, in the City of London, of the second part.

1. That the parties of the second part shall make and construct such works within the township as defined by clause 1 of the Ordinance No. 7, 1877, viz., within a radius of two miles from the District Magistrate's Court House in the cases hereinafter mentioned to supply a quantity of water from the Vaal or other rivers not less than 400,000,000 gallons per annum.

2. That the parties of the second part shall, for the purpose of conserving a necessary supply of water for the purposes in the preceding section mentioned, make, construct, and provide a suitable reservoir or reservoirs at or about the spot as pointed out on the township of Newton to Messrs. Cooke and Buchanan within the limits of the Municipality, one of such reservoirs to be fitted with filtering beds capable of filtering so as to supply a sufficient quantity of filtered water to the inhabitants of the township of Kimberley, according to their requirements, and all the necessary outlets for the distribution of the water from reservoirs, and for the purpose of supplying the township with the water, shall lay down good and sufficient pipes, valves, etc., in the roads and streets within the township of Kimberley, to the extent shown on the plan hereunto annexed marked A, it being agreed upon that after the requirements of the inhabitants of the township shall have

been supplied, the parties hereto of the second part shall be empowered and allowed to dispose of the surplus water (if any) in any other way they may think fit

3. The parties of the second part shall provide, at their own cost, the necessary land for the reservoirs, filtering beds, engine-houses, dwellings, settling tanks, and for laying the pipes, valves, etc., either within or beyond the boundaries of the Municipality, and the parties hereto of the first part shall give the parties of the second part full and free rights for entering upon or using any such unoccupied lands, either belonging to or acquired by the parties of the first part, for the purpose of the works to be constructed by the parties of the second part, within the Municipal boundary or limits hereinbefore named, and they shall also, within the said limits, grant to the parties of the second part all such rights of breaking up roads for laying pipe valves, etc., in them, and for repairing the said pipe valves, etc., as they, the parties of the first part, possess or have the power to grant, provided that all breaking up of roads, as herein mentioned, and the repairs of the same by the parties hereto of the second part, shall be done and performed by the parties hereto of the second part, under the direction and supervision of the Town Surveyor, or such other officer as shall from time to time be appointed for that purpose by the parties hereto of the first part.

4. That the parties hereto of the first part shall be at liberty, and they are hereby empowered and authorised to purchase and take over the hereinbefore-mentioned works at any time after the completion of the same, at a price to be mutually agreed upon, provided they shall have first given to the parties of the second part six clear months' notice in writing of their intention to do so.

5. That up to the time of the purchase of the works (constructed under this agreement) by the parties hereto of the first part, should they purchase, the parties of the second part shall have power to sell and dispose of the water brought in by them to the inhabitants of the township of Kimberley and neighbourhood, either within or beyond the Municipal boundary, on such terms as they shall think fit (save and except that

the maximum price or sum to be charged by them for the water supplied within the Municipal limits shall not in any case exceed the sum of 1s. 3d. sterling per 100 gallons), and generally to carry on the business of a waterworks company, and for that purpose the parties of the first part shall afford to the parties of the second part all the assistance in their power, and, in particular, shall give to the parties of the second part the full and free right of entering upon and using any lands of the Corporation, and breaking up roads and laying and maintaining pipes and other works in connection therewith, subject nevertheless to the conditions contained in clause 3 of this agreement with reference to the right of breaking up roads; it being agreed upon further that should no purchase be made of the works to be constructed under this agreement, as hereinbefore mentioned, they, the parties hereto of the second part, shall have the sole and exclusive right and privilege to supply the township of Kimberley with the water brought in by them from the Vaal River or any other rivers for a period of 25 years, reckoned from the date of these presents, provided, however, that no rights or privileges regarding the sale of water from wells or otherwise at present existing, or which may hereafter be created, save and except the right to supply water brought into the township from the Vaal River or other rivers, shall be prejudiced or interfered with by or under this contract.

6. The parties of the first part bind themselves and their successors in office, during the subsistence of this contract and until the works shall be purchased and paid for by them, under the provisions of clause 4, not to construct or promote or assist in the construction or promotion of waterworks, or permit any other waterworks having for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal River or other rivers in this province.

7. The parties of the second part hereby undertake and bind themselves to commence the construction of the works not later than one year from the date of this agreement: Provided that they, the parties of the second part, shall previous to the expiration of that period be al-

lowed to withdraw from this agreement, by giving notice thereof to the parties of the first part, failing which notice or on failure to commence the works as herein provided at the date above mentioned, this agreement shall be considered null and void.

The following affidavit was read in the Court below for the respondents:

1. I, Henry Alfred Oliver, of Kimberley, am the Mayor of the Borough of Kimberley.

2. I have perused the notice of motion herein dated the 11th instant, together with the affidavit and annexures thereto of Frank Stewart Lynch.

3. I admit paragraphs 1, 2, 3, 4, 6, 7, 10, 12, and I deny paragraphs 8 and 14 of the affidavit of the said Frank Stewart Lynch.

4. In reply to paragraph 9, I admit the publication of the advertisement therein referred to, and I also admit that the letters therein mentioned were written and delivered.

5. I crave leave to refer to the said letters in support of the respondents' case.

6. As regards paragraph 11, I say that I have been informed and verily believe that when the said contract was entered into between the Council and the said Bisset that he informed the Deputy-Mayor and Councillors who signed the contract on behalf of the Council that the agreement he had previously entered into with one Thomas Lynch had lapsed, and was of no further effect.

7. As regards paragraph 13, I admit that the Council has not purchased or taken over the agreement of the 20th May, 1880.

8. Since January last correspondence has passed between the said applicants and the Council with reference to the price at which the applicants would be prepared to sell their waterworks undertaking to the Council.

9. The applicants first asked as the purchase price for their undertakings £450,000, but subsequently reduced the price to £360,000. The Council's expert advisers report that a new system of waterworks, complete in every respect and in accordance with the latest requirements of waterworks undertakings, could be constructed and laid down by the Council for £200,000.

10. The applicants also refuse to sell their undertakings in so far as the same are connected with the water supply of

the Borough of Kimberley alone, but made it a condition of their offer that the Council should, in the event of purchase, take over certain contracts existing between the applicants and the De Beers Consolidated Mines (Limited) and the Beaconsfield Municipality, which were entered into without reference to the Borough Council, and do not fall within the scope of the Municipal administration of the Borough of Kimberley, which said contracts bind the applicants for a period of about 8½ years beyond the said period of 25 years referred to in the agreement of the 20th May, 1880.

11. In view of the position taken up by the applicants, and the excessive price required by them, negotiations between the applicants and the Council have fallen through.

12. On the 3rd October last the Council wrote to the applicants stating that it was the intention of the Council to arrange for the necessary supply of water to the inhabitants of the borough in order that the new waterworks may be completed and the Council be in a position to supply water immediately upon the expiry of the said period of 25 years.

13. The said period will expire on the 20th May, 1905, and the Council is advised that it is absolutely necessary that no time should be lost in proceeding with the construction of the new waterworks, otherwise the same will not be completed and in working order on that date.

14. I say that if the Council be restrained from proceeding with the construction of the new waterworks, and compelled to remain inactive and allow the full period of 25 years to expire before in any way proceeding with the carrying out of the said scheme, that instead of having the sole and exclusive right and privilege of supplying the township of Kimberley with the water for a period of 25 years, as provided for in the agreement of the 20th May, 1880, the applicants will enjoy an extended monopoly for at least four or five years after that date, and to which they are not entitled.

15. In a letter dated the 25th October, 1901, the applicants wrote to the Council stating that: "If the Municipality will grant an extension of the concession

for 25 years from the 20th May, 1905, the Board will recommend to their shareholders a reduction in the price of water, thus admitting that the agreement of the 20th May, 1880, only extends up to the 20th May, 1905.

16. I further say that after the last day of the said period of 25 years the applicants might refuse to supply any more water to the inhabitants, or might increase their charges. The position of the burgesses would then be most serious, and the Council is desirous of taking timely steps to prevent any such evil and a perpetuation of the monopoly.

17. The Council has no intention of supplying water to any consumer prior to the expiry of the period of 25 years referred to in the agreement of the 20th May, 1880, nor to authorise or permit any company or person to in any way interfere or compete with the said applicants in supplying water during that period.

The following is a copy of the order of the Court below:

On the motion of Mr. Phear, of counsel for applicants, and upon reading the documents filed of record, Mr. Sampson, K.C., appearing for the respondents to oppose the application, the Court grants an order as prayed, with liberty to the respondents to bring an action to discharge the interdict or for a declaration of rights or such other form of action for such other relief as they may be advised, if such action be brought, costs to be costs in the cause, if not, to be paid by the respondents. On the application of Mr. Sampson, K.C., the Court grants the respondents leave to appeal.

Mr. Schreiner, K.C. (with him Mr. Buchanan) for appellants: The rules of the House require that notice of application for powers to carry out a water scheme should be given to the House and to all parties concerned. As we see from page 15 of the record, notice was given of a public meeting of citizens to consider this question of water supply. It is true that it is not compulsory to call a public meeting, but the calling of such meeting is clearly in accordance with the spirit of Section 9 of Act 35 of 1885. We are now debarred by this judgment of the High Court from approaching Parliament. On May 20, 1880, an agreement was entered into between the Griqualand West Water Co. and the Town Council. Subsequently

the Kimberley Water Works Co. took over the business of the Griqualand West Co. If this agreement be strictly interpreted the Water Works Co. are out of Court. However, the agreement is very badly worded. The company had a right to open roads, etc., and clause 4 gives them the right to dispose of the whole concern if they can agree with purchasers to do so. Water from wells might still be sold, but subject to that exception the company had a monopoly for twenty-five years dating from May 20, 1880. It is true that during that time we must not supply water, but we may take steps with a view to doing so after the expiration of the twenty-five years. I submit that Mr. Phear's construction of the act in the Court below was perfectly correct and not that of the Judge President. Allow me to illustrate the case by an example. Let us suppose that a Cape Town firm is supporting an up-country shopkeeper on condition that he is not to get goods from anybody else for three years. Near the end of that period he enters into arrangements with another firm to take goods from them when the three years shall have elapsed. Would he be interdicted from so doing? But our case is a much stronger one. We are a public body and the duty is cast on us to supply water to the community. How can we do this unless we can make arrangements before our contract with the Water Works Company has expired. They are not bound to furnish water a single day after the expiry of the twenty-five years.

In the case of the *Green Point Municipality v. Metropolitan and Suburban Railway* (8 Juta, 61) the company got its act in consequence of opposition having been withdrawn. Subsequently the company were sued for specific performance, and the plaintiffs were told that they should have sued for damages (*Green Point Municipality v. Metropolitan Railway* (8 Juta, 61). See also *Van der Linden's Judicial Practice*, pp. 285-286; *Van Leeuwen Cens. Foren.*, 2, 21, 18, and 22, 40, 1 Eort C. 25.

Mr. Searle (with him Mr. Upington) for respondents: There is no allusion to Parliament in this agreement. In *Breda's Executors v. Mills* (2 Juta, 189), it was held that a private bill did not override a contract. There is nothing in the argument that Parliament can provide for something being done which a contract prohibits. In the first place we have to

ask whether there is anything to prevent the Town Council from getting water from any source they like save the Vaal River. They must not go to it or to any other rivers within the province of Griqualand West. But there may be many other sources of supply in the district, *e. g.*, from the Wesselson Mine. Kimberley is on the border of the Orange River Colony, and nothing would be easier than to get a water supply from sources outside the province of Griqualand West.

[De Villiers, C. J.: Unless the Water Works are purchased you cannot go on with a new scheme. You do not give a literal construction to the agreement.]

I cannot admit that we may not prosecute a new scheme unless we first purchase the company's plant. Such a construction would involve transposing the words of the agreement. We must also remember that in 1880 the founders of this company ran great risks. Nobody then had much faith in the stability of Kimberley, and it was a very venturesome undertaking to attempt to supply it with water.

[Buchanan, J.: There was a better demand for water then than there is now.]

The population may have been larger, but it was a floating population. Nobody expected to stay there.

[Buchanan, J.: At all events the Town Council bind themselves during the subsistence of this contract.]

It does not follow that because a restriction governs in point of time it governs also in point of object. The natural sense of this agreement is that we are not to promote waterworks with the object of introducing water into Kimberley during the subsistence of the present contract.

[De Villiers, C. J.: Should not the 5th and 6th clauses of the agreement be read in connection? According to your own contention you cannot supply water within the 25 years.]

We are debarred only from supplying water from the Vaal River.

[Maasdorp, J.: When this agreement was drawn up your object was to get a monopoly for 25 years?]

Yes.

[Buchanan, J.: Then at the end of 25 years you could stop supply?]

[De Villiers, C. J.: After the end of 25 years you have no right to construct waterworks?]

If the Municipality do not buy us out, a third party could come to the boundary

of the Municipality with water, although he could not lay pipes in the streets during the 25 years. After the expiry of that term he could come in and do so. Section 6 of the regulations does not restrict section 5, but rather amplifies it. This is simply a matter of construction of a contract. As to the question of interdict, the Court has over and over again departed from the rule laid down by *Vander Linden* (Bk. 3, ch. 4, section 7) that applicant must be exposed to irreparable damage. The Court below granted an interdict pending an action to be tried before them. If this Court wishes to aid these people, let them order us to go on with the action. I submit that we were quite justified in applying for an interdict rather than to lie by and allow 5,000 or 6,000 pounds to be frittered away in law and other expenses.

Mr. Schreiner (who was not called upon in reply): See *Fry* (par. 387, 404, and 1,147).

De Villiers, C.J.: The learned judges in the Court below have expressed a very decided opinion as to the proper construction of the agreement now under consideration and it is therefore with great diffidence and after very careful consideration that I have arrived at a different conclusion. By the 6th clause of the agreement the appellants "bind themselves and their successors in office, during the subsistence of this contract, and until the work shall be purchased and paid for by them under the provisions of clause 4, not to construct or promote or assist in the construction or promotion of waterworks, or permit any other waterworks having for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal River or other rivers in this province." The preamble of the agreement recites that under Ordinance No. 7 of 1877 the appellants are empowered to construct works for supplying the Municipality with water or to grant leave to any person or company to lay down pipes or execute such works, and that the appellants had made proposals for the construction of certain waterworks to the Griqualand Waterworks Company, who had acceded to such proposals. The 4th clause provides that the appellants shall be at liberty to purchase and take over the works at any time after the completion of the same at a price to be

mutually agreed upon, and the 5th clause provides that, should no purchase be so made, the company should have the sole and exclusive right and privilege to supply Kimberley with the water brought in by them from the Vaal River or any other rivers for a period of twenty-five years, reckoned from the date of the agreement, viz., the 20th of May, 1880. The period of twenty-five years will therefore expire on the 20th of May, 1905, and, in anticipation of such expiry, the appellants on the 1st of November last called a meeting of burgesses to authorise them to adopt such measures as might be necessary in order to obtain authority by a private Bill, or otherwise, to construct waterworks, to obtain water by means of water pipes, sluits, cuttings, reservoirs or otherwise from the Vaal River, and to supply water to consumers within the Municipality of Kimberley. The respondents, who appear to have acquired the rights of the Griqualand Waterworks Company, thereupon applied to the High Court for an order restraining the appellants from carrying out its declared intention of promoting and constructing the waterworks, pending an action to be instituted in respect of such breach of agreement. The High Court granted the order as prayed, but instead of requiring an action to be brought by the present respondents, as proposed by their notice of motion, the Court reserved the right to the appellants to bring an action to discharge the interdict or for a declaration of rights or such other form of action as they may be advised. Against this order the appellants now appeal. The appellants state, and their statement is not denied, that they do not intend to supply the inhabitants of Kimberley with water until the expiration of the full period of twenty-five years fixed by the contract. Their object in giving the notice objected to was to secure ample time before the 20th of May, 1905, for the proper construction of the works in order that they may be in a position to supply the water to the inhabitants from the moment when the right and privilege of the respondents under the fifth clause shall cease and determine. The appellants were advised that it was absolutely necessary that no time should be lost in proceeding with the con-

struction of the new waterworks, for that otherwise they could not be completed and in working order on the 20th of May, 1905. This statement is not denied, but the respondents deny the right of the appellants to take any steps whatever before the 20th of May, 1905, that may be necessary to enable them to supply water from any rivers of the Province to the inhabitants of the Province. Their counsel, Mr. Searle, has informed the Court that they even deny the right of the appellants, after that date, to take such steps unless they shall have purchased the existing waterworks and paid for the same. Mr. Searle, however, hesitates to accept this view, and admits that the more reasonable view to hold would be that the words in the 6th clause, "and until the works shall be purchased and paid for by them," should be controlled by the words "during the subsistence of this contract." But if his view be correct, it would be equally reasonable that the words "during the subsistence of this contract" should control the rest of the clause. Such a construction would do less violence to the 6th clause than to substitute the word "or" (until the works shall be purchased) for the word "and," which was actually used. What the parties intended to provide against was the infringement of the respondents' monopoly for a period of 25 years, but the reading given to the 6th clause by the Court below practically extends such monopoly beyond the 25 years. The Court suggested, indeed, that there was nothing to prevent anyone except the appellants from starting or promoting a new water scheme during the period referred to, but it was added "that would not cover anyone else, being merely a screen for the Council themselves." I confess that, when it is borne in mind that the appellants alone have the right to grant leave to execute waterworks within the Municipality, it is difficult to conceive how third parties could do what the appellants propose to do without exposing them to the charge of being merely a screen for the Council themselves. The practical effect of construing the 6th clause as the Court below has construed it, is to extend the monopoly considerably beyond the period of twenty-five years, fixed by

the 5th clause. It is indeed not quite clear from the judgment whether even after the 20th May, 1905, the respondents would have no right to construct waterworks unless they first purchased and paid for the existing waterworks. From such a construction the Court below would probably recoil, but it appears to me to be not more unreasonable than the construction actually placed upon the sixth clause. That clause ought, in my opinion, to be construed in such a manner as not to lead to a practical conflict with the provisions of the 5th clause. By holding that the words "during the subsistence of the contract" in the 6th clause control the whole of that clause, and that consequently the intention of the parties was to prevent the construction or promotion of such works only as had for their object the supply of water to the inhabitants during the subsistence of the contract, the two clauses are rendered perfectly consistent with each other, whilst the respondents retain the full benefit of the monopoly secured to them by the 5th clause. In this view of the matter it becomes unnecessary for me to discuss the further question which has been raised whether, even if the true construction be such as the respondents contend for, the case is one in which an interdict is the proper remedy. No case has been cited in which any of our Courts has restrained an application to Parliament for powers which might conflict with contractual rights of individuals, and the question is of too much importance to be dealt with cursorily. I need only say that I fully concur with my brethren in the view that, quite independently of the construction of the agreement, the case is *not* one for summary interventions by interdict. Being unable, moreover, to agree with the construction placed by the Court below on the 6th clause, I am of opinion that this Court should allow the appeal and discharge the interdict with costs in this Court and in the Court below.

Buchanan, J., said that the town of Kimberley having authority by statute to construct waterworks, entered into an agreement with the applicants to do the work for them, giving the applicants a monopoly for twenty-five years of sup-

plying the inhabitants of Kimberley with water. When this period of 25 years was approaching termination, the Council gave public notice that it was their intention to take steps to obtain legislative sanction to enable them to construct waterworks, etc., but it was admitted on all sides that they did not intend to interfere at all with the water supply of Kimberley during the 25 years for which the applicants had the monopoly. On the notice referred to being given by the Town Council, the applicants applied to the High Court of Griqualand, and obtained an interdict restraining the Council from taking the steps contemplated. His lordship had no doubt in his own mind that the applicants were not entitled to the interdict, either on the principle on which interdicts were granted or on the construction of the contract. The principle on which interdicts were granted had been clearly laid down in this Court, the main requisite being that there was a clear right. On that ground alone his lordship thought the interdict should be set aside. It was admitted during the course of argument that if the Council had intended to supply the water during the 25 years the interdict would be properly granted, but here there was no such intention. When one came to look at the contract, it was difficult to see how it could possibly be construed to give rights to the applicants after the expiration of the 25 years. In the Court below more especially it was said that the 6th clause actually prevented the Council taking any steps to supply the inhabitants with water unless they first purchased the waterworks belonging to the applicants. That seemed to his lordship to be a most extraordinary construction to be put upon the contract. If sound, then the contract could be read in such a way that the Waterworks Company, who by the contract were not bound to supply a drop of water after the 25 years, could then withhold the supply altogether, and by depriving every person in the place of the use of the water, compel the Town Council to purchase the works at the applicants' own price. In conclusion, his lordship said that although it was enough to say that there was no such clear right on the part of the waterworks as to entitle

them to an interdict, if he had to give judgment on the contract as it stood now he would say the Waterworks Company had no right at all to such an interdict. However, on the other ground, he had no doubt that the respondents were not entitled to an interdict, and accordingly his lordship concurred in the judgment that the interdict must be set aside with costs.

Maasdorp, J., said that in the Court below it was contended on behalf of the applicants that it was the intention of the parties to the contract to prevent the construction of any waterworks during the continuance of the period of twenty-five years, while on behalf of the respondents it was contended that the only intention was to prevent the introduction, not the construction of works, and on these contentions the parties came to the Court. It seemed to his lordship that on the primary and ordinary construction of the words of the 6th clause of the contract as they stood, the contention of the applicants would be correct, and the question would arise whether it would be necessary to go behind this primary meaning from any reasons that could be discovered in the remaining portions of the contract, for instance, whether it was inconsistent or in conflict with the objects in view. One of the objects in view was to secure for the respondents a monopoly of the supply of water for a period of twenty-five years, and if that was the only object the parties had in view then, it seemed to him, that it would be unnecessary and useless to prevent them constructing waterworks which had for their object the supply of water after the monopoly had ceased, and then it might be necessary to construe the 6th clause differently. But it seemed to him that there was also another object, and that was to effect between themselves the sale of this property, the option to the respondents to purchase being given by the 4th clause. It seemed to him that the idea of the two parties when they entered into that part of the agreement was that nothing should be done to affect the value of the property during the twenty-five years, and it seemed to him that the object of introducing the 6th clause into the agreement was to prevent the Town Council

from constructing waterworks or putting up competitive works during the period the Council had the option of purchase. If they took that construction there would be nothing inconsistent with the object the parties had in view. It seemed to his lordship that the monopoly for the supply of water to the Municipality for twenty-five years was fully secured by the 5th clause, and that the 6th clause was put in to secure the sale. Therefore he thought that the 6th clause should be construed as an operating clause. Under all the circumstances of the case he thought the 6th section should receive that ordinary and primary meaning that the Council were now to be prevented from constructing works, and that they had now no power to construct works. At the same time the case stood in the position that if it was necessary for the parties wishing to obtain an interdict to have a clear right, it was necessary for them to prove that right. If he had sat in the Court below he would have taken the same view as that Court, and would have granted an interdict, but in a different form, viz., an interdict pending an action to be brought by the applicants. At present no clear right had been proved and the interdict would therefore be dismissed.

[Applicants' Attorneys, Scanlen and Syfret; Respondents' Attorneys, Van Zyl and Buissinné.]

CALDER AND CO. v. MCKENZIE AND CO. 1902.
Feb. 3rd

Dock agent—Shortage—Costs.

Defendant, acting as a dock agent had received 2,474 bales of hay on behalf of plaintiff. Of these the Court found that plaintiffs received delivery of 2,257 bales; though plaintiffs contended that there was a shortage of 237 bales. Plaintiffs left a considerable quantity of loose forage lying about. The Court found that 12 bales in all were unaccounted for. It was admitted that 12 bales fell into the sea, but there was

no evidence to show how, or at what stage of landing this happened.

Held, that defendants were liable to plaintiffs for these 12 bales, valued at £6 12s.

Held further, that though plaintiffs had sued defendants for the value of 237 bales (£130 7s.) as no tender had been made; the judgment must carry costs and seeing that the case was not clearly one for a Magistrate's Court, that costs must be allowed on the Supreme Court scale.

This was an action brought by Alexander Calder, Sidney Nicholson, and Henry Hamilton Daniel, trading as Calder and Co., against Andrew Ritchie McKenzie, trading as A. R. McKenzie and Co., for the delivery of certain bales of oathay, or, in the alternative, for payment of the value of the same.

The plaintiffs' declaration was as follows:

1. The plaintiffs carry on business at Wynberg as produce merchants under the style or firm of Calder and Co.

2. The defendant at the time of the transactions hereinafter set forth was a landing, forwarding, and shipping agent, and more particularly a dock agent, and carried on business at Cape Town under the licence as such dock agent issued by the Table Bay Harbour Board, under the style or firm of A. R. McKenzie and Co.

3. In or about the month of May last the steamship Orange Branch was discharging her cargo in the Table Bay Docks.

4. The owners of the said steamship, in terms of the 31st regulation of the Table Bay Dock Regulations, duly approved in terms of section 32 of Act 36 of 1896, appointed the defendant to be dock agent to land and receive all cargo out of the said ship, and to render delivery to the consignees thereof or their forwarding agents.

5. The defendant then and there, as such dock agent and forwarding agent, received and landed out of said ship cer-

tain 2,474 bales of oathay, consigned to the plaintiffs, and being part of the aforesaid cargo.

6. By reason and in terms of the aforesaid regulations, the defendant, while so receiving and landing the said bales, was and acted as the statutory agent of the plaintiffs, and it thereupon became and was the duty of the defendant to deliver the said bales to the plaintiffs or their forwarding agents.

7. The plaintiffs appointed Messrs. Tunnell, Duncan and Co. as their forwarding agents to take delivery of the said bales from the defendant, but the defendant only delivered 2,237 bales and has not delivered the remainder to wit 237 bales.

8. The value of the said 237 bales is the sum of £130 7s.

9. All things have happened, all times have elapsed, and all conditions have been fulfilled, necessary to entitle the plaintiffs to delivery of the said 237 bales or to payment of £130 7s., their value, but the defendant neglects and refuses to make such delivery or such payment, though called upon to do so.

Wherefore the plaintiffs claim (a) delivery of the said 237 bales, or in the alternative, payment of £130 7s., their value, with interest *a tempore morae*; (b) costs of suit.

The defendant's declaration was as follows:

1. The defendant admits paragraphs 1, 2, and 3.

2. The defendant admits that the owners of the said steamship appointed him as dock agent, and says that it was his duty as such dock agent to receive the cargo at the ship's side, and thereupon to place the same within the Table Bay Docks, where directed by the Harbour Board or its representative. The defendant received certain oathay consigned to the plaintiffs at the ship's side, some of which was in a loose and broken condition, and thereupon placed the same where directed by the Harbour Board. He denies that he so received 2,474 bales of oathay, and says that the plaintiffs refused to take away from the said Docks a quantity of the said loose and broken oathay.

3. The defendant admits that the plaintiffs appointed Messrs. Tunnell, Duncan and Co. as their delivery agents, and says that it was the duty of the

said agents to duly remove the said oathay where it had been placed as aforesaid; that after it had been so placed as aforesaid it was under the control and in the custody of the Harbour Board, and not of the defendant, and that the said agents, Messrs. Tunnell, Duncan and Co., neglected and failed to remove the said oathay with due and proper despatch.

4. The defendant says that all the oathay consigned to the plaintiffs and received by defendant at the ship's side was placed by him where directed, and that if the plaintiffs have not received the oathay delivered over the ship's side and consigned to the plaintiffs, which he does not admit, it is through no fault or neglect of the defendant, who has duly performed his duty and contract.

5. Save as above the defendant denies paragraphs 4, 5, 6, 7, 8, and 9.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

The replication was general.

Mr. Gardiner (with him Mr. Solomon) for plaintiffs; Mr. Buchanan (with him Mr. Wilford) for defendants.

Mr. Gardiner called

Alexander Calder, the plaintiff, who said that in May last he imported 2,474 bales of oathay per the steamship Orange Branch, and appointed Tunnell, Duncan and Co. as his delivery agents. The ship was berthed on May 5, and witness afterwards saw part of the consignment. It was removed from the South Arm as fast as it came out of the ship, and stacked at the East Quay. It was mixed with other bales of hay, and his must have been underneath, as it was the first to come out of the ship. On May 9 witness took delivery of the first lot, delivered on trucks. With the exception of the broken stuff delivery at witness's store was completed on May 29. He did not know when delivery was completed at the Docks. He claimed that 237 bales of the consignment were not delivered to him. In the correspondence witness first claimed 287 bales, but afterwards, so as not to prejudice his claim, he took delivery of all the loose and broken stuff. He could not say what became of the 237 bales. A bale of hay was worth 11s. Witness had done his best to get the stuff away from the Docks as speedily as possible.

Cross-examined by Mr. Buchanan: You have often imported hay, and know how things are managed down there?

Witness: Unfortunately I do.

Cross-examination continued: Witness had a warrant from the Chief Wharfinger guaranteeing that no more than 50 bales of loose stuff were delivered. Witness did not know all about the practice of the Docks, according to which, the goods were removed from the South Arm to the East Quay by order of the Harbour Board officials, because his delivery agents were not at the former place to receive the goods. The fifty bales of loose stuff witness took were all useable, and a lot had to be burned. About two Scotch cart loads were left at the Docks. That would represent about 500 lb. of hay, not more.

De Villiers, C.J.: Where has the remainder of the stuff gone then?

Witness: I cannot say; mysterious things happen at the Docks.

Mr. Buchanan: It is not a very uncommon thing to lose goods.

Witness: No; I lost 500 bags of bran once, and afterwards traced them.

Cross-examination continued: Witness was well aware that there had been a lot of trouble and difficulties at the Docks at the time this consignment was landed.

A. Zoutendyk, an examining officer of Customs, produced the Customs discrepancy list of the cargo of the steamship Orange Branch. A *pro tem.* order was given to enable consignees to take away goods landed from a ship. He produced the *pro tem.* order in this case, which showed 2,474 bales of hay delivered from the ship.

James West said he was an acting tide-waiter at the time this consignment was landed. He had seen the *pro tem.* order for 2,474 bales, and he was satisfied from his tally books that they were all delivered from the ship on to the quay.

Cross-examined: A large amount was landed loose, but he could not say how many bales.

Thomas Milton Duncan said he was a clerk employed by Tunnell, Duncan and Co., and had to do with the delivery of this consignment of hay. The ship commenced discharging on May 5, and as soon as they could get railway trucks witness's firm commenced taking the hay away. There was some delay in getting trucks. Witness could not say when

they commenced and finished delivery. They took delivery from McKenzie and Co., the latter having a clerk at the quay to give a receipt. There were a number of bales short, and over 50 bales of loose stuff.

Cross-examined: Witness was at the East Quay three or four times a day. There was always someone at the trucks. They took delivery as soon as they could get railway trucks. They refused to take away the loose stuff until they had instructions from Mr. Calder. The loose stuff lay there a couple of months. It was covered with tarpaulins, but sometimes the wind would blow the tarpaulins off, and then it would be uncovered for a day or so. Witness did not know that the Harbour Board had to cart some hay away.

Washington Chase, wharfinger in charge of the East Quay, said he was working on the East Quay when the Orange Branch arrived, and saw the hay carted from the South Arm. Some of the stuff was loose, but it could still be recognised as being in bales. About three days after the stuff was placed on the East Quay, Tunnell and Duncan started taking delivery, and that occupied them three weeks. That was about the usual practice at the Docks.

By the Court: Witness had no idea where such a quantity as 237 bales of hay had gone; McKenzie and Co. had men continually there, and also had a man in charge of the quay. Rent was charged on the good bales while they were on the quay, but rent was not charged for the loose stuff.

Cross-examined: On July 6 witness wrote telling Calder and Co. to come and take away their stuff. He wrote again in August, and then they came and took away such of the loose stuff as could be used. He estimated that there were about 50 bales of the stuff. There was then a considerable quantity of sodden, loose stuff left behind. The Harbour Board took away two cartloads of that stuff and burned it.

Re-examined: Witness would say that about twenty bales of hay had been blown away.

William Frederick Harding gave evidence as to his having tallied some of the hay from the Orange Branch. None of the hay witness tallied was loose, but he had seen some loose.

Kenneth Hammond, an acting tide-waiter at the Docks, also deposed to having tallied 1,213 bales of oathay from the Orange Branch. Besides that he saw a quantity landed loose.

This closed the case for the plaintiff.

For the defence,

William Beatty deposed that at the time the Orange Branch discharged her cargo he was dock manager for Messrs. A. R. McKenzie and Co. The hay in question was taken from the ship at the South Arm, and deposited at the East Quay. The defendants were appointed landing agents, and according to custom, took the goods from the ship's slings, and then by direction of the Harbour Board's chief officer took them round to the East Quay. If Tunnell and Duncan had been at the South Arm when the goods were delivered from the ship's slings the goods would have been delivered to them there. In this particular consignment there was a large quantity of loose hay, and that was taken round and placed on the same spot as the bales. There were two stacks of loose hay. When the hay was placed on the East Quay the defendants had nothing more to do with it except to supply the labour when Tunnell and Duncan came and asked for delivery. Defendant's firm did not get any rent for the ground the hay was on. The Harbour Board got that. He had spoken to Tunnell and Duncan about delivering the hay, and they had said that they could not get trucks to take it away. That was during May. During five or six days at that period the weather was rough and windy, so that the hay became sodden and wasted and scattered all about the place. Defendants only acted as landing agents for Calder and Co., and not as delivery agents. The latter gave them receipts for the goods taken away.

By the Court: Witness would say that the hay depreciated 30 per cent. by lying on the quay. He himself had seen horses eating at these bales of hay, and then some was blown away. He was quite sure the missing hay was not delivered to anyone else. What was left the Harbour Board took away, saying it was a nuisance, and dumped into the sea.

Cross-examination continued: There was one other consignee. He got his

exact quantity, having taken it away at once. Witness spoke to Mr. Duncan time after time about taking this stuff away. He would not take away the loose stuff. The bales would be about 90 lb. weight each.

By the Court: Witness did not see the bales in the ship, but if they had not been broken there the ship would not have accepted a receipt saying that some of the bales were broken.

Cross-examination continued: Defendant did the stevedoring as well as the landing, and in the course of the stevedoring twelve bales were lost overboard.

By the Court: If the tackle was at fault then the ship would be responsible for these twelve bales, but if not, then defendants would be responsible.

Cross-examination continued: Witness did not see any bales put down rather roughly from the slings. Witness would say from a former decision of the Court that between the time the goods were landed and placed on the East Quay until put on the wagons for delivery the Harbour Board was responsible for their custody.

Re-examined: They had just to put the goods in whatever store or at whatever place the Harbour Board official told them. As to the twelve bales lost overboard, that would be a matter between witness's firm and the ship. They only came in as landing agents after the goods were delivered from the slings.

Gustav Tollner, a clerk in the employ of defendant till 14th October, and from that date in the employ of the Harbour Board, deposed that he delivered 2,257 bales of oathay to Tunnell and Duncan. The consignment was mostly in bales, but a good many bales had been broken. Delivery was taken of these 2,257 bales in May, the final delivery of loose forage, part of this lot, taking place in August. There were two big heaps of loose forage after the unbroken bales had been removed, probably between ten and twenty bales, all in good condition.

Cross-examined: He could not say how much was taken away on the 14th August. It was contained in two trucks. They were not small trucks.

Percy Leibbrandt deposed that he assisted Mr. Beatty at the Docks. He saw the cargo of oathay landed. He saw a large quantity of loose and broken oathay. It would be hard to estimate, but

there were considerably more than 50 bales loose. It was removed to the East Quay and covered over. There were from 150 to 200 loose bales lying about very much exposed to the wind. Some part was blown away, and the balance removed. Duncan removed some, leaving from 15 to 50 bales that was destroyed by the Board. What remained was sodden, and very much deteriorated. He saw Mr. Duncan on the matter; he saw the head wharfinger, and also the agent (who wrote to Mr. Duncan about the state of the forage). He drew their attention to this forage.

Cross-examined: He could estimate there were from 150 to 200 bales. He doubted if there were less than 150 bales. He had had five years' experience in Johannesburg in charge of produce and machinery, mostly produce, and he was able to form an estimate of the quantity.

Re-examined: He doubted if those bales weighed 100 lb. They would lose in transit at least 10 per cent. while in bales. If they were loose the loss would be ever so much more.

John Wm. Jackson, chief clerk at the Docks under the new regime, deposed that he had formerly worked at the Docks. The truck loads of forage for Messrs. Calder and Co. passed through his hands. He had the consignment note of May 25, 1901, before him. The average was 90 lb. per bale. He had not the consignment note of May 14. The document handed him was a copy of that consignment note. The average worked out at 73 1-3 lb. per bale. The consignment note of two trucks on 13th August was 7,352 lb., which was not in bales. He had the consignment note of 26th August, one truck load, the weight of which was 6,224 lb. loose.

James Rankin, sub-inspector of railway goods, C.G.R., at the Docks, deposed that on August 14 he weighed two trucks of hay consigned to Calder and Co. by Tunnell and Duncan. It was in bulk—loose. One truck weighed 4,012 lb., and the other 3,340 lb.

Cross-examined: That was the net weight after deducting the tare of the trucks. It was all loose forage. He could not say if it was damp. The weight of tarpaulins covering was allowed for.

Harry McCabe, assistant inspector of railway goods, Cape Government Rail-

ways, deposed that on the 26th August he weighed a truck of hay consigned to Calder and Co. by Tunnell and Duncan.

The weight was 6,224 lb. net. He did not check it himself.

Cross-examined: He would not see the condition it was in, whether wet or dry.

Andrew Richard McKenzie, the defendant in this action, deposed that bales of forage weighed as a general rule from 70 lb. to 100 lb. The whole of the oats on the outside of a bale were completely threshed out in transit, leaving only the straw. When a bale was broken the whole of the oats became ripe and dropped out. Under these circumstances about 30 lb. per bale would be lost in a bale originally weighing about 100 lb.

Cross-examined: He had often weighed in oathay to test his theory, and was satisfied of its correctness.

Alexander Calder, recalled, and examined by the Court, said they were not aware that there was a quantity of broken hay till they got instructions from the Harbour Board authorities requesting them to remove the stuff. His firm came on McKenzie for the number of bales short. They had not refused to accept delivery. They took possession of the hay directly they were advised by the Harbour Board that it was there at their risk. They were not aware that it was lying on the jetty before the notification. He did not dispute their liability to take the loose stuff, but they would not take 50 bales as representing 200 odd bales. They had never refused to take the bales that were there. There did not seem to be any proper check on the goods going away from the Docks.

Mr. Gardiner (for plaintiff): The first point is that they deny the receipt of 2,474 bales. The evidence shows that McKenzie received that quantity. It is therefore their duty to account for these parcels. See *Lister v. McKenzie* (17 Juta, 277) and *Isaacs v. McKenzie* (11 Sheil 568.) When a dock agent has received goods for a consignee he is bound to account to such consignee unless the consignee has been guilty of negligence. *Isaacs v. McKenzie* (11 Sheil, 568). The dock agent is bound to do his best to look after goods entrusted to him.

[Maasdorp, J.: What is "his best," and how is he bound to protect the goods?]

He must take all reasonable precautions to prevent loss. Here 64 bales were in dispute on one day and 16 on another. We have signed only for 2,257, minus 80 bales: we are said to have signed for 13,500. The weight may have been increased by damp. How then does this work out per bale? The bill of lading works out at 101 lb. per bale. There are 132 bales short on defendant's own computation. It has been said that the loss, if any, was due to undue delay in removing the goods, but Chase and Duncan both said there had been no undue delay. Then it was said that some of the bales were broken. McKenzie had landed rather heavily and without due care. Even if the Court were satisfied that the forage was delivered 12 bales were lost overboard. They were in McKenzie's custody. The sum in dispute is small but it may affect the question of costs. At the lowest estimate we are entitled to judgment for the value of these 12 bales.

Mr. Buchanan (for defendants): With out going into the question of law I submit that we have fulfilled our contract. As to the 12 bales, we have only the statement that 12 bales were lost overboard. There is nothing to show that they were plaintiff's bales.

[De Villiers, C.J.: Oh yes, the other consignees got all their bales.]

They were satisfied, but we never got these 12 bales. We were acting as stevedores for the ship. As delivery agents we are not responsible till we get the things from the ship.

[Maasdorp, J.: Then were they still in the ship's custody?]

Yes; they were being landed with the ship's gear and tackle. We are not insurers and are under no obligation to make good losses of this kind.

[De Villiers, C.J.: There is no evidence to show that these bales went overboard.]

The consignees never gave a clean receipt. McKenzie acted both as stevedore and as landing-agent. The landing-agent is *functus officio* when he has taken the goods from the ship and put them on the dumping-ground. Then we were absolved from further responsibility. Plaintiffs do not allege our want of diligence

as stevedores. There is no evidence to show that defendants' negligence was so gross as to render him liable. The Harbour Board took a receipt from McKenzie, but that was not a clean receipt. Defendants could have brought their action before but they have lain by, and therefore cannot make us liable, even for the 12 bales.

Mr. Gardiner (in reply) was not heard.

De Villiers, C.J.: It has been proved to the satisfaction of the Court that the defendant has received on behalf of the plaintiffs 2,474 bales of oathay, and the question is, what quantity has been delivered? According to the receipts put in on behalf of the defendant, plaintiffs got delivery of 2,257 bales. It seems that there are some 64 bales in dispute, but there has been no cross-examination as to the meaning of the entry as to certain bales, and I think therefore that the Court may take it as proved that the number of bales delivered, not including the broken and loose hay, is 2,257. Then, in addition to that, in the month of August there was delivered to the plaintiffs certain quantity of loose hay, estimated by the plaintiffs at 50 bales. In my opinion, the plaintiffs' evidence clearly shows that there must have been a good deal more than 50 bales. There were three consignments, and the total amount is 13,576 lb., which would certainly be nearer 180 bales than 50 bales. Taking it that there were 180 bales, there still remain 27 bales unaccounted for. Part of that may be accounted for by the fact that plaintiffs did not remove to their stores the loose forage lying about, but left a considerable quantity there. Taking this at 15 bales, there still remained 12 bales unaccounted for. Now the defendants explain their non-delivery of these twelve bales by saying that they fell into the sea, but there is no evidence as to how they fell into the sea, or at what stage of the landing. Now, as they had accepted this position of agent, and accepted the duty of obtaining delivery, the onus certainly lay upon the defendant to satisfy the Court as to how the twelve bales were lost. It is suggested now that the defendant lost these bales in his capacity as stevedore for the ship, but there has been no evidence to satisfy the Court as to the manner in which the bales

were lost, and as to the particular point of time at which they were lost. For these reasons, in my opinion, the defendant cannot escape liability for the twelve bales. For the rest, the plaintiffs have themselves a great deal to thank for not being able to recover them. When they received notice to take the hay they refused because the quantities were not sufficient, but they did not try, and if they had tried to remove what there was they would possibly have found the requisite quantity there. Therefore, in my opinion, the plaintiffs are entitled to succeed only in respect of the twelve bales, for the non-delivery of which the defendant has given no satisfactory explanation. The value of these twelve bales at 11s. per bale would be £6 12s., and for that amount judgment will be given for plaintiffs. Unfortunately there has been no tender, and therefore the judgment must be with costs.

Maasdorp, J., concurred.

Mr. Buchanan submitted that Magistrate's Court costs only should be given, as the amount, £6 12s., would fall within the jurisdiction of the Resident Magistrate, and as the Court had pointed out, it was owing to the plaintiffs' own fault that they did not get the balance of the hay.

De Villiers, C.J., said it seemed hardly a case for the Magistrate's Court, as there were some very important points arising. Besides if it had been perfectly clear and there was no reasonable doubt that the £6 12s. only was owing, there might be something in the argument, but there were circumstances in the case which certainly justified the plaintiffs in claiming the larger amount. Therefore the case did not seem to be one so clear for the Magistrate's Court as to justify the Court in giving Magistrate's Court costs only.

[Plaintiff's Attorneys, Messrs. Scanlan and Syfret; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

SMITH AND CO. V. SOLOMON. { 1902.
Feb. 4th.

Account—Action to debate—
Costs.

This was an action calling upon defendant to debate and settle an account.

Plaintiffs' declaration was as follows:

1. The plaintiffs are Charles Sonnenberg and George David Smith, carrying on business in Cape Town as G. D. Smith and Co.; the defendant resides in Cape Town.

2. In or about the month of December, 1899, the plaintiffs entered into a contract with the Imperial Government to supply the troops stationed in the Eastern Districts of this Colony with potatoes and onions. Thereafter, in or about the month of January, 1900, the plaintiffs entered into a contract with the defendant, by which it was agreed that, with regard to the supply of potatoes and onions to the troops stationed in the Eastern Districts, the Defendant should proceed to the Eastern Districts, to attend to the carrying out of the said contract with the Imperial Government, and to obtain other contracts from the Military, if possible; and that, as to the first named contract, after deducting cost of produce and all other expenses connected with the carriage, agency, etc., and in fine all and every item of expenditure incurred in the carrying out of that contract, the nett profit remaining should be divided as follows:—One-third to the defendant, and two-thirds to the plaintiffs; and that, with regard to all and every other military contract obtained by the defendant during the continuance of the present war, after deducting every expense connected with the carrying out of the contract, the nett profit remaining should be divided as follows:—The defendant to receive one-half thereof, and the plaintiffs one-half; the plaintiffs to find the capital for the carrying out of the contracts.

3. In pursuance of the said contract the defendant proceeded to the Eastern Districts to carry out the said contract for the supply of the said potatoes and onions aforesaid, and received large sums of money from the plaintiffs, and disbursed large sums, and bought and supplied to the Imperial

Government large supplies of potatoes and onions; and the defendant also obtained permission to open a dry canteen business at the Military Camp at Sterkstroom, and, as the Imperial troops moved onwards, the said business was also moved, until it was closed at Bloemfontein. The defendant received and disbursed large sums of money, and bought and sold large quantities of goods in connection with the said canteen. The said contract as to the supply to the Imperial Government of onions and potatoes has terminated.

4. It was and became the duty of the defendant to keep due and proper accounts, duly supported by vouchers, of all his dealings in regard to the potato and onion contract and the canteen business, and to render to the plaintiffs true, full, and correct accounts thereof, duly supported by vouchers, but the defendant has failed in and neglected his duty in that behalf and to render the said accounts as aforesaid. The plaintiffs say that, if the defendant will render such accounts, there will be found on debate thereof a considerable balance in the plaintiffs' favour.

5. In or about the month of April the plaintiffs entered into a contract with the Imperial Government to supply the troops with potatoes in the Orange River Colony, and in or about the month of May, 1900, it was agreed between the plaintiffs and defendant that the profit arising from the supply by the defendant of potatoes to the Imperial troops under the aforesaid contract, that, provided the cost of a bag of such potatoes, including the sum of 2s. 6d. hereinafter mentioned, should not exceed 16s., the said sum of 2s. 6d. per bag should be divided between the parties, the defendant to receive one-third and the plaintiffs two thirds; and that, if the cost of the bag exceeded 16s., there should be a corresponding abatement in the sum of 2s. 6d.

6. The defendant did supply potatoes to the Imperial troops in the Orange River Colony, and it was and became the duty of the defendant to keep due and proper accounts, duly supported by vouchers, of all his dealings in regard to the supply of potatoes as aforesaid, and to render to the plaintiffs true, full, and correct accounts thereof, duly supported by vouchers; but the defendant has failed

and neglected his duty in that behalf and to render the said accounts as aforesaid. If the defendant will render such accounts, there will be found on debate thereof a considerable balance in the plaintiffs' favour.

The plaintiffs claim:

(a) A true, full, and correct account, duly supported by vouchers, of all his dealings and disbursements in regard to the potato and onion contracts in the Eastern Districts;

(b) A true, full, and correct account, duly supported by vouchers, of all his dealings and disbursements in regard to the dry canteen business;

(c) A true, full, and correct account, duly supported by vouchers, of all his dealings and disbursements in regard to the potato contract in the Orange River Colony;

(d) A debate of the said three accounts, and payment of such sums as may be found due to the plaintiffs thereon;

(e) Alternative relief.

(f) Costs of suit.

To this declaration the defendant pleaded as follows:

1. He admits paragraph 1.

2. As to paragraph 2, the contract with the Imperial Government referred to is dated January 12, 1900, and is one between the said Government and C. Sonnenberg, one of the plaintiffs, for the purpose of supplying potatoes and onions to the depôts on the Eastern Line of communication, and the said Sonnenberg thereafter entered in a verbal agreement with defendant that the business under the said contract of January 12, 1900, and any renewals of the same from month to month or otherwise should be carried out as follows:

Sonnenberg to find the necessary capital—defendant to proceed to the headquarters of the depôts on the said Eastern Line to manage the business there—the nett profit after deducting the cost of goods purchased, carriage, agency, travelling expenses and necessary disbursements and expenses to be divided in the proportion of two-thirds to the said Sonnenberg, and one-third to the defendant; thereafter on February 1 the said agreement was confirmed in a letter written by plaintiffs to defendant, which further provided that all contracts with the Military subsequently obtained by defendant should be treated on the same

basis as to share to profits, as in the same ment above set forth.

3. As to paragraph 3 the defendant admits that he proceeded to Sterkstroom for the purpose of carrying out the said agreement, he says that his son opened a "dry canteen business" and that the accounts relating to the said business have by mutual agreement been treated as though the said business was a military contract obtained by himself, though the plaintiffs did not provide all the capital for the said business as was agreed in the said letter of February 1 with regard to military contracts.

4. He admits that he did from time to time receive large sums of money from plaintiffs, and disburse large sums, and supply to the Imperial Government large quantities of potatoes and onions, and he says that the original agreement between himself and said Sonnenberg which had reference to the contract of January 12 was from time to time extended as the the area of military operations was shifted, and as renewals of the aforesaid contract of January 12 were from time to time entered into with the Imperial Government.

5. As to paragraph 4 he says that he has kept proper accounts, and has from time to time furnished the same to plaintiffs.

6. As to paragraph 5 he says that the contract entered into with the Imperial Government was an extension of the aforesaid contract of January 12, and that plaintiffs and defendant on or about April 8 entered into a further agreement whereunder they agreed that they should supply the said Government with potatoes and onions to be delivered at any railway-station on the Eastern Line of Railway as far as Bethulie for two months from April 10, and share of profits to be divided in the same proportion as before.

7. Thereafter, on April 14, 1900, plaintiffs obtained a further contract with the Imperial Military Authorities to supply potatoes and onions for delivery in the Orange Free State (now Orange River Colony) at any railway-station or siding as far north as Bloemfontein.

8. Thereafter in the said month of April defendant agreed with the said Sonnenberg acting for plaintiffs that this contract should also be dealt with by plaintiffs and defendant on the same basis as the previous ones, and that the

profits thereon should be shared in the same proportion.

9. The defendant thereafter from time to time did furnish certain supplies to the Imperial Government as far as to Bloemfontein under the agreement entered into between himself and plaintiffs. He has kept account of his dealings in that behalf, and has from time to time rendered accounts to the plaintiffs.

10. He admits that the said contracts with the Imperial Government have been terminated, but save as above he denies the allegations in paragraphs 2, 3, 4, 5, and 6 of the declaration.

11. The plaintiffs have not rendered to defendant proper accounts of their dealings and transactions in the matter of the aforesaid joint ventures, especially with regard to the contract referred to in paragraph 8 of the declaration, but upon a true and proper debate of all the accounts between the parties, there will be found a balance owing to the defendant by plaintiffs.

Wherefore he prays that plaintiffs' claim may be dismissed with costs.

And for the alternative plea in case this Honourable Court should find that the defendant is not entitled to a one-third share of the profits in the contract entered into with the Imperial Government for supplies to the troops in the Orange River Colony as far as Bloemfontein referred to in paragraph 5 of the declaration, the defendant says:

1. He craves leave to refer to the matters pleaded above in paragraphs 1, 2, 3, 4, 5, 6, 7, 10, and 11.

2. The defendant in April, 1900, and thereafter did furnish supplies to the Imperial Government for the troops in the Orange River Colony as far as to Bloemfontein, and should this Honourable Court find that plaintiffs are not liable to share with defendant in the profits of the contract entered into by plaintiffs with the Imperial Government for that purpose, the defendant submits that he is entitled to a reasonable remuneration for his services in carrying out the said contract—he says that the plaintiffs offered him a remuneration of 2s. 6d. a bag, for every bag of potatoes purchased by him for the said supply and that the above would be a reasonable remuneration in case the accounts are adjusted on that basis.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention the defendant, now plaintiff in reconvention, says:

1. He craves leave to refer to the matters above pleaded.

2. The plaintiffs, now defendants in reconvention, from time to time furnished certain supplies on behalf of the joint ventures above referred to, and disbursed certain monies, and it became and was their duty also to furnish to defendant, now plaintiff in reconvention, full and proper accounts supported by vouchers, especially with regard to the contract with the Imperial Government referred to in paragraph 5 of the declaration—but the defendants in reconvention have neglected and refused to supply such accounts.

3. Upon such accounts being furnished and debated there will be a balance due by defendants in reconvention to plaintiff in reconvention.

The plaintiff in reconvention claims:

(a) That the defendants in reconvention be ordered to furnish to plaintiff in reconvention full and proper accounts supported by vouchers of all their transactions in and about the aforesaid joint ventures, especially that relating to the furnishing of supplies in the Orange Free State (now Orange River Colony) as far as to Bloemfontein.

(b) A debate of such accounts.

(c) Payment of the balance due upon such debate to the plaintiff in reconvention.

(d) Alternative relief.

(e) Costs of suit.

Plaintiffs' replication was general.

Their plea to the claim in reconvention was as follows:

1. They beg to refer the Court to the pleadings in convention.

2. They say that all accounts the defendant is entitled to have been duly and properly rendered; but,

3. They say that they are not bound to render any account of their dealings under the contract in the 5th paragraph of the declaration mentioned.

4. Save as above they deny the allegations in the claim in reconvention contained.

Wherefore they pray, etc.

Defendant's rejoinder was a joinder of issue and his replication to the plea in reconvention was general.

Mr. Benjamin (with him Mr. Gardiner) for the plaintiffs; Mr. Searle, K.C. (with him Mr. Close) for the defendant.

Charles Sonnenberg said he was one of the plaintiffs, and carried on business in partnership with Mr. Smith. A contract was entered into on January 11, 1900, between the firm and the Imperial Government. That contract was the one produced, and was for the supply of onions and potatoes in the Eastern Districts. They required someone to manage the business in the Eastern Districts, and witness approached defendant. He agreed to go if he got one-third of the profits on the contract, witness's firm to get two-thirds, and to pay all money. Defendant asked him to put the agreement into writing, and this was done. This agreement (produced) also specified that on all subsequent contracts obtained by defendant, the profits should be equally divided between plaintiffs and defendant. The plaintiffs supplied the capital; defendant was to have the management. Witness gave defendant a copy of the contract with the military. A day or two after the agreement was signed defendant left, and afterwards supplied the troops along the line with onions and potatoes. Afterwards defendant started a dry canteen at Sterkstroom, and this was continued until it got to Bloemfontein. Witness obtained an extension of the original contract from two months from the 10th April. The dry canteen started while the contract was running, in about March or April, and finished in about November. The Eastern Districts contract ended in June. The firm entered into a contract on the 14th April for the supply of potatoes and onions in the Orange River Colony, on stations as far north as Bloemfontein. Witness had the Western contract as well. Defendant supplied potatoes for the Western contract, but had made no claim in respect to this. On the 9th May, witness wrote to the defendant a letter, in which he stated that in order to avoid any unpleasantness, he wished to make the potato contract perfectly clear. He said that the defendant's contract for vegetables ran from East London to Pethulie, but that beyond Bethulie he had no interest, but he (witness) was pre-

pared to allow his (defendant's) branch a commission of, say, 2s. 6d. a bag on goods supplied to Bloemfontein or beyond Bethulie, provided it did not bring the potatoes to more than 16s. per bag. There was a conversation previous to that. Defendant had nothing to do with the contract in May. After the conversation witness thought the defendant might consider he had an interest in the Bloemfontein contract, and so he wrote the letter. The commission was to diminish in proportion to the amount below 16s. Defendant replied to this letter, stating that he was surprised at witness repudiating his interest in the contract. He said that nothing of this sort had been hinted at before, that he could not grasp the arrangement as to the commission, and that something definite must be proposed before he could agree. Witness replied stating that the contract was as stated in his letter of the 9th May. Witness wired for defendant to come over, but he did not come." Defendant did no work in connection with the Bloemfontein contract, except to buy potatoes. Witness managed the contract. Defendant had charged him with 1,800 bags. There had been 1,500 supplied by defendant for Bloemfontein and 300 for places under the Western contract. Witness himself supplied 5,000 bags for Bloemfontein. In connection with the Eastern contract, on which he was given a share of the profits, defendant visited the different depots, collected accounts, and purchased potatoes. He did not perform any service in connection with the Bloemfontein contract, except buying the 1,500 bags of potatoes. The third of the half-crown was about 5 per cent. The usual commission for buying was from 2½ to 5 per cent. Defendant rendered an account (produced). He did not claim in that he had an interest in the Bloemfontein contract. He charged commission in that account for the whole 2s. per bag on potatoes. His commission was, according to the agreement, one third of this. In another account drawn up after the dispute, defendant charged half a crown a bag. He claimed no partnership in the Bloemfontein contract until he was pressed for the letter in which the agreement was stated, of which witness had no copy. This was the letter of the 9th May. Witness superintended the working of the can-

teen while at Bloemfontein. The practical working was performed by a young man named Ulyett, who could have worked the canteen without help. Defendant's son was there. It was unnecessary for him to be there with Ulyett. Defendant himself could have managed the canteen. If it was necessary to have a manager, it was defendant's duty to go and manage the canteen after the Eastern contract was finished in July. The canteen was kept open until November. Defendant's son Lawrence charged £30 a month for seven months, and his boarding expenses. Up to the 11th August there was nothing in the canteen account about defendant's son. About August defendant said to witness that he ought to allow his son something, as he had done so very well in Bloemfontein. Witness did not reply; he did not consider that the son was entitled to anything. Afterwards he was charged with the £210.

Cross-examined by Mr. Searle: The contract with the Imperial Government was for a month, to be renewed by mutual consent. It was allowed tacitly to run on. Witness had not a chaff contract, but he thought that while in Bloemfontein he bought and sold some chaff. He advanced the money for the canteen also, and it was all in his name. They had both tried to settle the matter amicably. Before they had any dispute at all defendant rendered that account, showing the price 2s. per bag. Witness took up the position that defendant was entitled to a commission of 8d. or 10d. per bag, which was a very liberal commission, seeing that every possible expense was charged. Defendant's son went up, but it was to get new contracts from the military if he could. Witness in July told Mr. Solomon that he himself should go to Bloemfontein. Witness only took the trouble to send defendant's son up because his father wanted him to go, and the son himself was anxious to go. Witness made about £700 profit on the Bloemfontein contract; about 5s. a bag on an average.

Godfrey Cripps said he was an accountant, and was employed by Mr. Scannenbergh to go through the accounts in connection with this business. He and Mr. Cosnett met and came to an arrangement, subject to the decision of

the Court. Apart from the questions of the Bloemfontein contract and the salary there were no difficulties. The son's salary of £210 was ultimately brought up in a ledger account.

Cross-examined: The salary was brought up when the accounts were gone into at Cape Town.

This closed the case for the plaintiffs.

Mr. Searle called

Sampson Solomon, the defendant, who said it was common cause that he entered into an agreement with Mr. Sonnenberg with regard to these contracts. Witness went up in February. He had to go up from East London and follow the troops as they moved forward. Witness's son came up at the end of January or beginning of February. He started the dry canteen, having secured the concession in Cape Town. Mr. Sonnenberg arranged that witness's son should come up. He bought what was required for the canteen at East London, and then came up and opened it. Before that witness's son was in employment in Cape Town. Witness had a number of depots to look after, working from Sterkstroom as a base. Witness's son managed the canteen himself for a month. Ulyett, who succeeded him, started at £8 per month, subsequently rising to £15 a month. There was a lot of work in starting the canteen. £25 was not an unreasonable salary. His son had that and expenses before he left Cape Town, and on returning got the same. As to the Bloemfontein contract, when witness went to Bloemfontein he saw Mr. Sonnenberg, and there was a conversation about the potatoes, the number wanted, the ways of getting them, how much Sonnenberg could get in the Colony, and how much witness could get in his part. Nothing was said until the letter of May 9 about this being a matter witness was not interested in. He went about buying potatoes under the impression that he was a partner in the transaction. He had supplied 1,600 bags for the Bloemfontein contract. With regard to the potatoes forwarded to Bloemfontein, they were consigned from the different places to the military. That was the only way witness could get them up there. Witness did all the work in connection with these potatoes. Witness did not arrange for his son Lawrence to go up to Bloemfontein. That was arranged by Mr. Son-

nenberg and his son. Sonnenberg never suggested to witness that he should go up to take over the canteen from his son. £30 a month was, witness thought, a small salary taking into consideration the many inconveniences of the work.

Cross-examined by Mr. Benjamin: Witness did not consider it his duty to go to Bloemfontein and manage the canteen after the Eastern Districts contract had ended. The charge of 2s. per bag in the account was put in at Mr. Sonnenberg's suggestion, in order to show how matters stood. Witness's son Charles, who was at Sterkstroom, was 23 years of age.

Charles Solomon said that before he went up to Sterkstroom he was employed by the Dominion Tobacco Co., and was paid £25 a month and expenses. A telegram came from Sterkstroom, and witness showed it to Mr. Sonnenberg, who suggested that witness should go up to look after the business. Mr. Sonnenberg paid witness's fare. Witness started the business, and put it on a good footing. Witness was then telegraphed for to come back to the Dominion Co., and he returned. Witness charged the same as he was receiving from the Dominion Co., viz., £25.

By the Court: Witness imagined he would receive the same as he was getting from the Dominion Co. He had not been paid the £25. He had never made a demand for it from Mr. Sonnenberg or his father.

Lawrence Solomon said he went to Bloemfontein in April by arrangement of Mr. Sonnenberg to work the canteen business. He worked the business until it was closed at the end of October or the beginning of November. Witness managed the business. He bought the goods himself. When he took it over, there was a deficiency of about £90. Witness had never been in his father's employ in this country, except in regard to this canteen business.

By the Court: Witness charged all his expenses against the business.

Mr. Searle said it was expressly provided in the contract that all expenses should be paid.

Examination continued: Witness only charged his living expenses. When he was employed by a Cape Town firm and went up-country, he always got his living expenses.

Cross-examined: Witness did not think £30 a month too much for salary. He only charged his living expenses while he was in the hotel during the last three months.

This closed the evidence.

After argument,

Buchanan, J., in giving judgment, said: In the month of January, 1900, the plaintiffs, Messrs. Smith and Co., entered into a contract with the military to supply the various depots on the Eastern lines of communication with vegetables. To carry this contract out, Mr. Sonnenberg, one of the plaintiffs, saw the defendant, Mr. Solomon, and entered into an agreement with him, the effect of which is stated in the letter of the 1st February. This letter was written to confirm a verbal agreement entered into, and it sets forth that after deduction of costs of produce and all other expenses connected with the managing, the agency, etc., to carry out the contract, they agreed, in consideration of Solomon giving his services to work the contract, to allow him to receive one-third share of the profits, the other two-thirds going to the plaintiffs. At the same time this agreement was entered into it was agreed between Sonnenberg and the defendant that any other contract that defendant might obtain should be carried on for their mutual account, but that on any such contracts obtained by Solomon the latter should receive half the profits and Smith and Co. the other half. All the funds, and the credit which was as good as funds, were supplied by Smith and Co., and the work by Solomon. At the time the agreement was entered into only this one contract was in existence, and Solomon went to the frontier and did the work necessary to purchase supplies. He had all his expenses paid, and he bought produce for which Smith and Co. advanced the money, and this produce he supplied to the military. The defendant made out accounts and obtained such moneys as he could from the military, portion of the money was paid over to him and portion to Smith and Co. Defendant also made remittances from time to time to Cape Town. A second contract was entered into on the expiration of this first contract for the same supplies on the Eastern lines of communication, but at a slightly advanced price, and as the second contract

was considered by the parties as a continuation of the previous contract, there is no dispute as to these two contracts, the parties agreeing that Smith and Co. are entitled to two-thirds share of the profits arising from them, and that the defendant Solomon is entitled to one-third. After the second contract was entered into Smith and Co. made a further contract with the military authorities for the supply of potatoes in the Orange River Colony, not in the Eastern district at all, as far north as Bloemfontein. This contract was not within the contemplation of the parties to this suit when the agreement was made. It was not known that it was likely to come into existence. The defendant on his part obtained permission to establish a dry canteen business, and with reference to this some dispute has arisen as to credits to be allowed. There is no dispute between the parties that the profits of the canteen business are to be divided equally between plaintiffs and defendant. The disputes are, first, whether what was called the Bloemfontein contract is to be included in the original contract between the parties, so that it is to be considered as having been carried on on the mutual profit system, plaintiffs being entitled to two-thirds share of the profits and the defendant to one-third; or whether it was a contract entered into by plaintiffs solely on their own account. Then, secondly, as to the canteen contract, whether the defendant is entitled to charge as expenses against this contract certain salaries paid to his two sons. The plaintiffs claim, and the defendant cross-claims, accounts from each other, and it is these accounts which have now to be debated. The parties have rendered accounts to each other, and these are the items in dispute. It is agreed between the parties that if these disputes are settled, the accounts themselves shall be referred to accountants, who shall determine the amount due by one to the other respectively. As to the first matter in dispute, the Bloemfontein contract, at the time that contract was entered into the plaintiffs had numerous contracts with the military for different parts of the country, but, on the evidence led, I am forced to the conclusion that the only contracts that plaintiffs agreed with the defendant to share profits in, are those relating to supplies for the Eastern lines of communication. The

renewal of the original was running when the Bloemfontein contract was entered into. As to the other contract, the defendant Solomon was sent up to the border to see that contract carried out. With reference to the Bloemfontein contract, Sonnenberg went up himself to see to its execution. When he was going up he telegraphed to the defendant to meet him on the way. Defendant, however, did not do so. Sonnenberg telegraphed to the defendant that he wanted potatoes for this Bloemfontein contract, and asked defendant to send him any surplus he might have without injury to the other contract. This contract was entered into on April 14, and towards the end of that month defendant met Sonnenberg in Bloemfontein. After the case got into the hands of the attorneys, the case as set up for the defendant that—I presume at this interview—he agreed with Sonnenberg that this contract should be dealt with on the same basis as the previous one. But the defendant has no evidence to support this allegation. When we look to the correspondence, which is really perhaps more reliable than the recollection of the parties, we find that on the 9th May Sonnenberg wrote to the defendant about this contract, and defendant replying in a letter on the 12th, said, "I know nothing about this second contract." He could not therefore possibly have agreed in April that it should be carried on on joint account. On May 9 Sonnenberg distinctly wrote the defendant stating that the latter had no interest in the second contract, and stating to him on what terms he proposed to pay him for any vegetables he (Solomon) had bought and might still buy and send up to Bloemfontein to plaintiffs. Defendant repudiates this offer, but without any further agreement between the parties he goes on supplying vegetables, and then afterwards, when he came down to town in connection with a proposed settlement, he sends an account in which he says, "Commission," not profits, "as agreed, or 1,665 bags of vegetables at 2s. sent to Bloemfontein." Now, in the face of these documents, it is impossible for the Court to find that there is any agreement putting this Bloemfontein contract on the same terms as the Eastern lines of communication contract. But it is common

cause that work was done by the defendant for plaintiff in regard to this contract, and plaintiff says, "I offered him a commission on potatoes at a rate not exceeding 2s. 6d. per bag, provided the potatoes did not come to more than 16s. per bag, and that there should be a proportionate reduction if they came to more." Plaintiff said they did come to more, and that the price of 16s. only allowed 2s., instead of 2s. 6d. profit; but the plaintiff says this commission is to be paid to what he calls the branch business at Sterkstroom, which was the business under the Eastern lines of communication contract; in other words, that the commission so earned should be taken into account of the branch business, and should be considered as one of the profits of that business, and divided under the original agreement between the partners. I find very great difficulty in coming to such a conclusion. In the first place, there was no mutual agreement, and in the absence of any agreement one is forced to the conclusion that any recompense paid for work done must be paid to the defendant personally, and not to the branch business. Defendant in his plea claimed an alternative that he is entitled to reasonable remuneration for his services in connection with the purchase of these vegetables, and he says that the reasonable remuneration should be 2s. 6d. The real dispute, therefore, is, what is a reasonable remuneration to allow for these services? The amount which, in his account, the defendant claimed, and which Sonnenberg himself said was agreed upon, and which plaintiffs were willing to pay, provided it went into the branch business, is 2s. per bag, and looking at the circumstances in this case, I think the *quantum meruit* should be 2s., but it must go to the defendant personally, and not put into the account of the Sterkstroom business. As to the canteen contract, the only item in dispute is the amount claimed as salary due to defendant's sons. This contract was obtained either by the sons or by the agency of the defendant, and therefore he was entitled in this case to half the profits. He himself did not start the business, but one of his sons was sent up to do so, and to set the business going. This son had a month's leave of absence from his employers in Cape Town, but as at the expiration of the month they wanted him back, he engaged a young man named

Ulyett at £7 or £8 a month, to manage the canteen, which was afterwards increased to £12 or £15 a month. Now, as Ulyett was not employed until after this son left, we think the son's services for the month should be paid for on the same footing as Ulyett was paid. It seemed necessary that somebody should be there to conduct this business, and defendant could not be expected personally to go and serve in the canteen. As to the amount, the son says there was no agreement, and we think under the circumstances the utmost paid to Ulyett is a sufficient reward to him for starting this business, viz., £15. But there is a further claim for £210 as salary for a second son at the rate of £30 a month. Now, this charge seems to be wholly unwarrantable, and not a necessary charge against the business, seeing that Ulyett was there and carried on the business the whole time. Defendant himself was interested in this business as much as the plaintiff, and the other contract having terminated, he ought to have given as much supervision as he could to this business. There was no necessity to pay that son £30 a month with Ulyett at £12 to £15 a month, and with defendant's supervision. It seems a wholly unnecessary and excessive charge. The second son was at Bloemfontein when the canteen was moved there from Sterkstroom, but while he was there he was doing other work. It was proved in evidence that one month he was actually working for Sonnenberg and getting £30 a month from him, and how could he expect to get this other £30 a month? It was an unnecessary expense. If the defendant was unable to supervise this business and therefore got assistance from this son, he certainly could not expect Sonnenberg to pay for that. In August a statement of account of this canteen business was requested by Sonnenberg, and was framed and entered in the books on the 8th August. The assets, liabilities, and stock-in-trade in the business were all brought up, and up to that date no charge whatever was entered and no liability brought forward for salary for this son. Therefore, in referring this matter to the accountants agreed upon, Messrs. Cripps and Cosnett, for stating the accounts between the parties, it shall be a direction to them that the Bloem-

fontein contract should not be included as within the agreement between plaintiffs and defendant, but that defendant should be allowed commission of 2s. per bag on potatoes supplied, and that on the canteen contract a sum of £15 shall be allowed as necessary remuneration for the services of the one son, but that no sum shall be allowed for the services of the other son.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Messrs. Minchin and Sonnenberg; Defendant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before BUCHANAN, J. and a Jury.]

TERHOVEN V. COLONIAL	{	1902.
GOVERNMENT.		Feb. 5th.
STEPHAN V. COLONIAL		" 6th.
GOVERNMENT.		

Contributory negligence.

Contributory negligence, to disentitle a plaintiff to recover damages for inquiries sustained must be such as, but for such negligence the mischief would not have happened and where the defendant could not by the exercise of proper care have avoided the consequences of plaintiff's negligence.

These were consolidated actions brought against the Commissioner of Public Works. In the former the plaintiff claimed £500 damages for injuries alleged to have been sustained by him on the 24th December, 1900; and in the latter, the plaintiff claimed £85 damages, sustained owing to the smashing of a cart and the killing of two horses on the same date.

The declaration of the firstnamed plaintiff alleged (1) that he was the manager of the Fresh and Cured Fish Co., and resided at Somerset West Strand.

2. That on the 24th December, 1900, the plaintiff was proceeding with a cart and horses from the village of Somerset West to Somerset West Strand, and while lawfully crossing at Somerset West

Halt the railway line, which is the property of the Colonial Government and under the control and management of the defendant, an engine and train, the property of the Government and under the control and management of the servants of the Colonial Government, who in driving the said engine and train were acting within the scope of their employment, were so carelessly and negligently driven by the said servants that the engine and train ran into the said cart and horses.

3. By reason of the said negligent and careless conduct of the said servants of the Colonial Government in charge and control of the said engine and train, the plaintiff was seriously and dangerously injured, and was under medical treatment for three months, and suffered great pain and physical suffering, and was prevented from attending to his business and incurred medical and other expenses, and is still suffering from the effects of the said negligence and carelessness, and has sustained damage and loss to the extent of £500.

The second named plaintiff's declaration was in practically similar terms, and claimed £85 damages for the loss of the cart and two horses, which were his property, and which were being driven by Terhoven when he was injured.

The defendant, in his plea, denied that the collision was caused by negligence or carelessness on the part of the engine-driver or of any servant or agent of the Colonial Government.

He specially said with reference to paragraph 2 of the declaration that the engine-driver and other servants of the Colonial Government employed in connection with the said train exercised all due and proper caution and skill in driving the said train, that the whistle was sounded before the train approached Somerset West Halt, and that every care and endeavour were made to avoid the aforesaid accident.

The said accident was caused by the carelessness and negligence of the plaintiff, who, although he knew that the train was approaching Somerset West Halt, and had been duly warned of the train's approach by the whistle, attempted to cross the line in front of the approaching train, and in consequence received the injuries of which he now complains. He denied the other allegations in paragraph 2.

He said he had no knowledge of the facts alleged in paragraph 3, but he denied that the plaintiff had sustained any injury and incurred expense and damage in the sum of £500, or in any amount, by any act or omission on his part or on the part of any servant or agent of the Colonial Government.

The plea to Stephan's claim was in similar terms to the above.

Mr. Schreiner, K.C. (with whom was Mr. Close), for both the plaintiffs.

Mr. Searle, K.C., and Mr. Sheil, K.C., for the Government.

Mr. Schreiner called

James Frederick Inglis Curlewis, who said he was a Government land surveyor, and framed the plan of the ground in question by actual survey. It was essentially correct, and the distances marked were absolutely correct. Witness lived at Somerset West, and knew the road in question. On account of trees and foliage on the Government property it was very difficult for a person driving down to the Halt from Somerset West to see a train coming. Witness was on the platform at the time of the accident. He saw the train coming rather suddenly, as he thought, and after going to call Mrs. Curlewis he turned round and saw a cloud of dust and the train coming in. One horse was then lying dead under the train. An iron standard had been broken, apparently by the cart being thrown against it. There were no gates at that crossing, and although witness had often been there, he had never seen a man placed at the crossing to warn drivers of vehicles that trains were approaching. Witness thought the train was coming in rather fast that day, faster than he thought it should. He never heard the engine whistle.

Cross-examined by Mr. Searle: Witness knew nothing about signals. He did not know that the custom was for the stationmaster to go down the platform and signal the train in from the bend. He could not swear that the engine did not whistle. He had not measured the taaibosch, but he thought it would be about 5 feet high. He could not say whether the taaibosch and gum-trees had been pruned before or after the accident. The taaibosch was high enough to obstruct the view of the line, the

road until the rise was reached being below their level. When witness drove down that road he never depended upon seeing the train through the trees. He would slow down before reaching the line, and then on the rise, about 5 or 6 feet from the line, he had a clear view of it.

Re-examined: A person had to turn his head considerably to see up the line. When the cart was on the rise the horses would be touching the rails.

Hermanus Terhoven, the plaintiff in the one action, said he had lived all his life at Somerset West Strand. Formerly he had a boat of his own, but at the time of the accident he was employed at Stephan's Fresh and Cured Fish Company. His salary was £12 a month and 5 per cent. commission. He also speculated in buying other produce, and his income would be about £400 or £500 a year. On December 24, 1900, witness was driving Mr. Stephan's horses to a farm near Somerset West Strand. There was a little boy with him. The harness was worth about £4, and the cart £15 or £16. The horses were a good pair, and were worth from £70 to £80. They were quiet horses, and perfectly under control. Witness was sitting on the usual driver's side of the cart. He first saw the train when it was right on him. The horses were then on the line. He could do nothing to get backward or forward in time to prevent the accident. Just as the train struck him witness heard the whistle. He did not know the train was coming, and did not whip up his horses to get across the line before the train passed. An approaching train could not be seen until a person got right on the line. Proceeding, witness detailed the nature of the injuries he received. He was in bed for five or six weeks, and it was four months before he could really get about again. The sight of witness's eye was impaired, and he could not hear as well as he could before the accident. He used to be a man of strong nerve, but now he had no nerve at all. Witness had a wife and nine children, and was 46 years of age. He would not like to have another such accident for £10,000.

Cross-examined: Witness knew the afternoon train was due about the time of the accident. It was the ordinary train, and witness had often travelled by it. Coming along the road it was

possible to see the train from certain points. Witness was not in the habit of stopping at the spot mentioned by Mr. Curlewis and looking up the line to see if the train was coming. Witness's hearing was good before the accident, but he did not hear the engine whistle 100 yards from the station. The train was very seldom signalled by a flag from the bend. Witness had never heard the train whistle just as it came into the straight, but since the accident he had heard the train whistle there. It might whistle some days, but never while he was there. The top of the taaibosch was cut after the accident. It would now be about 5 feet high, but at the time of the accident it was a very big taaibosch. The train was about 12 yards from him when witness first saw it. Witness had a whip in his cart, but did not use it. The cart was still lying at the station. Both wheels and the disselboom were broken. It was a good cart. After four months witness went to Mr. Keytel and worked on commission. During a good season, such as last year, witness would make more than he did while in Mr. Stephan's employ. He still dealt with Mr. Stephan on commission, and collected rents for him.

Re-examined: Witness's work was now on shore, although he had a little pleasure boat he sometimes went out in.

Peter Keytel said in 1900 he was manager of Stephan's Fresh and Cured Fish Company, and Terhoven was the assistant manager at the Strand. Terhoven was a sober, steady man, and, to witness's own knowledge, a capable driver. Terhoven entered witness's service in April, 1900. Stephan was the owner of the cart and horses. Witness had bought the cart, and although he could not quite remember the price, he was sure that it was over £10. He was certain that at the time of the accident he could not have bought the cart and harness for £15. The horses were a good pair, and worth £70. Witness had had offers of £70 for them. Witness wrote to the Government on December 28, 1900, regarding the accident, made a claim, and received a reply on December 31 saying that inquiries would be made. Then in January he got a further communication from the General Manager of Railways repudiating liability for the

damage caused by the accident. When Terhoven was able to come to Cape Town a solicitor was consulted, and ultimately these legal proceedings were commenced.

Cross-examined: Witness believed the horses cost about £50 eighteen months before the accident. The cart was bought about two years before that date. Witness could not explain why the summons in this case was delayed until August last.

Robert A. McIntyre, partner in the firm of Tredgold, McIntyre and Bisset, said the delay in the issuing of the summons was due to his being ill and having to leave Cape Town for a time.

Dr. Edmund William Scarborough said he practised at Somerset Strand. On the evening of December 24, 1900, Terhoven was brought to his surgery, and witness attended to him. He had a contused wound on the top of the head, 1 to 1½ inches long, a contused wound over the left eyebrow of about a couple of inches, fracturing a little portion of the frontal bone. There was also a wound on the left cheek 3 or 4 inches long. That was a deep wound. Then there was a fracture of the jaw. The left-hand side of his chest and his left arm and hand had also contused wounds. His body was more or less contused all over. Witness attended to Terhoven's needs, and bandaged him. It was a bad case, and the patient suffered severely from the shock. Terhoven had all his senses at that time. They were injuries which in the case of any but a very strong man would possibly have caused death. Witness treated him for a couple of days, but he knew that altogether Terhoven was under medical treatment for over three months. On April 30 Terhoven complained to witness about his jaw, and on witness making an examination he found that the jaw was still ununited. That was a very serious thing. There was also an abscess formed there.

Cross-examined by Mr. Searle: If a man had a weakness of heart, the shock might have proved fatal. Witness had not attended Terhoven since the 30th April. Witness had seen him going about, and he looked all right.

Dr. William Hewat, district surgeon and medical officer of the railway at Somerset West, said he saw Terhoven

after the first two days. He was in bed about six weeks. For a time witness attended him daily. It was a bad case. Pieces of dead bone were coming out of the jaw. Now the jaw was satisfactorily united. Witness's account would be £15 or £20.

Cross-examined by Mr. Searle: Terhoven was nervous, and was not the same man he used to be.

Petrus van Nierop, post contractor, said he drove up and down the road in question often. So far as he knew, Terhoven was a steady and experienced driver. There was a great deal of traffic there. There was no gate, and no man was stationed there to warn people of the approach of trains. He had not seen any flag or signal. He was at the station that day. He took the mails and passengers up, and reached the station at 3.30, fifteen minutes before the train arrived. The bags were on the platform waiting for the train. He did not hear the train whistle until it was within 8 or 9 yards of the cart. There was no chance for the cart to draw back or go forward. He had good hearing, and believed he would have heard the whistle if it had been blown before. A man driving down the road, with the trees as they then were, could not see a train coming. The gum-trees had since been cut away. He did not see the cart before it was on the line. This was when he heard the whistle. He considered the horses to be worth from £70 to £80.

Cross-examined by Mr. Searle: Witness was on the platform nearly every afternoon. On the day in question he was standing between the station offices and the third-class shelter, in about the middle of the platform. When witness first saw them, the horses were on the line. The engine always whistled when coming round the bend, about 500 yards away—at the Bush. Sometimes, but not always, it whistled after it came into the straight. Witness did not hear it whistle on this afternoon in the straight. He would not say it did not whistle.

Charles Overtown, cab proprietor, Strand, said he also was on the platform. He gave evidence similar to that of the preceding witnesses. If a man was on a Scotch cart, which made a big rattle, he would not hear the train come down. It came down smoothly.

Witness saw the horses just as they got on the line. Witness did not see the driver whip up the horses. When the train whistled, there was no time for the driver to do anything. The taaibosch prevented anyone on the road from seeing an approaching train. The value of the horses was from £60 to £70. The value of a cart of that sort was, he thought, about £10 or £12.

Cross-examined by Mr. Searle: The train usually whistled when within 100 or 200 yards of the station.

Petrus Johannes van Blerck gave similar evidence.

Cross-examined: He did not see a man come out with a flag. Witness would not say that a man did not wave a green flag.

Phillip W. A. Hope was called, and said he saw the cart just as the engine struck it. He heard no whistle before.

Cross-examined by Mr. Searle: Witness did not see the stationmaster come out with a flag. The platform was crowded. If a driver took particular notice, he could see through the trees the train coming.

Henry Allen Fagin said he had formerly resided at Somerset Strand, but for more than a year now had lived at Somerset West. Until a couple of months ago he was Mayor of the Municipality. He confirmed what the other witnesses had said as to the traffic on the road, and the nature of the locality of the accident. Long before the accident the danger of the locality had been discussed by the Council, but they did not communicate with the Government on the matter until after the accident. Before the accident the trees were too thick, and after that the Government proceeded to have the trees chopped down. The trees had previously obscured the view, and one could hardly see the line unless he stood quiet for some time.

Cross-examined: The trees along the line obstructed the view, and not the trees along the road. Witness did not go into details, but just took the general effect, and the general effect was that the view was now better with the trees removed. Considering the immense amount of traffic on the road, with at times the wind blowing hard and the train coming stealing into the station, witness still thought a gate was necessary at the crossing. The Municipality

had asked the Government to put a gate as well as cut down the trees.

Alfred Lipman said he had been at the Strand for the last two years. He was at the station at the time of the accident, having gone there on his bicycle to see some friends off. Before the collision, he had been on the platform a quarter of an hour, and he did not hear the whistle of the train until the accident happened. On hearing the whistle he immediately looked round, and saw a cloud of dust, and heard people saying an accident had happened. Witness afterwards assisted to remove Terhoven to the cloakroom. He saw the one horse under the train and the other horse was so injured that it had to be killed.

Cross-examined: Witness's attention was not directed to the train until the accident happened, but if the train had whistled before that he would have heard it.

John J. van Dyk said he had resided at Somerset West Strand for some time. On the day of the accident he was going to Stellenbosch, and was waiting on the platform for the train. He heard no whistle, but saw the train 200 or 300 yards away. He saw the cart and horses approaching the line, and the train was then just on them. The train whistled, but there was no time between that and the collision. Witness did not see the man on the cart whip the horses. The train was coming in at a good fast pace.

Cross-examined: When witness first saw the cart about two yards from the line, just rising out of the dip, it was going at an ordinary pace. Witness did not see the stationmaster coming out and waving a flag, his back being to the stationmaster's office. The engine did not always whistle when it came in.

Re-examined: If the engine did whistle and he did not hear it, the whistling must have taken place a long way off.

By a Jurymen: The train must have dragged the horse between forty and fifty yards.

Counsel said the distance on the plan was 56 yards.

This closed the case for the plaintiffs. For the defence, Mr. Searle called

Arthur Edward Sanson, who said he had been stationmaster at the Strand Halt Station for 3½ years, and had been 12 years in the Government service. He remembered the accident on 15 December

24, 1900. The train was due to arrive at the station at a quarter past four, and if it had not collided with the cart it would have arrived just up to time. Witness heard the rumbling of the train before it reached Mostert's Bush. He then heard it whistling at Mostert's Bush, and went out and waved the green flag, which was the signal for the train to come in, there being no fixed signals at the station. The engine whistled again coming into the straight.

By the Court: If the driver did not see the signal he should stop outside the station.

Examination continued: After waving the flag witness went into his office, and when he came out again the train was about 50 yards from the road. Then the engine commenced giving sharp whistles, which called witness's attention, and looking round, he saw a cart just about the corner of the fence. When the cart had got 3 or 7 yards away from the crossing Terhoven put round his hand, took up his whip, and started whipping the horses to get across the line in front of the train. He did not cross in time. He only got the horses on the line, and not the cart, and the engine caught the horses. The engine pulled up a few feet in front of the shelter. If the driver of the cart had pulled his horses round when the engine gave the sharp whistle he could have avoided the accident. Immediately the engine caught the horses witness jumped down off the platform and rushed up the line in front of the train. Witness was about 500 yards away from Terhoven when he fell. He picked him up, and, with assistance, brought him to the platform. There had been no recent alterations in the timetable. Before a person came to the crossing there were spaces between the trees on Mostert's ground where he could see a train coming down. The red gums did not obscure the view much. All the trees on Mostert's ground which obstructed the view had been cut down and sold for firewood. With ordinary care any man could avoid an accident at that crossing. The cart in question was a very old one, and witness thought that at the outside a £5 note would be paying too much for it, because the only good parts about it were the springs.

Cross-examined: On the afternoon of December 24 witness had two porters assisting him. Witness had to issue tickets

and do all the signalling work, and had no foreman to assist him. On the day in question the platform was full of people, and witness's hands were full in selling tickets. The horses were not on the rails when the sharp whistle was given. The train never ran faster coming into that station than it did at other stations. Passenger trains never ran through without stopping, but goods trains did. It was not part of witness's duty to watch the road, but if he saw something coming on the line from the road he would give the driver the signal not to come in too close. It was after the second whistle that witness gave the train the signal with the flag. The engine whistled at Mostert's, and then when coming into the straight, and when it was coming into the straight witness gave the flag. Then it whistled for the crossing about 60 or 70 yards away, and then there were the sharp whistles before the accident. The taaibosch branches had not been cut down since the accident. The taaibosch was only about 3 feet in height. A person coming down the road would not be prevented by the taaibosch from seeing the line.

Re-examined: Before witness came out of the office, he heard the whistle from Morkel's Crossing. Then he went out, waved the flag, and took the flag back. When he again came out, he heard another whistle, and afterwards the engine blew a sharp whistle for the cart.

Albert Jones, engine-driver, said he had been in the service of the Colonial Government for sixteen years. He had been six years an engine-driver, and had been driving on the Sir Lowry Pass line close on two years, up to the time of the accident. He drove the train which ran into the cart. There were two crossings near the Bush, and witness whistled for each. Witness saw the stationmaster come out with the flag about 500 yards away, when he whistled for the station. He whistled about 100 yards from the crossing, at the foot of the platform. Witness saw the horses through the bush. He thought they were standing. He whistled, and saw that the horses were moving. He applied both brakes. They were powerful brakes. As far as he could recollect, they drew up an engine and a carriage beyond the crossing. Witness did all he could to avoid the accident. At the time witness whistled, he thought the horses could have been

stopped. They could, he believed, have been pulled on one side. Witness could not stop. At the time of the whistle, the engine was about 40 yards away.

Cross-examined by Mr. Schreiner: Witness was sure he gave all the whistles he had referred to. He was just as likely to forget to stop at the station as he was to forget to whistle. He could see the horses' legs, but not the driver.

Jasper Bardens, porter at Somerset West Halt, said he had been employed there for over five years. He was engaged at the station on the afternoon of the accident. He was standing waiting for the arrival of the train. When witness first saw the train it was on the straight, about 500 yards away. It then whistled. Witness heard the engine whistle at Morkel's Crossing. He saw the stationmaster with his flag. The engine whistled 100 yards from the crossing. Witness saw Terhoven driving down the road to the crossing. He saw him whipping his horses, trying to get over the crossing. Witness had often driven down the road towards the Halt. The train could be seen between the trees. Witness thought Terhoven could have pulled up in time to avoid the accident.

Cross-examined by Mr. Close: By looking carefully and stopping, the train could be seen. When witness saw the cart, it was four or five yards from the crossing. The train was then about 40 yards away. After the whistle had blown, the driver whipped the horses up. The whistle blew sharply three times.

Re-examined by Mr. Sheil: Witness was standing close to the crossing.

David Smith Barrie, porter at the station, said he heard the engine whistle at Morkel's Crossing. It whistled on the straight, and again about 100 yards from the crossing. Afterwards, when about 40 yards away, it whistled for the cart, which was about 5 or 6 yards off the line. Witness saw the driver whip up the horses. Witness was standing by the shed, and had a full view. He considered the driver of the cart could have pulled up before the engine reached him.

Mr. Searle called

Joseph Yare, a guard in the employ of the C.G.R., who deposed that he was in charge of the train which drove into the cart at Somerset West Halt on December 24. They were approaching as usual round the curve from Morkel's Crossing at a speed of fourteen miles an hour,

gradually reducing the speed. The driver whistled for the station at 500 yards distance, and then again whistled for the crossing about 100 yards from the crossing. His first attention to something unusual taking place was the application of the brake and the driver whistling, giving a repetition of short whistles, denoting danger. There was a screw brake in his van, and the train was fitted with a continuous brake. He did not apply the brake in his van. There were a great number of passengers waiting on the station platform to board the train. There was not a strong wind blowing at the time, which might have prevented the intending passengers hearing the whistle of the approaching train. There was merely the ordinary breeze. He was not aware that a passenger train had ever entered the station before being signalled in. That had never occurred within his experience.

Re-examined: There was a brake in the guard's van. There was also the automatic brake on the engine and in the guard's van. That automatic brake was applied before the whistling. He judged that from what he felt in his van. He had to run the length of seven vehicles—six carriages and his van—to get to the front after the train had stopped.

Iwin Frederick Ross, a fireman in the employ of the C.G.R., deposed that he was fireman on the train when the collision occurred on the 24th December. The train whistled from the bend, then from the straight, and then 100 yards from the crossing. It was signalled in to the station that day. He saw the flag on the platform. The train was then about 500 yards off. After whistling the three times, she gave another short whistle. That was given by the driver. He was looking out on the station side, and did not see the cart at all till the train was drawn up. The brake was put on, and the train was brought up quickly.

William Frederick Taylor, a clergyman in the Church of England, deposed that he resided at Somerset Strand at the time that the accident occurred. He was driving towards the station that day, and on the way passed the cart driven by Terhoven. He passed Terhoven. When near the crossing, he heard a train whistle about 500 yards away. He drove across the line. He then drove to the toll, about 100 yards further on. Just

as he drew up at the toll, he heard the crash of the collision. He both saw the train and heard it whistle distinctly. The train was then in the straight. He had crossed the line at that point two or three times a week for six or seven years. He never had the slightest difficulty in getting over, as he could always distinctly see if the train was approaching or whether the line was clear.

Cross-examined by Mr. Schreiner: When he passed Terhoven, he (witness) was driving faster. Terhoven had a little boy with him. He could not say the exact distance Terhoven was behind him when he drove over the siding.

By Buchanan, J.: He had crossed the line at the point where the accident occurred often. From the point where a clear view of the line was to be had, there was plenty of time to draw up before reaching the crossing.

After counsel had addressed the jury, His Lordship, also addressing the jury, said that on the 24th December the plaintiff Terhoven was driving from Somerset West to the Strand in a cart with a pair of horses belonging to the plaintiff Stephan. On crossing the railway line at an open crossing an engine and train ran into the cart, with the result that the cart was smashed up, one of the horses was killed and the other was damaged, and unfortunately the plaintiff Terhoven was injured. Terhoven had told them that in consequence of that accident he had suffered great pain and incurred the expense of medical attendance, and on that account he brought on the present action against the Government for damages. In a case like that they had, of course, the greatest possible sympathy with a man who had suffered such injury. But the case had gone beyond the province of sympathy. They were now in a court of law, and they had to decide according to the law applying to the case. The declaration charged the Government with negligent and careless conduct on the part of their servants in the management and driving of the train. On the other hand, the defendants said that there had been such contributory negligence on the part of the plaintiff that he caused the accident. They alleged that the plaintiff was warned of the train's approach by the whistle, and yet notwithstanding that he attempted to cross the line in front of

the train, and in consequence of his own conduct he sustained his injuries. It was for the jury to find on the facts of the case as shown in the evidence. To assist them he would state the issues raised. The first question was whether there was any negligence on the part of the defendants. If they found there was no negligence on the part of the railway officials they were bound to find for the defendants; but if they found there was negligence on the part of the Government officials, they had then further to consider if there was negligence on the part of the plaintiff Terhoven directly contributing to the accident, and if they found there was that contributory negligence they would have still to find for the Government. If they found that the railway servants had been guilty of negligence, and that the plaintiff had not directly contributed to the accident, then they would have to consider the question of damages. In dealing with the question of damages, if they should find for the plaintiff, they must take into consideration the actual loss sustained; the expense incurred by reason of the accident, and the pain and suffering undergone by the plaintiff Terhoven. He would ask them not to put down a specific sum against any one or other of these items, but to find on the whole a reasonable sum. In the case of Stephan it depended altogether on the view they took of the conduct of Terhoven. If Terhoven failed then Stephan must also fail; if Terhoven was entitled to damages then Stephan was entitled to be paid for the damage done to his cart and horses. In the declaration the charge of negligence put forth was the negligent driving of the engine, but this depended on all the surrounding circumstances. Counsel had asked them to bear in mind the locality and the fact that the road upon which the accident occurred was in frequent use. Counsel had also asked them to remember the difficulty in seeing along the line, and that the train did not make much noise coming down the incline, and that the Government had not provided any warning either by means of a man stationed at the crossing or by a bar. There was no law which in terms required the Government to put a man at the place, and no law compelling the Government to put up a bar; but he would put it to them broadly that it was the duty of the Government to manage

and carry on the railway with the same amount of care and skill as would be required of any private company working a railway, and he would give them a general principle on which they could go. Where the Government was authorised to work a railway it must work that railway in a proper manner, and in the usual way in which railways were worked. In crossing a footway or a level crossing the railway officials were bound as to the mode of working their line, as to the rate of speed, signaling, and whistling, to do everything that was reasonably necessary to secure the safety of persons who had to cross the line. They had to take reasonable precautions. If the Government were negligent, however, that did not justify a man in negligently putting himself in danger and then saying: "You have injured me through your negligence, and you must pay me compensation." Wherever an accident is brought about by a person's own carelessness or recklessness, he had no ground of action. But this carelessness or supineness must be the immediate and proximate cause of the injury. Where negligence on the part of the plaintiff is remotely connected with the cause of the accident, the jury must see whether the railway servants could, by the exercise of ordinary care and skill, have avoided the injury. Contributory negligence on the part of the plaintiff, to disentitle him to recover, must be such as, but for such negligence, the mischief would not have happened, and where the defendant could not, by the exercise of proper care on his part, have avoided the consequences of the neglect or carelessness on the part of the plaintiff. Those were, broadly speaking, the principles of law on which they must act in this case. The Government must work its railways with reasonable precautions. The plaintiff must, for his part, take reasonable precautions, too, and not do anything to contribute directly towards an accident. On the question of whistling, a great deal of evidence had been given on both sides whether the whistle of the engine had been sounded on approaching the crossing or not. Many said they did not hear it. Defendants' witnesses, on the contrary, said there was whistling, and gave details. They had the evidence of the Rev. Mr. Taylor, who distinctly heard the whistle,

and took the precaution of ascertaining the distance of the approaching train before driving across the line himself. The evidence of one witness who positively heard the whistle was of more value in this case than that of several who said they did not hear the whistle, unless, of course it was apparent that a person deliberately went into the witness-box and perjured himself. The jury would not be disposed to treat the evidence of Mr. Taylor in that light way. Mr. Taylor was driving along the road, and passed Terhoven. He was driving faster than Terhoven. He heard the whistle, stopped, and looked up the line. He saw that he could easily pass before the train arrived, and he crossed in safety. It was said in evidence that there was a difficulty in seeing the line from the road approaching the crossing, but this should induce one to take extra precautions. The plaintiff knew the locality well, and knew the times when trains were due. He knew that the notice to the public that a train was approaching was given by whistling. That was apparently the only notice, and it was very essential in this case to find whether or not whistling took place. Plaintiff heard no whistle; why, that was difficult to say. He was not very far behind Taylor, who heard the whistle. But Terhoven said he did not hear the whistle. The jury had to consider if there was not such negligence on the part of the plaintiff directly contributing to the accident as to disentitle him to damages. Was there such negligence on the part of the Government as to lead the plaintiff to believe that in crossing the line he had nothing to fear? If the latter, then he might have a strong case against the Government. If the jury thought, on the contrary, that there was whistling and reasonable care taken by the Government, or if they thought that there was contributory negligence on the part of the plaintiff, then the latter was disentitled to damages. If the plaintiff knew the train was approaching, and chose still to cross the line in front of the train, that was careless and reckless conduct under the circumstances that should be taken into account by the jury as being contributory to the accident. His Lordship concluded his remarks by again instructing the jury on the point of awarding damages.

The jury retired to deliberate, and returning an hour later, the foreman jurymen intimated that they were unable to arrive at an unanimous verdict, nor would they be able to agree after further deliberation.

His Lordship asked if there was a majority of six against three on a verdict. The foreman replied that there was.

His Lordship pointed out that the law provided that a verdict could be returned if, after deliberating for an hour, a majority of six to three of the jury agreed to such verdict, and asked what verdict had been arrived at.

The foreman replied that they found for the plaintiffs for the amount of damages claimed.

On the motion of Mr. Schreiner, a verdict was entered accordingly, with costs, the expenses of the plaintiff as a necessary witness being allowed.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendants' Attorneys, Messrs. Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G.) and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL CASES.

MARAIIS V. DU PLESSIS. } 1902.
Feb. 6th.

Mr. De Waal applied for provisional sentence on a promissory note for £100, with interest and costs.

Granted.

BARRON V. NIEZER.

Mr. P. S. Jones moved for provisional sentence on a promissory note for £224 18s., less £162 3s. 7d. paid on account, with interest and costs, and for judgment under Rule 329d, for £135, money paid by plaintiff on defendant's behalf.

Granted.

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FLEMMER V. MAGUIRE AND ANOTHER.

Mr. De Villiers appeared for the plaintiff, and Mr. Upington for John Thomas Maguire, sen.

An affidavit by J. T. Maguire, sen., was read, in which deponent declared his alleged signature to be a forgery.

The case in respect to J. T. Maguire, sen., was ordered to stand over for a fortnight, judgment being given against J. T. Maguire, jun.

ILLIQUID ROLL.

OHLSSON'S V. BEER.

Mr. De Villiers moved for judgment, under Rule 329d, for the sum of £55 10s., rent, interest, and costs.

Granted.

BARNON V. MEYER.

Mr. Buchanan applied under Rule 329d for judgment for £45 16s. 6d., being balance of account for goods sold and delivered, with interest and costs.

Granted.

PRESWICH V. WEIDNER.

Mr. Bisset moved for judgment under Rule 329d for the sum of £63, with interests and costs.

Granted.

GENERAL MOTIONS.

Ex parte ENGELS. } 1902.
Feb. 6th.

This was an application to have a rule *nisi* made absolute. The rule called on petitioner's children to show cause on February 6, 1902, why an interdict should not be granted restraining the Registrar of Deeds from passing transfer of certain property, pending an action to be immediately instituted by petitioner in the Supreme Court. The said rule *nisi* (to operate meanwhile as an interdict) was granted by the Chief Justice in Chambers on January 15, 1902.

The petition upon which the said rule *nisi* was granted set forth that on April 4, 1876, petitioner purchased a certain piece of ground, situate at Rondebosch, and paid the stipulated price to the vendor. Owing to his ignorance of business matters, he neglected to get transfer of the said ground, which was on May 11 transferred by the estate of the late ven-

dor to Annie Engels, in her capacity of executrix of petitioner's deceased wife. The said transfer was fraudulently obtained, inasmuch as it was represented that petitioner was deceased at the time. On May 11, 1888, this property had been transferred to petitioner's children, issue of his marriage with his late wife. There are seven children; the land still stands registered in their joint names, and petitioner is informed and believes that the property has been sold by the said children to one Williams, who is now seeking to obtain transfer thereof, and has already begun to erect a building on the said property. Petitioner intends to institute an action against his children to have the transfer to them set aside, and now prays for an order restraining the Registrar of Deeds from passing transfer to Williams.

On the motion of Mr. Alexander, the Court made absolute the rule *nisi* which had been granted in Chambers, upon production to the satisfaction of the Registrar of the death notice of Abraham Marthinus Engels (one of the said children).

[Applicant's Attorney, J. J. Michau.]

ESTATE MAZINGISA V. MASINGISA AND OTHERS.

Mr. Benjamin applied for removal of trial to the Circuit Court at Kokstad. There was a consent paper.

Granted, costs to be costs in the cause.

Ex parte STEYTLER N.O. re } 1902.
GOLDSTEINS ESTATE. { Feb. 6th.

This was an application by Geo. Wm. Steytler, in his capacity of trustee of the insolvent estate of Lewis Goldstein upon notice of motion to: (1) The Civil Commissioner of the Cape; (2) the Chief of Police, Cape Town; (3) the officer in charge of the Cape Town Gaol; (4) the insolvent to deliver up to the trustee certain property or effects in their possession, belonging to, or found on, or taken from the insolvent. The matter was before the Court on January 13, when the application was granted as regarded the goods in the possession of the gaoler. The rest of the application was ordered to stand over till to-day, when it was granted on the motion of Mr. Buchanan.

[Applicant's Attorneys, Silberbauer, Wahl and Fuller.]

Ex parte STORK. } 1902.
Feb. 6th.

Foreign marriage—Community— Property of Wife—Transfer —Assistance of husband.

Where a wife married in Germany and afterwards became domiciled in this Colony together with her husband had been deserted by him, and had thereafter acquired with her own money certain immoveable property. The Court made an order allowing her to pass transfer of this property to a purchaser without her husband's assistance.

Petitioner, married in Germany, out of community of property, applied for authority to transfer certain property without the assistance of her husband. The petition set forth that petitioner and her husband arrived in Cape Town, and have since resided there. On June 12, 1899, petitioner purchased with her own money, obtained without assistance of and independently of her husband, a certain piece of ground, with buildings thereon, situate in Longmarket-street, Cape Town, transfer of which was duly passed to petitioner on August 12, 1899. In or about July, 1897, petitioner's husband deserted her, having informed her that he had no intention of returning to her. Petitioner has sold the said property, and is desirous of passing transfer to the purchaser, but she is unable to obtain the signature of her husband assisting her execution of the necessary documents. Petitioner's husband has no interest in the said property, and she is unaware of his whereabouts.

On the motion of Mr. Benjamin the Court granted an order as prayed.

[Applicant's Attorneys, Silberbauer, Wahl and Fuller.]

STANFORD V. WILLIAMS AND OTHERS.

This was a motion to fix a day for trial by jury.

Mr. Uppington appeared for applicant; Mr. Gardiner for respondents.

The respondents had given notice to apply on the 28th February to fix a day for trial, Mr. Gardiner saying that it

was their intention to have the case heard in the May term. An affidavit was read to the effect that several of defendants' witnesses were on active service.

The Court fixed the 10th March for trial, the Chief Justice saying that if, meanwhile, the respondents found it impossible to get all their witnesses here, they could make another application before the jurors were summoned. Costs were ordered to be costs in the cause.

PATERSON V. PATERSON. { 1902.
Feb. 6th.

Mr. Benjamin made application for personal attachment of respondent for contempt of Court by failing to obey an order to contribute £5 per month for the maintenance of applicant and children. There had been a judicial separation, defendant having been ordered to pay the amount stated. He was £53 10s. in arrear, and costs were also due amounting to £26 2s. 6d. Defendant, it was stated on affidavit, was in the employ of the Cape Government Railways.

Defendant appeared, and said that he had refused to make payments until the applicant had given him certain papers which she had belonging to him. There were three Masonic certificates and a life policy.

Mr. Benjamin said the wife had the life policy. This had been kept in consequence of some proposal to cede it in payment of the arrears. He (counsel) was not instructed as to the other documents.

Defendant further said that he was not able to pay. He had not objected to the Court's order, because he had promised his wife not to appear in court to oppose her application.

The Chief Justice said that defendant would probably be able to raise money on the life policy. An order would be made for payment of the money on condition that applicant handed over to the respondent the life policy and Masonic papers belonging to him in her possession. Of course if applicant did not have the Masonic papers she could apply again.

DAVIS V. WOODSTOCK MUNICIPALITY.

Mr. De Villiers moved to fix a day for trial by jury.

The Registrar pointed out that there was no proof of service on the respondent, and the case was ordered to stand over for production of proof.

Ex parte ROUX. { 1902.
Feb. 6th.

Executor and tutor—Purchase of property in the estate.

Where an executor in an estate who was also tutor dative to the minor children of deceased had purchased certain property in deceased's estate at a public auction and for a fair value, the Court confirmed the sale.

This was an application for an order confirming the sale of certain property. The petition of Petrus Jacobus Stephanus Roux, of Phesante Kraal, Caledon, stated that towards the end of 1884 he bought certain properties in partnership with his brothers, Alexander Andreas Roux and Willem Adolph Roux. The three brothers held the said properties in undivided shares till the beginning of 1896, when petitioner and his brother Willem Adolph bought one-third share of their brother Andreas, and have since held the said pieces of ground in undivided half shares. Willem Adolph died in August, 1901, his wife having predeceased him in 1896. Petitioner was appointed executor dative in the estate of his deceased brother aforesaid and Tutor dative to his said brother's four minor children. As Executor dative petitioner instructed certain auctioneers to sell all the moveable and immoveable property in the said estate by public auction. The sale having been duly advertised, was held on April 24, 1901, and was largely attended. Petitioner bought the half undivided shares in the aforesaid farms belonging to the said estate publicly and in open competition for the highest bid offered, and at a fair and reasonable price. Petitioner paid £800, and the property had been valued (as appeared from appraiser's affidavit annexed) at £650.

On the motion of Mr. De Waal an order was granted as prayed.

Applicants' Attorneys, Dampers & Van Ryneveld.

HACKENBERG V. HACKEN- { 1902.
BERG. { Feb. 6th.

Removal of interdict.

Where a husband has been ordered by the Court to pay over to his wife £25 to enable her to sue him for divorce and had been interdicted from alienating certain of the common property: the Court after the lapse of more than two years removed the interdict as the wife had failed to bring her action within that time.

This was an application for an order removing a certain interdict. The said interdict had been obtained by Messrs. W. E. Moore and Son, at the instance of Thekla Hackenberg (the respondent), restraining her husband Vinzenz Hackenberg (the present applicant) from selling, mortgaging, or otherwise alienating certain landed property on the Cape Flats registered in the name of the applicant. The circumstances under which this interdict was granted, as disclosed in applicant's affidavit, were as follows: On March 14, 1899, on the application of the present respondent the Court granted a rule *nisi*, returnable on April 12, 1899, calling on petitioner to pay to respondent £25 to enable her to institute an action against him for divorce, and restraining him from alienating certain two properties on the Cape Flats, registered in his name. This rule was made absolute on May 1, 1899. Petitioner was at the time unable to pay the said £25, and by consent of attorneys on both sides a bond was passed on the property for £350 to pay off an existing bond and to provide funds for both parties to carry on the suit. The £25 aforesaid was paid to respondent, but since then she has taken no steps to proceed with her action for divorce. Wherefore petitioner prayed for an order removing the aforesaid interdict.

On the motion of Mr. Gardiner, the Court granted an order as prayed.

[Applicant's Attorney, C. W. Herold.]

SEALE V. SEALE.

Mr. C. de Villiers applied for leave to plaintiff to sue her husband for divorce *in forma pauperis*.

Granted.

IN THE MATTER OF THE PETITION OF HERMANUS S. DREYER.

Mr. Buchanan applied for the appointment of a *curator ad litem* to petitioner's minor daughter, Hermina S. Dreyer.

Mr. Van Rensburg was authorised to enter into a provisional agreement, subject to the ratification of the Court.

GRIFFITHS V. GRIFFITHS

Mr. Benjamin applied for a decree of divorce to be made absolute.

Granted.

Ex parte BOTHA, N.O. AND { 1902.
OTHERS. { Feb. 6th.

This was an application by an executrix testamentary for leave to transfer to herself certain property in the estate. The major heirs under the will joined in the petition. The petition of Hester Hendrina Catharina Botha (born Pretorius), in her capacity as executrix in the estate of the late Marthinus Johannes Botha, and also of the three major heirs of the said estate, stated that there was a fourth heir, still a minor. That the estate was indebted to the executrix in the sum of £2,450, the amount of a certain promissory note dated August 1, 1894, signed by deceased in her favour, and which in greater part represents the purchase price of certain erven in the town of Cradock. Deceased bequeathed to the executrix the life-usufruct of these erven, and she is now 53 years of age, and it has been agreed by the other petitioners that she should take over these erven from the estate in full satisfaction of her claim of £2,450. The said erven are valued for Divisional Council purposes at £1,440, for Municipal purposes at £1,400, and by a sworn appraiser at £1,850; thus it will greatly benefit the estate if the said debt of £2,450 can be discharged by executrix taking it over. Should this claim be enforced against the estate, it will be necessary to sell these erven by public auction subject to the aforesaid life interest, under which circumstances they will not realise as much as any of the aforesaid valuations.

Wherefore petitioners pray for an order authorising the said executrix to pass transfer to herself of the aforesaid arven in full settlement of her said claim of £2,450. The Master reported favourably.

On the motion of Mr. Benjamin the Court granted an order as prayed.

[Applicants' Attorneys, Fairbridge, Ardenne and Lawton.]

GINSBURG V. CHURCH. { 1902.
Feb. 6th.

This was an application for leave to attach certain moneys. The petition of Samuel Joachim Ginsburg, a general dealer, of Barkly East, stated: Petitioner obtained judgment against William Louis Church, a watchmaker, of Barkly East, on January 13, 1902, in the Supreme Court, for a total sum of £49 10s., with interest and costs, since taxed at £6 8s. 10d. On May 15, 1901, a writ was issued against the goods and chattels of defendant from the Supreme Court in the matter of Meintjes v. the said defendant, to which the Sheriff made a return of *nulla bona*. Defendant has been awarded £148 12s. 8d. by the War Losses Compensation Commission, of which one-fourth was paid previous to June 12, 1901. On that date the Supreme Court, upon the application of Meintjes, granted an order declaring this money (then in the hands of the Civil Commissioner) executable for the said debt and costs. Thereafter a second instalment of one-fourth of the aforesaid award was deposited with the Civil Commissioner, and out of these moneys the exigencies of the said writ was satisfied, leaving a balance of about £10 to the credit of the said defendant with the said Civil Commissioner, and a balance of £74 6s. 4d. is still due to defendant upon the said award. In or about March, 1901, defendant left Barkly East; he has not returned, and petitioner has not been able to ascertain his present whereabouts. Petitioner therefore prays for an order declaring the moneys lying to the credit of defendant with the Civil Commissioner, and also the aforesaid balance due to him, executable for the said judgment debt, taxed costs, costs of this application, and for any other costs to be incurred thereon.

On the motion of Mr. C. W. de Villiers, the Court ordered that a rule nisi

issue, calling upon respondent to show cause on February 27, 1902, why attachment should not be made as prayed. Rule to be served on respondent personally; failing which, one publication to be made in the "East London Dispatch."

Postea, Feb. 27.

On the motion of Mr. C. W. de Villiers, the rule was made absolute.

[Applicant's Attorneys, Messrs. Van der Byl and Van der Horst.]

WATSON V. MAIN. { 1902
Feb. 6th.

This was an application for release from curatorship of person and of property.

Applicant had been placed under the curatorship of John Alfred Henry Main by order of Court on December 11, 1900. (10 Sheil 747.)

The petitioner stated that since then the petitioner had wholly recovered from alcoholism, and was again capable of managing her own affairs. That her said curator, together with his family, had resided with her in her house since the date aforesaid, and had behaved in an overbearing and insulting manner towards her, so much so that she had been obliged to have her meals in her own room. An affidavit from Dr. Lessing stated that he knew the parties, and that applicant now appeared to have abandoned her addiction to alcohol, and was sufficiently under self-control not to relapse into the use of intoxicants. The affidavit of Dr. Key stated that the relations between applicant and her curator appeared to be very strained, and to be acting in a detrimental manner on her health, and that since December, 1900, applicant had conducted herself with propriety and decorum. The affidavit of Christiana Ellen Main, the wife of respondent, denied that applicant was capable of managing her own affairs, or that she had been in any way insulted or badly treated. Deponent asserted that applicant had frequently behaved in a violent and insulting manner towards her (deponent), and that if released from curatorship, she would again relapse into her intemperate habits.

In her answering affidavit petitioner denied these allegations, and repeated several statements set forth in her original affidavit.

Mr. Benjamin appeared for applicant, and Mr. Buchanan for respondent.

After counsel had been heard, the Court refused to make any order.

[Applicant's Attorneys, Messrs. Innes and Hutton; Respondent's Attorneys, Messrs. Scanlen and Syfret.]

LOUW V. RHODES.

Plaintiff applied for provisional sentence on a promissory note for £2,000.

Mr. Searle, K.C. (with him Mr. Gardiner), for plaintiff.

Mr. V. Sampson, K.C. (with Mr. Benjamin) on behalf of defendant.

Mr. Gardiner said that in this matter the principal witness, the Princess Radziwill, had been duly subpoenaed, and he (counsel) had seen her the previous afternoon, but that morning they had received an intimation that she was unwell, and unable to attend. There had, of course, been no time in which to get a medical certificate, and he therefore asked that the case might be postponed. He asked for a postponement for a fortnight, but he understood that Mr. Sampson intended applying that it should be postponed only until that afternoon. There was no information as to how ill the Princess Radziwill was, so they could not say whether she would be able to attend in the afternoon.

Mr. Sampson said he objected strongly to any postponement. Mr. Rhodes had been brought out here for this case, and there was no affidavit before the Court as to the Princess being unable to come.

The Chief Justice: I do not think there is any reason for a postponement. We will go on with the case.

Mr. Gardiner said that the plaintiff sued for provisional sentence on a promissory note for £2,000, purporting to be signed by Mr. Rhodes in favour of the Princess Radziwill, and by her endorsed over to Mr. Louw. The signature was disputed by affidavit. The Princess Radziwill was the only witness the plaintiff had as to the signature, and the plaintiff could not proceed without her presence. If the Court did not see fit to grant a postponement, he could only go into the principal case, which would involve further delay.

Mr. Sampson: We would very much like to have the Princess here. Very much depends upon her.

The Chief Justice: The Court is prepared to hear the defendant if he wishes to deny his signature.

Mr. Sampson said that Mr. Rhodes would not be in court until eleven o'clock. Arrangements had been made that he should be there after the Princess Radziwill had given evidence.

The Chief Justice said the case would be heard later during the morning.

The Court then proceeded to take other cases, and at a subsequent stage of the morning's proceedings,

Mr. Sampson, K.C., intimated that Mr. Rhodes was present, and that he was prepared to go on with the case. I understand, added Mr. Sampson, that the plaintiff is going to call no witnesses, so that the onus is upon him to prove the genuineness of the signatures. But after Mr. Rhodes has given evidence, he will not be able to call rebutting evidence.

The Chief Justice: In the principal case I suppose they can?

Mr. Sampson: But not in the provisional.

Mr. Gardiner: In the provisional case I am not prepared to call any evidence. There are certain affidavits which I would pray leave to refer to on the matter of signatures.

Mr. Rhodes having been duly sworn, Mr. Sampson conducted the examination in chief.

What is your full name?—Cecil John Rhodes.

You are a member of the Privy Council and the defendant in this case of Louw v. yourself and Princess Radziwill?—Yes.

You are sued in this case as the maker of a promissory note, dated July 3, 1901, for £2,000, to the following effect: "On the 23rd day of September next I promise to pay the Princess Katarina Radziwill, or order, the sum of £2,000 for value received, payable at Kenilworth.—C. J. Rhodes"—Yes.

Is that your signature or not?—No (after examining the note produced), it is a forgery.

Did you ever sign a promissory note in favour of the Princess?—No.

Or in favour of anybody?—I may have done, years ago.

The forgery you can swear to?—I swear that that is a forgery.

You discovered that there was a series of forgeries at that time of your name?—When I was away at Bulawayo Mr. Michell, of the Standard Bank, cabled to me, and said there was a note for £400 or £500, pretending to have my signature. Had I signed such a note? I replied no. And that was my first information as to the fact that my name had been used.

The Chief Justice: When was that?—In Bulawayo.

Mr. Sampson, K.C.: You went to Bulawayo in March, 1901, before you sailed for England? You sailed for England on July 3?—I came down from Bulawayo to Kimberley, and then I went to England.

The note you had been instructed about had then disappeared, had it not?—I arrived in Cape Town in the morning, and left the same day, but I was informed that the note had been withdrawn, and so I proceeded to England.

And in England another note came to you?—No, not in England. At Madeira I received a telegram from Mr. Hawksley, my attorney, to say that a note for £6,500 had been submitted. Had I signed such a thing? I replied by cable from Madeira, "Certainly not."

From your information and from documents before you forgeries to the amount of £23,100 were attempted to be discounted, being forged documents?—I don't know the exact amount. I know that large amounts were attempted.

Well, in Cape Town there was a note for £1,000 discounted, made by the Princess Katarina Radziwill in favour of one Friedjohn, made on June 8, 1901, and purporting to have your signature on the back as endorser. Would you tell me whether that is a forgery?—Yes, they are all forgeries.

Mr. Sampson (handing witness another document): Please look at this one; is that a forgery?—I have signed no promissory notes. They are absolute forgeries.

Now if you look at all these signatures and compare them from the tracing which has been made of them you will see them to be mathematically exact. All the signatures are exactly in the same place, every dot and every line?—Yes, I believe so.

The Chief Justice: That is your signature, Mr. Rhodes, is it not (handing witness a document)?

Mr. Rhodes (after examining the document): Well, it looks like it. Yes, that is a note expressing my desire to have the case postponed. That is my signature.

Mr. Sampson: On the forged signatures, which I put in, every single stroke and dot is put in the exact place on each signature?—I see.

Mr. Sampson observed that the forged signatures were evidently taken from one genuine signature from some document.

The Chief Justice (addressing the witness): It is a very good imitation of your signature, is it not, Mr. Rhodes?

Mr. Rhodes: Yes, I think it is. I may say for the information of the Court that I have not signed a promissory note for a very long time. I think not for many years.

Mr. Sampson: You would be prepared to swear that within the last two years you have not signed a promissory note?—Yes, I should be prepared to swear that; but I might say at once, my lord, that occasionally, some time ago, I have helped a friend, and I have endorsed a note for a friend, but I don't think I have done so during the last two years. Now, this here is my signature.

Mr. Sampson (addressing the Court): Now, if your lordship will put a tracing of the forged signature over that signature your lordship will see that it does not coincide at all exactly; that the distance between the lines are different. (To Mr. Rhodes) There must be certain variations in the distance in all your signatures?—I believe so.

But in these nine forged documents there is not the slightest variation?—So I believe.

Mr. Gardiner rose to cross-examine: You said that while at Bulawayo you heard about this first?—Yes.

Would that be long before you came down?—Not very long; it might be a month or two; it was a communication from Mr. Michell, of the Standard Bank.

Thank you. Now, Mr. Rhodes, you are well acquainted with the Princess Radziwill?—I met her, I may tell the Court, at a dinner at Mr. Moberley Bell's in London. He is a well-known man, sub-editor of the "Times" I believe, and I sat next to her at dinner. That was several years ago. Since then, the next time I had a communication from her was in connection with that

letter you have got. She wrote and said she had £200,000, or a large sum, to invest, and asked me to invest it for her. I wrote to her in reply; you might read the letter.

Mr. Gardiner read the letter, which was dated from the Earlington Hotel, April 6, 1899, and ran as follows: "Dear Princess,—Excuse my delay. I have been very busy lately. It is always dangerous to advise a friend in money matters, and I make a rule not to do so, but I think anyone might subscribe with safety to the Mashonaland Railway Debentures, in order to get a safe 5½ per cent. But I dislike discussing business with friends."

Mr. Rhodes (proceeding): Well, then, when I was leaving Southampton on the ship, she suddenly turned up on the ship, and that was my second occasion of seeing her. She was alone, and she asked one to allow her to sit at one's table.

And you have often met her since then?—Yes, frequently.

You have discussed politics with her?

Mr. Rhodes: No, I have discussed politics with very few; certainly not with women.

Have you been in correspondence with her?—No; well, to the very slightest extent.

Mr. Gardiner here produced several typewritten letters, purporting to bear Mr. Rhodes's signature.

Mr. Gardiner: I do not wish to read them all.

Mr. Rhodes: Oh, but you had better read them, hadn't you?

Mr. Gardiner (handing the letters to Mr. Rhodes): Can you tell us whether any of these are your signatures, and, if so, which? There is a typewritten letter of August 10?

Mr. Rhodes: I cannot typewrite; so that must be a forgery.

Mr. Gardiner: They are all typewritten?—I have no one to write for me. It is one of those foolish things. I cannot unfortunately type. They are not my signatures. I have never signed any typewritten documents; not in connection with such matters. In the De Beers office or the Charter office I may sign a typewritten document, but on social matters or private matters of my own, my secretary writes it out and I sign.

You would not if you were in a hurry get someone to type a letter for you?—

No, because these are all political matters.

You would never get anyone to type political letters for you?—No, my secretary would do it.

When your secretary is not there?—Well, I have never typed political letters. The main point is that I have never typed these.

Now when the Princess arrived here you introduced her to Mrs. Scholtz?—No, I met Mrs. Scholtz, and she mentioned the Princess, and I said she was an interesting woman, and Mrs. Scholtz might call upon her.

Did you tell the Princess that if she wanted anything she was to refer to Mrs. Scholtz?—No, I did not say that. One moment. When was that?

Did you tell her that if she wanted anything she was to refer to Mrs. Scholtz?—Oh, certainly not.

Did you not make Mrs. Scholtz an intermediary?—Mrs. Scholtz informed me once that she thought the Princess was in difficulties pecuniarily, and I said, "You can mention it to me, and if it is so, let me know the circumstances." I was subsequently told that she could not pay her bills at the Mount Nelson, and that she was in a dire state of impecuniosity, and I then said, "I will instruct my attorney (Mr. Syfret), and if she will leave the country, I will pay her bills." I paid her bills, and she left the country, but she has come back again. To show the curious mixtures of the case, she brought a special letter of introduction from Lord Salisbury to the High Commissioner. I may also state this for the information of the Court, when I was at Home I saw Lord Rowton, who was Lord Beaconsfield's private secretary, and I asked, as I had heard she had been present at the Berlin Conference, if it were true. He said, "It is quite true. She is a clever woman with a big position here." I think I may add that she was one of the maids-of-honour to the Empress of Germany. I think I am correct in saying that. I say this merely for the information of the Court.

Now some time in 1901 did the Princess write to you and inform you that she had received certain bills from Mrs. Scholtz with your name?—No.

Now you knew that she was starting a paper called "Greater Britain"?—Yes.

And I think you favoured the idea?—No, she informed me she was going to start a paper. Did I object to it? I said I had nothing to do with it.

Did you not give her these bills in order that she might have assistance?—No, certainly not. I was never asked to give assistance. She said she was going to start a paper, and I said, "That is your business, and you will find that it will give you a lot of trouble."

You mentioned three other bills. Have you seen any of these bills?—No.

Have you any reason to suppose that there are such, not made out by the Princess?—There was the bill at Madeira, which her lawyer informed my lawyer, after my repudiation had been cabled for and sent back to South Africa. There was the bill of £400 or £500 that I was informed of by the manager of the Standard Bank; those two. Then I heard from time to time from Mr. Stevens, secretary to the Charter, that there were others being submitted in Cape Town, and it was owing to that that I said to Mr. Hawksley, my attorney, that we had better put some notice in the paper, otherwise some innocent person might be injured. A notice was then inserted in the London "Times," stating that I had heard that certain bills had been attempted to be negotiated in my name, and that they were forgeries, and the notice was sent here, but it was too late.

The Chief Justice: We know nothing of that repudiation of Mr. Rhodes's signature.

Mr. Rhodes: I heard that certain bills were being attempted to be negotiated in my name, and they were forgeries, so the notice was inserted in the "Times."

This concluded the cross-examination.

Mr. Sampson: Your lordship will find that all these signatures are taken from one copy.

Mr. Gardiner: I think my learned friend is wrong. The signatures all do vary on these letters.

Mr. Sampson: I am not sure that I am wrong. We have compared some of the signatures.

Mr. Gardiner (addressing the Court for the plaintiff) said the Court had the admitted signatures before it, and the Court had to deal with the case. He was not in a position to argue or prove any facts before the Court. If the Court

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refused provisional sentence he would consider whether to proceed with the evidence in the principal case.

De Villiers, C.J.: The plaintiff was very anxious to have the case set down for to-day, and when some weeks ago application was made on behalf of the defendant for the postponement, the postponement was strongly objected to. The case was accordingly allowed to be set down for to-day. To-day no witness appears on behalf of the plaintiff, and we have only the statement made by her counsel that the Princess Radziwil is ill. There is no affidavit in support of that statement, and, in the absence of that affidavit, the Court refused to postpone the case. The defendant has now been called, and positively denies the signatures. In my opinion they are not the signatures of the defendant, and are clearly forgeries. The application must, therefore, be refused. Of course, it is competent for the plaintiff to go into the principal case. I say it is competent for her to do so, but I think that after this expression of opinion about the case, the Court will not be called upon to go into the case, and we shall probably hear no more about it. The application must be refused with costs.

[Plaintiff's Attorney, Mr. Bernard; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

SUPREME COURT

[Before DE VILLIERS, C. J., and BUCHANAN and MAASDORP, J.J.]

SMITH V. SMITH. { 1902.
Feb. 7th.

This was an action for divorce, custody by plaintiff of the children of the marriage, and forfeiture by defendant of the benefits of marriage in community of property. The action was brought by the husband, Gerrit Johannes Smith, against his wife on the ground of her adultery with one Blackman.

Mr. Alexander appeared for the plaintiff; the defendant was in default.

Francis Henry le Sueur, clerk in charge of the Marriage Registers in

the Colonial Office, produced the original marriage certificate of the parties to the suit.

Gerit Johannes Smith, the plaintiff, said that he was married to the defendant at St. George's Cathedral on August 28, 1888. They were married in community of property. There were four children of the marriage alive. Up to 1900 witness and defendant lived happily together, and then disputes arose owing to defendant drinking, and a man named Blackman visiting her during witness's absence at work. Proceeding, witness deposed to going down to a house at Wynberg and finding his wife living there in adultery with Blackman.

Sarah Barnes corroborated as to defendant living with Blackman at Wynberg. Defendant had told her that she had had a child, of which Blackman was the father.

A decree of divorce, plaintiff to have the custody of the children of the marriage, was granted.

MDUNA V. MDUNA.

This was an action for divorce, brought by the plaintiff against his wife, on the ground of her adultery. Plaintiff also claimed the custody of the children of the marriage.

Mr. Wilkinson appeared for the plaintiff; the defendant was in default.

Francis Henry L. le Sueur, marriage register clerk in the Colonial Office, produced the register of the marriage of the plaintiff and defendant.

Sigeni Mduna, the plaintiff, deposed that he married defendant in 1899, and they lived happily together until October last, when his wife left him. From what he heard, he went to a house in Boomstreet, and there found his wife in a locked bedroom with a man named Sabana.

Corroborative evidence having been given, a decree of divorce, with custody of the children, was granted as prayed.

BOYCE V. BOYCE.

This was an action for divorce, brought by the husband against his wife on the ground of her adultery. There was an alternative claim for restitution of conjugal rights, failing which, for divorce, with forfeiture by the defendant of the benefits of marriage in community of property.

Mr. Buchanan appeared for the plaintiff, and said that he would abandon the claim for decree of divorce on the ground of adultery.

Francis Henry le Sueur produced the original marriage register of the parties to the suit.

Joseph William Boyce, the plaintiff, deposed that he was formerly a cab proprietor in Cape Town, and on the 14th July, 1896, married the defendant, who was one of the Jubilee Singers. She left the same day for Kimberley, with witness's consent, for a month. She returned unexpectedly one day, and as she said she had business at Wynberg, witness gave her his horse and trap to drive there. When she came back in the evening she said that an accident had happened. She left in the cart to drive to the house, and witness had not seen her since. There had been no quarrel. He had warned her that if she left him without his consent she would have to stand the consequences.

The Court granted a rule *nisi* calling upon the defendant to return to plaintiff on or before April 15, failing which to show, on May 1, cause why a decree of divorce, with forfeiture of the benefits of marriage in community of property, should not be granted.

DUNCAN V. DUNCAN.

This was an action for restitution of conjugal rights, brought by the husband against the wife.

Mr. Wilkinson appeared for the plaintiff; the defendant was in default.

Francis Henry le Sueur, clerk in charge of the marriage registers in the Colonial Office, produced the original marriage register of plaintiff and defendant.

Robert Duncan, the plaintiff, stated that he married defendant in Cape Town in December, 1891. There were three children of the marriage, aged nine, seven, and three years respectively. Witness and his wife lived together until eight or nine months ago. At the end of last year defendant was keeping a boarding-house, and witness lived there, but not with his wife. Defendant then left the boarding-house, and went to her parents, and refused to return to him. He tried to prevail upon her to live with him, but she had refused to do so. Witness had since lived in the Gardens.

The Court granted a rule *nisi*, calling upon defendant to return to or receive

plaintiff on or before February 28, failing which, to show cause by March 12 why a decree of divorce should not be granted, plaintiff to have the custody of the children of the marriage.

VEALE V. VEALE.

In this case the husband, Westcott Harris Veale, sued his wife for restitution of conjugal rights, failing which, for divorce. As a claim in reconvention, the wife asked a divorce *a mensa et thoro*.

Mr. Close appeared for the husband, and Mr. Searle, K.C., for the wife.

The defendant gave evidence first, and deposed as to her husband being intoxicated on a number of occasions, and also to his using abusive language towards her and shaking her by the arm. She had left him on account of his bringing a revolver home and saying that he was going to shoot himself and another man who had been gossiping about him.

The plaintiff denied the allegations of ill-treatment, and said he had not the slightest idea why his wife left him, nor had he had any warning of her intending to do so. He had made repeated efforts to get her to return, and he still wanted her to go back to him.

After argument, De Villiers, C.J.: I am of opinion that this application for a decree of restitution of conjugal rights should be refused. The conduct of the plaintiff has been such, in my opinion, as to justify the defendant in refusing to return to him, but his conduct was not such as to justify the Court in granting a decree of separation *a mensa et thoro*, because for that purpose more than occasional instances of intemperance will be required. There would have to be proved habitual intemperance and habitual cruelty. Solitary instances of intemperance or solitary instances of cruelty would not be sufficient unless the Court was clearly satisfied that it was absolutely intolerable for the defendant to return to the plaintiff. In this case there have been occasional cases of intemperance, but in addition to that we have the inference of the correspondence. Every letter written by the defendant to the plaintiff is in affectionate terms, and his answers are callous, indifferent, and show absolute repulsion to the defendant. Clearly there was no *bona fide* intention on his part that she should return. His object was to get a divorce, and his desire was

that she should not come back. I see no reason to disbelieve her statement that she met defendant, and he told her he would make her life unpleasant for her if she did come back. Under these circumstances, there must be absolution from the instance in the claim in convention, and also in the claim in reconvention. As to costs, I suppose there would have been no claim in reconvention if the plaintiff had not brought the action, and the plaintiff must therefore pay the costs.

Buchanan, J.: There is no allegation of misconduct in this case. The only allegation is that the wife left her husband without cause. The wife has all through shown the most affectionate regard for her husband, and the letter she wrote on his birthday is not only in the most affectionate terms, but in the most sincere terms she offered to return to him if he could provide for her. After that he comes into court and says, "I honestly want her back." If he wants her back let him first try to regain her affections, which he has tried his best to extinguish. Judgment must be for defendant with costs.

REX V. STEYNEVELDT. { 1902.
Feb. 7th.

Abusive Language—Sec. 10 of Act 27 of 1882.

Where accused, standing on his own ground, had used certain abusive language to complainant, who was seated at the door of her hut, a street but no barrier or wall being between the parties, and accused had thereupon been convicted and sentenced in a Magistrate's Court, and the High Court had on appeal sustained the conviction.

Held, on further appeal to the Supreme Court, that the abusive words were uttered in a public place, and that the decision of the Courts below must be affirmed. Q. v. Muller (9 Shiel, 569), distinguished.

This was an appeal against a decision of the High Court, dismissing an appeal

which had been made against a judgment of the Acting Assistant Magistrate of Kimberley.

On the 25th September, in the court of the Resident Magistrate, Kimberley, Adriaan Steynveldt was charged with contravening section 10, Act 27 of 1882, in that upon or about September 18, 1901, and at (or near) Kimberley, in the said district, the said Adriaan Steynveldt did wrongfully and unlawfully make use of threatening, abusive, or insulting words or behaviour, to wit: "Bird whores with you." "You are unable to pay your house rent, so you whore with Bird, and he pays it for you," etc., towards Meta Galant, a native woman, with intent to provoke a breach of the peace, or whereby a breach of the peace may have been occasioned, at No. 2 Location, a public place in Kimberley. The prisoner pleaded "Not guilty." He was found "Guilty," and sentenced to pay a fine of £1 or to be imprisoned for seven days, with hard labour.

Mr. Lezard, attorney-at-law, who appeared for the defence, excepted to the summons, that it was not mentioned therein that the abusive language complained of was uttered in a public place.

Mr. Attorney Anders (for the prosecution) argued that No. 2 Location denoted a public place.

Exception overruled—the words "a public place" appearing on the original summons, and having been omitted from the copy apparently by a clerical error.

The evidence showed that there was a street between where the accused stood when he called first to complainant and the place where she was sitting. He was standing in front of his son-in-law's house, under the verandah. Complainant was sitting in front of her door, at a distance of about twenty yards from the accused. He seems afterwards to have crossed the road to speak to her. Two other persons heard the language complained of.

The Magistrate's reasons for his judgment were as follows: "I consider the language alleged to have been used by the accused towards the complainant to be abusive and insulting, and calculated to provoke a breach of the peace.

"It would appear that complainant and the accused were at the time in the open in front of certain houses, facing a street, in the location, and that the language complained of was shouted out by the accused to the complainant across the

said street in the hearing of the bystanders. The language I therefore deemed to have been uttered in a public place."

The accused appealed from the decision of the Magistrate to the High Court, which disallowed the appeal and upheld the judgment of the Magistrate. The remarks of Lange, J. (who heard the appeal), are as follows:

"There were three grounds on which this appeal was argued:

"1. That the Magistrate was wrong in overruling the exception raised in the Court below to the summons.

"2. That the words alleged to have been used by the prisoner were not abusive.

"3. That they were not uttered in a public place.

"It will be seen that the original summons annexed to the record alleges that the words were spoken 'at No. 2 Location, a public place in Kimberley,' but in the copy served upon the accused the words 'a public place' were omitted. I decided that the Magistrate rightly held this omission not to be fatal to the summons, inasmuch as the term 'No. 2 Location' in the copy served, sufficiently indicated the public nature of the place.

"On the second point I held that the expressions clearly proved to have been used by the accused towards the complainant were undoubtedly abusive in character, and calculated to provoke a breach of the peace.

"As to the third point, the location appears to be a large collection of huts, with open spaces used as streets or thoroughfares, between them, and it was across one of them that the accused shouted the abusive language towards the complainant, who was sitting in front of her hut. In all the circumstances, I was of opinion that the words were uttered in a public place in terms of the 10th section of the Police Offences Act."

Mr. Benjamin (for appellant): A location is not necessarily a public place. There are private places in it, as well as public.

[Buchanan, J.: The abusive words could be heard in the road, and that is a public place.]

That does not constitute a breach of section 10 of Act 27 of 1882. See *Queen v. Muller* (9 Sheil, 569). It is necessary that the language used should be calculated to provoke a breach of the peace in a public

place. See judgment of De Villiers, C.J., in *Queen v. Brown* (7 Juta, 101), *Queen v. Stevenson* (2 H.C., 428), and *Queen v. Perish* (3 H.C., 369). In *Queen v. Muller* it was held that the principles governing the decision in *Queen v. Brown* must not be further extended. Here there was a street between the parties, but the appellant was standing on his own private property and the woman was on hers. In *Queen v. Brown* one person was standing in a public place.

[De Villiers, C.J.: There there was no abuse in the street; but in this case there was a good deal of abuse across the street.]

That is not a contravention of the section; besides it is by no means clear that appellant was not on the woman's property when he used the abusive language. Then, again, nothing was said in the summons about the language complained of having been used in a public place. The Magistrate seemed to attach importance to the fact that people in the street heard what was said: that was quite immaterial. *Queen v. Brown* and *Queen v. Muller*. A location is not necessarily a public place. *Queen v. Moser* (4 Juta, 500). The summons framed as it is discloses no offence.

Mr. H. Jones (for the Crown) was not called upon.

De Villiers, C.J.: I think it can admit of no doubt that the street at all events was a public place; it belonged to the location. The huts of the complainant and the defendant were on both sides of that street. Outside the house on the one side stood the complainant, and outside the house on the other side stood the defendant, and the defendant then uttered the abusive words across the street. There does not appear to have been any barrier or wall separating the parties. It is only the complainant's statement which throws a doubt upon the matter, because she says there was no street, but it so happens that the ground on which she stood is open, and there is nothing to separate that ground from the street. A breach of the peace would ensue quite as easily from words used in this way where the parties stood on their own ground, as it would if they stood actually in the street. It was not like a person using abusive words in his own house and the words being accidentally heard outside. The defendant's words were intentionally used across the street. Any person passing could hear those words. To all intent and purposes

those words were uttered in the street, and under these circumstances the appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorney, J. J. Michau.]

BIDDULPH V. ADCOCK AND { 1902.
ANOTHER. { Feb. 7th.

Broker—Commission.

Where a broker had told his client that it was hopeless to attempt to sell certain property of the client to a man who subsequently purchased it direct from the client.

Held, that as in order to entitle a broker to commission there must be a contractual relation between the broker and the vendor, and as the sale must be completed through the agency of the broker, plaintiff was debarred from recovering brokerage by reason of the absence of these conditions.

This was an appeal from a judgment of the High Court of Southern Rhodesia pronounced on May 23, 1901, in an appeal from the Resident Magistrate's Court of Bulawayo, in which the present respondents, Charles Christopher Adcock and Thomas George Norton, carrying on business in co-partnership, were the appellants, and the present appellant, Walter Ernest Biddulph, the respondent.

The summons in the Magistrate's Court called upon

Walter Ernest Biddulph, of Bulawayo (hereinafter styled the defendant), to appear before the Court of the Magistrate of this district, to be holden at Bulawayo on Friday, the 3rd day of May, 1901, at ten o'clock in the forenoon, with his witnesses, if he has any, to answer Charles Christopher Adcock and Thomas George Norton, carrying on business in co-partnership at Bulawayo, under the style or firm of Adcock and Norton, brokers and commission agents (hereinafter styled the plaintiffs), in an action wherein the plaintiffs claim payment of the sum of £9, and thereupon the plaintiffs complain and say:

1. On or about the 1st day of February, 1901, the defendant placed certain northern half of Stand 267, Bulawayo, in plaintiffs' hands for sale on commission, at a minimum price of £200.

2. The plaintiffs thereupon interviewed one Hankin and certain other persons in Bulawayo, and offered them the said portion of stand for sale.

3. Subsequently, on or about the 18th day of February, 1901, as a result of the negotiations entered into by plaintiffs, the defendant sold the said portion of stand to the said Hankin for the sum of £180, and thereupon plaintiffs became entitled to their commission on such sale.

4. The usual and ordinary rate of commission payable to a broker on the sale of landed property is 5 per centum of the purchase price, which charge is fair and reasonable.

5. All times have elapsed and all things have been done to entitle plaintiffs to the payment of their commission on the said sale.

Wherefore the plaintiffs claim payment of the sum of £9, with costs of suit, which sum the defendant refuses to pay.

Wherefore the plaintiffs pray he may be adjudged to pay the same, with interest and costs of suit.

To this summons defendant pleaded as follows:

For a plea to the plaintiffs' claim:

1. The defendant admits paragraph 4 of the summons, and denies paragraph 5.

2. With reference to paragraph 1, the defendant admits that he placed the said half stand in the plaintiffs' hands for sale with a reserve price of £200, but says that this was in or about the month of November, 1900, and not in February, 1901. The defendant instructed the plaintiffs to submit any offer received for the said stand to him.

3. With reference to paragraph 2, the defendant admits that the plaintiffs interviewed Hankin and others with a view to selling the said stand, but says that, when he placed the said stand in the plaintiffs' hands for sale, he specially instructed them to see Hankin in the first instance, and that it was owing to his instructions that Hankin was interviewed.

4. The defendant admits that he sold the said stand for £180 to Hankin on or about the 18th February, 1901, but denies that such sale was the result of the nego-

tiations entered into by the plaintiffs with Hankin, and denies further that upon such sale the plaintiffs became entitled to commission.

5. The defendant says further that, at the request of the plaintiffs, he reduced the reserve price of the stand from £200 to £190 in December, 1900, and to £175 in January, 1901, but the plaintiffs failed to find a purchaser therefor.

6. That the only offer submitted by the plaintiffs was £150, which offer was submitted subsequent to the sale of the stand.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention, the defendant (now plaintiff) craves leave to refer to the foregoing plea, and says further:

1. That when he placed the said stand in the plaintiffs' (now defendants') hands for sale he specially instructed them to offer the stand for £200 to the said Hankin, and, if that amount was not obtainable, to submit any other offer to him for consideration.

2. That the plaintiffs (now defendants) offered the stand to Hankin for £250, and, when it was refused at that price, they failed and neglected to offer the same at £200, in terms of their instructions.

3. That if the plaintiffs (now defendants) had offered the stand for £200, as instructed, the said Hankin would have purchased, and defendant (now plaintiff) would have received the sum of £190, after deduction of commission.

4. That in consequence of the neglect of the plaintiffs (now defendants), the defendant (now plaintiff) has suffered damage in the sum of £10, being the difference between the sum of £190 abovementioned and £180, the price received for the said stand.

Wherefore the defendant (now plaintiff) prays for judgment for the sum of £10 with costs.

Mr. A. Welsh joins issue on 2, 4, 6, admits paragraph 3, denies 5.

The plea in reconvention.

Denied that if £200 not obtainable, plaintiffs were to submit other offer; and joined issue on all other points.

Judgment was given for the defendant. The following were the Magistrate's reasons:

In this case I may say at once that where there is any conflict of evidence I accepted Biddulph's as being correct, as against Norton. The latter was a most unsatisfactory, vague, irresponsible kind of witness. He was utterly wrong about dates, and as he himself says (page 5): "I had entirely forgotten the whole thing until I heard the stand was sold."

I found as facts (1) that the matter had been placed in plaintiffs' hands in November, and not at the end of January or the beginning of February; (2) that Norton had told defendant "that it was hopeless." Although Norton denies this, he states (page 6) "that Hankin had told him he could not go in for it."

It is admitted that plaintiffs did not introduce the parties (*vide* paragraph 3 of plea), but for some reason defendant thought it better that Hankin, the owner of the other half stand, should be approached by a broker. It is true that defendant did not know Hankin's name, but this he could easily have ascertained, as indeed he offered to do, when he put the matter in plaintiffs' hands. It was only after plaintiffs had quite failed to do anything that defendant directly approached Hankin, and even then without avail, as Norton said the matter was hopeless, and it rested there until another set of circumstances arose. Hankin thought cottages for prostitutes were going to be put up next door to him, and then, and only then, decided to buy.

He would have done the same if he had never seen Norton. He knew defendant was the owner, and could have approached him in any case.

The authorities were fully argued, and will, no doubt, be more fully argued again, so I will merely say that, in my judgment, the sale was not the result of any introduction or negotiations of the plaintiffs, but resulted from a new set of circumstances (the parties being known to one another), and consequently the plaintiffs are not entitled to commission.

It must be remembered, too, that plaintiffs had had the matter in hand for nearly three months, and defendant was justified in assuming that they had given it up when Norton told him it (Hankin) was hopeless.

From this judgment the plaintiffs appealed to the High Court of Rhodesia.

In the High Court, Mr. Justice Vincent reversed the Magistrate's decision, allowing the appeal with costs, and Biddulph now appealed to the Supreme Court.

Mr. Justice Vincent gave his reasons for his judgment as follows: In this case I was of opinion that the parties in the first instance were brought together through the introduction of Adcock and Norton, and that the subsequent transaction was attributable to this introduction. The purchaser, in my opinion, became aware of the desire on the part of the defendant to sell through Adcock and Norton. The fact that the purchaser had given up all idea of dealing until he saw the two men examining the premises did not affect the question. The case of *Macnochie's Executrix v. Bidwell-Edwards* (2 Sheil 155), in my opinion, had no application to this case, for it is clear that in the case quoted it was the advertisement which caused the sale. The Magistrate, I think, erred in saying that the two men who viewed the property were the *causa causans*; he, I think, confused *motive* with *causa causans*. If the purchaser had not been requested by the respondent to approach him personally he would have gone to the appellants, and the deal would have been carried through by them. The parties having then come together through the introduction of appellants, and the sale having been effected while the mandate was still running, I was of opinion that the commission was due.

Mr. Schreiner (for appellant): In this case there was neither an introduction by a broker nor business done through the instrumentality of a broker. Norton had told Biddulph that it was "a hopeless business," and Biddulph then went to Hankin direct. Norton had said that Hankin found it impossible to do business with him. If a broker finds it impossible to do business, his principal is quite justified in doing business direct. Hankin knew that Biddulph was the owner of the property (see p. 6 of the Record). McKendrick suggested that Hankin should go straight to Biddulph. Though the sale was not withdrawn Hankin had ceased to be the broker. I cannot understand how the judge in the Court below distinguished this case from

Maconochie's Executors v. Edwards (9 Juta, 204). That case is quite in point. There the sale was concluded in consequence of an advertisement. Here it was in consequence of seeing two men looking at the property. They were on exactly the same footing as the advertisement in the other case. The original introduction of Norton to Hankin had nothing to do with the sale. The judge in the Court below drew a distinction between motive and *causa causans*. I must confess that I cannot follow this distinction. The point is "does the sale result in any sense from the action of the broker?"

[Buchanan, J.: There does not seem to be much difference on the facts, but rather on the interpretation of those facts.]

The broker's efforts did not tend to effect the sale. Hankin was off and Norton's introduction had nothing to do with the sale of the property. This was the finding of the Magistrate, and a Magistrate's finding on facts cannot be revised.

Mr. Searle (for respondents): There are several fallacies in my learned friend's argument. The fact that the principal told the broker that he was going to do business directly terminated the agency. The case is not at all like *Maconochie's Executors v. Edwards*. Here the broker introduced the parties.

[De Villiers, C.J.: For what does a broker get his commission?]

For doing business, but here the broker complains that he could do no business, and surely, in that case, the vendor might have taken the business out of his hands. In *Maconochie's* case the broker got his decree on the ground that he had worked hard and had been successful. It was not so in this case. (See top of p. 8 of the Record, and the cross-examination near the bottom; also the negotiations on p. 5.) As long as property is in a broker's hands it must be sold through him. In this case the broker brought the parties together, and when this is done and a sale is effected between them thereafter, the broker must be paid. Hankin did not object to the transaction going through a broker; he wished that it should do so. If a broker tells A that B wants to sell, that is an introduction. *Roux v. Brittain* (2

Sheil, 169). In this case the matter had never been taken out of the broker's hands. If at a certain stage of the negotiations a broker tells his principal that the person introduced will not buy and ultimately this same person does buy, the broker is entitled to his commission. *Mansell and Another v. Clements* (9 L.R.C.P., 139). Some of the Magistrate's reasons are not quite correct, as the evidence does not bear them out. It is not admitted that respondent did not introduce parties, and Hankin's motive for purchasing is quite immaterial. The question is, would he have purchased without Norton's intervention? The plaintiff got information from Norton that Biddulph wanted to sell. See *Kynaston v. Nicholson* (8 L.T.R.N.S., 671), *Wilkinson v. Alston* (41 L.T.N.S., 394). This latter case is very much in point, as the broker had actually been told to take no further steps, yet, as a sale followed, he was held to be entitled to his commission. See also the judgment of Watson, L.J., in *Toulmin v. Millar* (58 L.T.N.S., 96); also *Green v. Bartlett* (14 C.B.N.S., 681). Norton could and would have sold the property at the price at which it was finally sold, but he was instructed to ask £200 for it, whereas it was afterwards sold for £175. Although in this case the broker did not actually effect the sale, he certainly brought the parties together. In addition to cases already cited see *Moir v. Watts* (5 H.C., 109), *Goldschmidt v. Adler* (3 Juta, 117), *Woolley v. Hunt and Another* (7 H.C., 99), *O'Brien v. Simpson* (12 E.D.C., 77). This is one of the most recent cases in point.

Mr Schreiner (in reply) was not called upon.

De Villiers, C.J.: When a question of fact is at issue between the parties, the Court must be guided by the view taken of the case by the Court which tried it originally, and here the Magistrate, in his reasons for judgment, says that "where there is any conflict of evidence, I accepted Biddulph's as being correct, as against Norton. The latter was a most unsatisfactory, vague, irresponsible kind of witness. He was utterly wrong about dates, and as he himself says, 'I had entirely forgotten the whole thing, until I heard the stand was sold.'" Continuing, the Magistrate says: "I found as facts

(1) that the matter had been placed in the plaintiffs' hands in November, and not at the end of January or the beginning of February; (2) that Norton had told defendant that it was hopeless. Although Norton denies this, his own evidence goes to show that it was so; for he states that Hawkins had told him he could not go in for it." The test of the case last mentioned by Mr. Searle was that there must be a contractual relation between the original introducer and the ultimate purchaser. Here, as far as the introduction in the first place is concerned, it is not so clear that it was the plaintiffs who introduced the parties, but that it was the defendant's own suggestion that the plaintiffs should communicate with Hankin, who was part owner of the stand. The plaintiffs communicated with Hankin, but they found themselves unable to come to a sale, and thereupon they told the defendant that a sale to Hankin was hopeless, and it was only after this statement to defendant that the latter communicated with Hankin direct. Now it is quite impossible, under such circumstances, to say that there is a contractual relation between the original introducer and the actual vendor to Hankin. That relation was put an end to by the statement made by the plaintiffs to defendant that a sale to Hankin was hopeless, and quite justified the defendant in thereafter communicating direct with Hankin. The matter was put somewhat differently in some of the cases cited. In the case of *Maconochie's Executrix v. Bidwell Edwards*, the question put was: Was a sale completed through the agency of the broker? That always must be the test, and if they applied it in this case, how could it possibly be said that this particular sale was completed through the agency of the broker, when in the interval the broker had himself informed the seller that there was no chance of completing the sale. For this simple reason, I am of opinion that the High Court ought not to have interfered with the decision of the Magistrate. The case was mainly a question of fact, and upon every question of fact the Magistrate found in favour of the defendant. The appeal will be allowed, with costs in this court and the court below, and judgment entered in the Magistrate's Court for defendant, with costs.

Their lordships concurred.

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[Appellant's Attorneys, Messrs. Walker and Jacobsohn; Respondent's Attorneys, Messrs. Findlay and Tait.]

BOUSFIELD V. THE DIVISIONAL COUNCIL OF STUTTERHEIM. 1902. Feb. 7th. „ 13th.

Payment of Debt by Stranger—
Arrear Rates—Tender—Act
28 of 1881.

Where a person, not being the owner of property in respect of which arrear rates are due to a Divisional Council, tenders payment of such arrear rates, the Council is not entitled to claim the attachment and sale of the property under Act 28 of 1881, if the person making the tender makes it in the name and on behalf of the owner or, if having a bona fide claim to transfer, he makes the tender on his own behalf.

This was an appeal against a judgment of the Hon. the Acting Judge-President of the Eastern Districts Court in Chambers on September 18, 1901, in an application between the Divisional Council of Stutterheim and Frederic Henry Bousfield.

In the Court below the petition of the Divisional Council of Stutterheim stated:

1. That your petitioners are a Divisional Council constituted under and governed by the Divisional Councils' Act, No. 40 of 1889, and as such are lawfully empowered and authorised to assess and levy upon all immovable property situated in the Division of Stutterheim (except that which by law is exempt from the payment thereof such rates as to them shall seem necessary for their purposes, and that they have every year since their existence assessed and levied according to law a rate upon all such immovable property, and duly and publicly notified the amount of such rate

and the date upon which it became due and payable.

2. That your petitioners annex hereto a schedule of immovable properties in the said division of Stutterheim, upon all of which rates duly assessed and levied as aforesaid by your petitioners have remained unpaid to your petitioners for the space of five years and upwards, and setting forth the registered owners of the said properties and the amount of rates due and owing in respect of such properties.

3. That the immovable properties appearing in the said schedule have all been abandoned, deserted, and left derelict, and the whereabouts of the owners thereof are unknown to your petitioners, although diligent search and inquiry have been made by them to ascertain the same.

4. That everything in your petitioners' power has been done to trace the owners of said immovable properties and to obtain payment of the rates due and owing in respect thereof but without success.

5. That your petitioners are unable to recover the rates in respect of the said immovable properties, and in all probability will not be able to recover any future rates levied and assessed thereon owing to the circumstances aforesaid.

6. That your petitioners are therefore desirous of having the said immovable properties declared derelict and attached and sold in terms of the Derelict Lands Act, No. 28 of 1881.

Therefore your petitioners pray that your lordships will be pleased to declare the said immovable properties set forth in the schedule hereto annexed as aforesaid derelict, and to order them to be attached and sold in terms of the said Derelict Lands Act, No. 28 of 1881, or to make such other order or to grant such relief as to your lordships shall seem fit.

Dated at Stutterheim, on this 10th day of June, 1901.

Schedule referred to in foregoing petition:

Description of Property.	Registered Owner.	Amount of Rates Owng.
Lots 1 and 2, Block I in the village of Stutterheim	Louis Keifer	£1 2 2
Lots 4, 5, near Ohlsen, Division of Stutterheim	Heinrich Eygers	1 10 6
Lot 9, Block I, in the village of Stutterheim	Joseph Goler	0 17 2
Lot 6, Block F "	Johann Hansen	0 10 6
Lot 9, Block D, near "	Johann Hansen	0 1 10
Lot 27, near Ohlsen, Division "	Theodor Korner	0 9 0
Lot 2, Block U, in the village of "	Christian Lemkuhl	0 13 6
Lot 4, Block W "	Thomas Mollerup	1 6 11
Lot 3, Block I "	John Williams	0 14 5
Lot 6, Isidenge, Division "	Midawa Qweni	2 5 2
Lots 6 and 7, Block B, in village "	William Dickson and Charles Arkoll Dickson	1 5 1

For the Divisional Council of Stutterheim.

F. E. PHILPOTT, Chairman.

I, Frederick Edward Philpott, Civil Commissioner and Resident Magistrate of Stutterheim and chairman of the Divisional Council of Stutterheim, make oath and say as follows: That all and singular the allegations contained in the foregoing petition are true in substance and in fact to the best of my knowledge, information, and belief.

F. E. PHILPOTT.

Sworn at Stutterheim this 10th day of June, 1901, before me,

M. W. R. RUSHTON, J.P.

The affidavit of Frederick William Kekewich Wyld, of Stutterheim, was as follows:

1. I am the secretary and treasurer of the Divisional Council of Stutterheim, and have held such position for the last twenty years.

2. I have read the petition of the Divisional Council of Stutterheim in the above matter, dated 10th June, 1901, and have examined the schedule attached thereto.

3. To the best of my knowledge and belief all the properties mentioned in the said schedule have been abandoned, deserted, and left derelict, and the whereabouts of the owners thereof are unknown.

4. Rates have remained unpaid to the Divisional Council of Stutterheim for the space of five years and upwards in respect of all the said properties, and that the amounts set forth in the said schedule as due and owing to the said Divisional Council for the rates in respect of the said properties are correct.

The affidavit of Alphonso Allen de Beer, of Stutterheim, was as follows:

1. I am a member of the Divisional Council of Stutterheim, and have been such for the last twelve years.

2. I have resided in Stutterheim for the last eighteen years, and am well acquainted with all the immovable property in the division of Stutterheim.

3. I have read the petition of the Divisional Council of Stutterheim in the above matter, dated 10th June, 1901, and have examined the schedule annexed thereto.

4. All the properties mentioned in the said schedule have been abandoned, deserted, and left derelict, and the whereabouts of the owners thereof are unknown to the best of my knowledge and belief, and rates have remained unpaid to the Divisional Council of Stutterheim for the space of five years and upwards in respect of all the said properties.

Upon this petition and affidavits a rule nisi was issued, and on the return day the present appellant filed the following affidavit:

1. I am a law agent practising at Stutterheim and also the Town Clerk of the Municipality.

2. I have read the applicants' petition and other papers filed of record.

3. In regard to lots 1 and 2, block I., mentioned in the schedule attached to the petition I deny the allegations contained in the petition with the exception that the rates were unpaid.

4. The said lots 1 and 2, block I., were originally granted unto one Louis Keifer, as will appear in the two deeds of grant hereunto annexed marked A and B and dated respectively 5th May, 1865

5. Thereafter the said Louis Keifer became insolvent, and one Wilhelm Emmerich, then residing at Stutterheim, bought the said two lots, but omitted to take transfer

6. From the year 1889 to 1892 I acted as the agent of the said Wilhelm Emmerich, and in 1895 I purchased four other lots of ground from him, and he then requested me to sell his remaining property, namely lots 1 and 2, block I.

7. I had offers for the said two lots, but when it became known that transfer had never been taken by the said Emmerich from the said Keifer's insolvent estate, intending purchasers withdrew, knowing that the cost of transfer would exceed the value of the said lots.

8. Later on the said Emmerich died, leaving a joint will with his wife Katherine Elizabeth Emmerich, of which copy is attached, marked "C."

9. In January, 1899, I received an offer of purchase of the said two lots from one Inspector Wilson, and by letter dated 13th January, 1899, annexed marked D, communicated it to the widow Emmerich, and received a reply, dated January 18, 1899, annexed marked E enclosing the titles to the said two lots.

10. Thereafter in June, 1899, I received a further letter from the widow (letter mislaid), and on the 21st of that month wrote letter annexed marked F, saying that if Wilson did not take the said two lots I would take them myself at £20, and my purchase was subsequently concluded, and later on I received letter annexed marked G, dated 5th July, 1899, giving information as to means of obtaining transfer, but shortly afterwards the present war broke out and made transfer impossible for the time.

11. On the 11th April, 1900, Mr. A. A. de Beer, member of the applicant Council, came to me about the said lots, and told me that he was anxious to buy them. He has since purchased four lots adjoining these. I then told him that I had al-

ready bought them myself, so that he (Do Beer, a Councillor) knew that the lots belonged to me. About the same time I often had conversations with the secretary of the Council, F. W. Wylde, about my purchase of the said two lots, and he also knew that the lots belonged to me.

12. Afterwards, on the 5th July, 1901, I heard that applicants intended to apply to have the said two lots, with others, declared derelict, and I at once wrote them letter annexed marked H, and in reply received letter annexed marked I.

13. On the 30th July, 1901, I again wrote to applicants, letter annexed marked J, pointing out that they were not acting in good faith, as they or their legal advisers had previously shown me a list of properties to be declared derelict which did not include lots 1 and 2, Block I, which had been added to the list at the last moment.

14. On the 1st August I again wrote to the applicants, copy annexed marked K, tendering payment of any rates due in respect of the two lots, and received their reply, dated 2nd August, annexed marked L.

15. I say that it was within the knowledge of the Council that the said two lots belonged to me, and that I have never declined to pay the rates, but tendered them immediately I knew what were in arrear, and further that the said lots were not left derelict.

After argument by counsel, the Acting Judge-President (Hon. W. P. Schreiner, K.C.) made the rule absolute, the following being his reasons: I have a communication from the Registrar of the Eastern Districts Court intimating that an appeal to the Court of Appeal has been noted against a decision of the Eastern Districts Court sitting in Chambers, delivered on the 18th September, 1901 in the above matter, and I am asked to furnish a statement of reasons for the decision. I have before me a printed copy of the record. The Divisional Council of Stutterheim had obtained on petition a rule nisi under the Derelict Lands Act No. 28 of 1881 and Act No. 24 of 1887, calling upon persons having or pretending to have any right or title to certain properties situated in the village of Stutterheim, to show cause why these properties should not be declared to be abandoned and left derelict, and why they should not be ordered to be at-

tached and sold to satisfy rates due and unpaid for the space of five years.

Amongst the properties affected were lots 1 and 2 Block I. in that village, which were registered in the name of Louis Keifer.

Mr. Bousfield, now the appellant, appeared by counsel to show cause against the rule as affecting these two lots. He filed affidavits to which the Divisional Council replied. After a postponement the matter came before me finally on the 18th September at a sitting in Chambers of the Eastern Districts Court. It was proved to my satisfaction that the lots were abandoned, deserted, and left derelict, and Mr. Bousfield's claim to be regarded as the owner of the lots, in my opinion wholly failed. He alleged a purchase from one Mrs. Emmerich whose deceased husband had purchased the lots in the insolvent estate of Keifer. In support of his claim he attached certain letters and relied on annexures D, E, F, G, as proving his allegation. He had in 1899 entered into negotiations on behalf of Inspector Wilson for the purchase from Mrs. Emmerich of the lots in question. I could not find in the correspondence any proof of an actual concluded sale to Mr. Bousfield personally. But he alleged in paragraph 10 of his affidavit, after referring to that correspondence "my purchase was subsequently concluded." This allegation I did not find to be at all credible seeing that there was no suggestion of any later correspondence or that he and Mrs. Emmerich or her son had met and concluded the bargain. It appeared to me that, until after the Council took steps under the Act, Mr. Bousfield never took up the position that he was the buyer of the lots, and the affidavits filed for the Council appeared to me to afford more satisfactory evidence of his attitude than the affidavit of Mr. Bousfield. It was not possible to conclude from those affidavits that Mr. Bousfield had established his claim to be regarded as owner of the lots in question, as he had failed in establishing that claim I held his offer to pay arrear rates to be a voluntary offer which the Council was not legally bound to entertain. The Council I thought could not be forced to permit the uncertainty of the title to continue indefinitely. The lots were of small value and it is right to

mention that in reply to an inquiry by me, counsel for Mr. Bousfield did not wish to press for an opportunity to file pleadings under section 9 of the Act for the trial of the client's claim. Holding, therefore, that the claim had failed, the Court ordered that the rule *nisi* should be made absolute and that the present appellant should pay the costs occasioned by the opposition.

Mr. Searle (for appellant): I rely chiefly upon the statements made in appellant's affidavit. In their answering affidavits the Council impeached the purchase by De Beer, and said that he had not objected to the valuation. The Court will never declare lands derelict when there is an owner who wants to sell.

[De Villiers, C.J.: The person who wishes to sell is not the owner, but a purchaser from a purchaser who bought from the owner.]

The lands are not derelict; they are being looked after. The Council has made no attempt to trace the owners, though there are affidavits from persons who stand registered as owners in the Divisional Council books. The Council could have recovered the rates from De Beer, since the owner and the occupier are both liable for rates (Act 40 of 1889, section 269).

[De Villiers, C.J.: Who is the occupier?]

Bousfield. He cannot get out of paying the rates. There are people in Johannesburg who are now arranging to send down the title deed to him. Bousfield made a tender of the rates.

[Buchanan, J.: If he had done so on behalf of Emmerich there might be something in it.]

There may be a doubt as to who is the owner of the property, but it certainly is not derelict. De Beer himself wanted to buy it, and now he cannot come and say that he does not know that there is any owner, and that the land is derelict. In 1900 De Beer tried to purchase the property through Bousfield. Bousfield refers in his affidavit to this transaction. The correspondence between Emmerich and Bousfield shows that the land is not derelict. See *The Bank of Africa v. Daniel* (3 Sheil, 103). In that case the Court allowed a very distant relative of a former owner to put in a claim. Bousfield has a clear *locus standi* to object, if only as representing

the Emmerichs, and the Council could have recovered their rates under section 269 of Act 40 of 1889.

Mr. Buchanan (for respondents): Bousfield is claiming this property as his own. He is not coming in as one of the outside public. But he is not the owner, for there is no evidence of any sale from the Emmerichs to him having been concluded. In 1856 Bousfield was only acting as agent for Wilson, and in his letter of June 21 he only offered to take the lots in the event of Wilson refusing to take them. Then again he has not paid for this property and does not say that he has done so. If he bought the property why was no declaration of purchaser and seller drawn up in terms of Act 5 of 1884? He had only six months in which to get transfer unless he wished to incur the fine (section 5, Act 5 of 1884). Why again did not he, a Town Clerk, who is presumed to know something of these matters, not ask the Council to register the property in his name instead of Emmerich's? De Beers account of the conversation does not at all agree with Bousfield's. Bousfield clearly not being the owner of this land, he has no right under the Derelict Lands Act to show cause. No one can show a title to the land; it is vacant, unfenced, and, in short, derelict. Bousfield had been agent for the Emmerichs, and yet in 1900 he stated that he did not know where they were; he does not even say that he knows where they are now. Surely nobody can be allowed to make himself owner of a piece of land by the simple process of paying rates thereon as owner. Bousfield has previously refused to pay rates on behalf of Emmerich (see Wylde's affidavit, p. 10 of the record, paragraph 3).

Mr. Searle (in reply): Bousfield's tender of rates was quite unconditional; he did not tender as owner (see Bousfield's letter of July 5, 1901, record page 16).

Cur. Adv. Vult.

Postea (February 13).

De Villiers, C.J., in giving judgment, said: This is an appeal against an order of the Eastern Districts Court making absolute a rule *nisi* previously granted under Act 28 of 1881 for the attachment and sale of certain two lots of land in the village of Stutterheim to enforce the payment of certain arrear rates, which, however, the appellant has tendered to pay. The rule was granted

upon the affidavit of the secretary of the respondent Council to the effect that the lots had been abandoned, deserted, and left derelict, that the owner thereof could not be found, and that the Divisional Council rates had remained unpaid for the space of five years and upwards. On the return of the rule the appellant objected to its being made absolute in regard to the two lots in question on the ground that they were not derelict lands, he having purchased them from the executors of one Emmerich, who had purchased them from one Keifer. From the appellant's affidavit it appears that the lots are still registered in the name of Keifer, that in 1895 the appellant, as agent of Emmerich, endeavoured to sell the lots, but failed; that after the death of Emmerich he again communicated with the executors, mentioning one Wilson as a probable purchaser, and that the answer was that the executors were prepared to sell provided the appellant handed to them £20 clear of all expenses. So far there is no dispute between the parties, but the appellant further alleges that, failing a purchase by Wilson, he himself purchased the lots, and this purchase is not admitted by the Council. In support of his statement that he had purchased the lots, the appellant produced the copy of a letter to the executors, in which he asked for certain particulars as to the property, and stated that if Wilson did not take the erven he would himself take them for £20. On behalf of the respondent Council it is objected that the appellant has produced no proof that his conditional offer was accepted, but the reply written on behalf of the executors on the 5th of July, 1899, raised no objection to the conditional nature of the offer, but proceeded to give some of the particulars asked for. In fact, Wilson did not buy the lots, and the condition upon which the appellant had offered to buy was fulfilled. I am satisfied from the terms of the executors' reply that they did not object to the appellant having the lots for the same price for which they had offered it to Wilson, and that, if the Transvaal war had not intervened, the sale to the appellant would in all probability have been completed. He appears to me, at all events, to have a *bona fide* claim against the executors for the transfer of the lots. The facts that he did not claim to be placed upon the

valuation roll, and that he did not tender to pay the arrear rates until after the rule nisi had been published, do not prove that his claim against the estate of Emmerich was a dishonest one, for he may well have believed that until he had received transfer, he was not legally liable to pay the rates. In fact, he did, before the order appealed against was made, tender to pay to the Council all the arrear rates on the two lots and his share of the costs already incurred by the Council, and the question to be determined is whether the Court below was justified in ordering the attachment and sale of the lots for the purpose of enforcing a payment, which the appellant was ready and willing to make without such attachment and sale. There can be no doubt that by our law a payment made by a third person to a creditor on behalf of a debtor, even if the debtor is ignorant of the payment or objects to it, constitutes a valid discharge of the debt. *Voet* (46, 3, 1) says that this doctrine would not apply to the discharge of an obligation which is in its nature such that it can only be properly performed by the debtor in person, but the obligation to pay rates is clearly not of such a nature. It does not, of course, follow that the creditor is bound to accept the payment, and upon this point *Pothier* (on Obligations, sec. 464) has made the following pertinent observations: "The question whether a stranger who has no authority for the purpose, either specially or by reason of his situation, nor any interest in discharging the debt, can oblige the creditor to receive the payment, is attended with difficulty. . . We must look for the decision of this question to the law—*Digest* (46, 3, 72)—which decides that the offers made to the creditor by any person whatever, in the name and without the knowledge of the debtor, for the payment of his debt, places the creditor *en demeure*," so as to put an end to any action which the creditor may have commenced. It is necessary, however, that the tender made by a perfect stranger should be made in the name of the debtor, and, if the appellant in the present case had not shown that he had a *bona fide* claim to obtain transfer, his tender made in his own name and on his own behalf, and not on behalf of Emmerich, might have been properly ignored by the Council. The fact, however, that the appellant had such a

bona fide claim imposed the duty on the Council to accept the tender, leaving it to the appellant to make good his claim against Emmerich. It certainly was not the duty of the Council, after the appellant had tendered the rates and his share of the costs, to enter into an inquiry as to the validity of the appellant's claim against Emmerich, unless perhaps the claim was on the face of it palpably dishonest. The object of the Act, as stated in the preamble, is to provide for the speedy and inexpensive recovery of arrear rents, rates, and assessments, and if a tender for the payment thereof is made by a *bona fide* claimant, whether he be the owner or not, the public body should accept the money, and, if it refuses, the Court should not, after such refusal, order the attachment and sale of the property. The learned judge, in his reasons, says: "It was not possible to conclude from the affidavits that Mr. Bousfield had established his claim to be regarded as owner of the lots in question. As he had failed in establishing that claim, I held his offer to pay arrear rates to be a voluntary offer which the Council was not legally bound to entertain. The Council, I thought, could not be forced to permit the uncertainty of the title to continue indefinitely." I do not, however, find anything in the Act to justify the view that only a person having a valid claim to be regarded as owner has a *locus standi* to object to the attachment and sale of land under the Act. Nor do the sections relating to the recovery of arrear rates confer on the public body any right to insist upon certainty of title. The person from whom the appellant says he bought the property was never the owner of the property, and yet the respondent Council placed his name on the valuation roll, and for several years received rates from him. The appellant does not claim to be the owner, but he alleges that he has a claim against the executors of Emmerich to compel them to do what is necessary to transfer the ownership to him. If his claim is a valid one, the executors will first have to obtain transfer from Keifer, and then gave transfer to the appellant, and until then he will have no claim to be regarded as the owner. But his interest in the property was surely such as to justify the Court

in staying its hand and refusing to order the sale and attachment of the lots for the purpose of enforcing a payment which he was perfectly ready and willing to make. Of course if there was such an apparent want of *bona fides* on the appellant's part as to make it reasonably certain that he will not succeed in obtaining transfer from Emmerich, the Court would have been justified in refusing him any assistance, but I do not gather from the reasons given by the Court below that it took this extreme view of the appellant's conduct. That Court had no better opportunity than this Court has for judging of the appellant's conduct, and as the affidavits satisfy me that the appellant's claim for transfer is an honest one, I am of opinion that the appeal should be allowed, and the order for the attachment and sale of the two lots in question should be discharged with costs in this Court and in the Court below.

Buchanan, J., said: I concur, and I have only one remark I would like to add to those of his lordship. I think the learned Judge in the court below mistook two different procedures under the Derelict Lands Act. There is a procedure for the recovery of rates, and there is also a procedure for enabling a person to establish his title to land of which he claims transfer. This is not a case in which Bousfield claimed transfer or registration of the land in his name, but a claim by the Divisional Council for the payment of rates on property in which he (Bousfield) claimed an interest. If the Court had to decide with the information before it as to whether Bousfield was the owner, he had not established such a claim as would have entitled him to apply for an order under the Derelict Lands Act to have the property transferred into his name. That is a totally different procedure from one to recover rates.

Maasdorp, J., also concurred.

[Appellant's Attorneys, Tredgold, McIntyre and Bisset; Respondent's Attorneys, Innes and Hutton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

MACDONALD V. MACDONALD. { 1902.
Feb. 10th.

Mr. Benjamin, who appeared for the plaintiff, said that originally this was an action for a declaration of nullity, or in the alternative, for an order for restitution of conjugal rights. At the time the action was instituted, the plaintiff had certain information that his wife had been previously married. Consequently it was thought advisable to draw the declaration in the alternative. They had not been able to get evidence that the first husband was living at the time of the second marriage, and so they had abandoned that portion of the case.

After formal evidence as to the marriage had been given by Francis Henry le Sueur, clerk in charge of the marriage register,

Alexander Macdonald, the plaintiff, was called. He said he was married to the defendant on the 22nd December, 1899, at Cape Town. After the marriage, information came to witness that the defendant's first husband was living. He taxed the defendant with this, and defendant said that she had a letter from a friend stating that her first husband had died since the marriage. In April, 1900, defendant sailed by the S.S. Warri-gal for Sydney. Witness did not object to her going. He thought at the time that her first husband was alive. He had since made inquiries as to the first husband, but had not been able to obtain information. He therefore abandoned his petition for declaration of nullity.

An order was granted for restitution of conjugal rights as prayed, defendant to return on or before the 15th May next, or to show cause on the last day of the May term. Personal service was ordered to be made, if possible, otherwise publication in an Australian paper, and in the "Government Gazette."

VAN DER SPUY V. KETS. { 1902.
Feb. 10th.

This was an action to recover the sum of £250, together with interest thereon and costs of suit.

The declaration was as follows:

1. The plaintiff was a farmer residing at Oakdale, D'Urban-road, in the Cape

Division; the defendant is a hotelkeeper and storekeeper, residing at Kuil's River, in the division of Stellenbosch.

2. In or about the month of October, 1900, the plaintiff was indebted to the defendant in the sum of £100. The defendant, at the said date, was in want of funds, and thereupon requested the plaintiff to give him a promissory note for £400, payable at the Stellenbosch District Bank.

3. The plaintiff agreed to the above, and on or about the 24th October, 1900, the plaintiff gave to the defendant a promissory note for £400, payable four months after date.

4. On the maturity of the said note it was reduced by the sum of £150, plaintiff paying £100, and thus discharging his indebtedness to the defendant, and defendant paying £50 in to plaintiff's account in the Stellenbosch District Bank, where the said note had been discounted by the defendant. The plaintiff thereupon, at the request and for the further accommodation of the defendant, agreed to renew the said promissory note for the balance, viz., £250, and on February 23, 1901, the plaintiff signed a promissory note for the sum of £250 in favour of the defendant, due four months after date, and payable at the said bank.

5. The said note for £250 was discounted by the defendant at the said bank, and thereafter the defendant, having failed to take up the said note at maturity, the plaintiff paid the same to the said bank.

6. The plaintiff is entitled to recover from the defendant the amount of the said note, to wit, £250, with interest from June 23, 1901, the date of the maturity of the said note, and he has called on the defendant to pay him the said amount, but defendant has neglected and refused so to do.

The plaintiff claims: (a) the sum of £250, with interest from the 23rd June, 1901; (b) alternative relief; (c) costs of suit.

The following plea and claim in re-convention was filed by the defendant.

1. Defendant admits paragraph 1 of the declaration.

2. In the year 1900 the parties entered into a joint venture of purchasing horses and mules, for the purpose of sale to the military authorities, and certain horses and mules were so bought and sold. Upon notice from the said authorities ending the said buying by them, the

parties met and discussed the accounts between them, and an account was mutually stated and settled between them, showing the plaintiff indebted to the defendant in the sum of £350.

3. The plaintiff was further indebted to the defendant in the sums of £148 and £61, due respectively for money paid by defendant for and on behalf of the plaintiff, and for commission due on the sale of certain bullocks, sold for and on behalf of the plaintiff, through Messrs. Woodhead, Plant and Co., and paid by defendant.

4. Thereafter, in payment of the said debt, the plaintiff signed a promissory note for £100 in favour of Wilson, Son and Co., the proceeds of which the defendant received, and which, at maturity, was paid by the plaintiff.

5. Thereafter the plaintiff in part payment of the balance on the said debt, and by mutual arrangement, signed a promissory note for £400 in favour of the defendant, and made payable in the Stellenbosch District Bank, of which defendant received £300 and the plaintiff received £100, he being in want of money at the time.

6. At the due date thereof the plaintiff was unable to meet the said note, and it was agreed at the instance of the plaintiff, who was not able to pay more than £100, that the defendant should advance the plaintiff £50 to assist him in making part payment and renewing the said note, such being the terms as stated by the plaintiff upon which the bank would renew the note. The defendant advanced £50, and the plaintiff paid in addition £100, leaving a balance due on the note of £250, for which the plaintiff renewed the said note, and which is the note referred to in the declaration. Save as aforesaid, the defendant denies the allegations in paragraphs 2, 3, 4, 5, and 6 of the declaration.

7. The plaintiff is indebted to the defendant in the sums of £350, £148, £61, £50, and £10 17s. 4d., advanced by defendant for discount, and stamps on the said £400 note, or £619 17s. 4d. in all, less the sums of £300 and £100 paid by plaintiff, leaving a balance due by plaintiff to defendant of £219 17s. 4d.

Wherefore the defendant prays that the plaintiff's claim may be dismissed.

For a claim in reconvention, defendant (plaintiff in reconvention) claimed

£219 17s. 4d., with interest *a tempore morae*, and costs of suit.

In his replication and plea to the claim in reconvention, plaintiff (defendant in reconvention) admitted that there was a joint venture as alleged, but denied that the accounts between them were ever stated and settled as alleged, or that he owed defendant £350 as alleged. He said that defendant made the purchases of the horses according to agreement, and brought them to him, and that he (Van der Spuy) paid for all. He said he sold certain bullocks to Messrs. Combrinck and Co., but defendant had nothing to do with that. He admitted signing a promissory note for £100 in favour of Wilson, Son and Co., but denied that this was in payment of the debt alleged, and said that the amount was for defendant's share of profits realised from the sale of the horses and mules. He said the £400 note was an accommodation note. He denied being unable to meet the note. He denied the claim in reconvention.

Mr. Searle, K.C. (with him Mr. Wilkinson), appeared for the plaintiff.

Mr. Schreiner, K.C. (with him Mr. Uppington), for the defendant.

Mr. Searle called

Sybrant Johannes van der Spuy, the plaintiff, who said that after the commencement of the war he had transactions with defendant in connection with a military contract for the supply of horses and mules. The transactions commenced about February. Kets did the buying, and witness paid for all the animals. Kets brought the bulk to witness's farm, and part to the Remount Depot at Stellenbosch. Witness kept the rejected animals. In about May, 1900, the business was closed. There were then 22 rejected mules on witness's farm. Witness had advanced all the money for the buying of the animals. There was a "squaring up," and in settlement of the account witness gave defendant a note for £100, made in favour of R. Wilson, Son and Co., to whom defendant said he was indebted. Afterwards defendant took away half the rejected animals. That closed off everything. Kets afterwards bought a hotel property. He came to witness in October and said he wanted money. He asked witness to give him a bill for £300, which he said would carry him through. Witness said

he would give a bill for £400, and defendant could give him £100 cash. Defendant discounted the bill at the bank, and a couple of days later brought him £100 in notes. The bill was for four months. It was for their mutual accommodation, not on account of any transaction. Afterwards, in February, witness saw defendant, and told him the bill would be due in a few days. Defendant said he could only pay £50, and witness said that if he paid £50 and witness paid off his £100 the bill could be renewed for £250. Witness gave his cheque, and the bill was renewed for £250. Kets paid the charges on the bill on renewal. The bill was renewed for four months. Kets took the cheque and went to the bank. About a fortnight before the bill became due witness saw Kets, and reminded him that the bill would shortly be due. Afterwards witness got a notice from the bank. Witness wired to defendant, and also wrote to him twice asking for an explanation as to why he did not meet the bill. The telegram was sent after the bill was due. Subsequently witness met defendant and asked him why he had not met the bill. Defendant said he had no money to meet the bill, and witness asked him why he did not come to him and arrange about it. Afterwards witness's attorneys sent a letter of demand for £250. In reply to this defendant's attorneys wrote back on the 12th August stating that witness was indebted to defendant. Until the plea was filed witness never had any statement from defendant about the £148 or £61. Witness kept a book about the military transaction up to the time of the settlement. Witness's clerk, Somerville, who left in November, 1900, kept the book. There was no record in the book about the transaction with regard to the note. Somerville made out a receipt for £400, which was signed by defendant. This was not stamped. It was dated 14th October.

Cross-examined: Plaintiff advanced altogether £4,254. Defendant alleged that some money was due in respect of another matter. The first cheque was dated April 17, 1900. All the mules and horses purchased by Kets were handed over to plaintiff; the average price per head was about £28. Plaintiff also bought mules for the military, but he could not remember whether he bought one or one hundred. Before being in

this venture with Kets plaintiff was in a similar venture with Mr. John Faure. On one occasion plaintiff asked Kets not to press him for money as there was a large sum due to him from Faure. When Somerville left plaintiff's employ plaintiff only got back from him the wages book. The promissory note fell due in December. The £100 was in payment of plaintiff's account up to date. Somerville was present when this statement was made, and the balance due to Kets was £350. P. J. Hofmeyr and Kets had been buying mules before plaintiff joined the latter in similar transactions. In April plaintiff had an interest in 200 oxen, which were at Kuil's River, but he denied that he asked Kets to find a purchaser for them. At a subsequent sale of the cattle Mr. Graaff bought 177 oxen at an average of £10 a head, but plaintiff admitted no liability in respect of commission on their sale to Woodhead, Plant and Co. Kets might have introduced the Cold Storage people to the sellers of the cattle. Plaintiff did not suggest to Kets that he should have the bill discounted either by the A.B.C. or the Stellenbosch District Banks.

Re-examined: Neither Muller nor Woodhead, Plant and Co. claimed commission on the sale of the cattle.

Advocate Wilkinson then read evidence taken on commission of Richard Somerville, lately a clerk in plaintiff's employ, and now on active service, who deposed that he wrote out one promissory note for £400. He saw Kets subsequently, and he appeared quite satisfied with the settlement. No proper entries were made of the transactions regarding the horses and mules in the books kept by witness. Several hundred horses and mules were sold to the military. Witness owed plaintiff money when he left his employ. On one occasion defendant offered him £10 if he would not come into town to see plaintiff's attorney in regard to this action.

For the defence, Mr. Schreiner called Johannes Andrew Kets, landed proprietor and hotelkeeper at Kuil's River, who deposed that in company with plaintiff he came to Cape Town, and saw the military authorities, as the result of which he and plaintiff agreed to purchase mules for the military for joint account. Witness kept a small pass-book of the transactions. Witness re-

ceived £4,254 from Van der Spuy, and he spent all that money on purchasing mules, with the exception of nearly £300. Van der Spuy drew all the money from the military. Somerville went into the books, having been sent by plaintiff to witness for that purpose. The statement produced was in his handwriting, and was made in witness's presence. This statement was not discovered at the time the evidence was taken on commission. This statement showed that witness had purchased mules and a few horses in five trips to Piquetberg to the value of £3,298 10s., and in the Cape Division to the value of £663 10s.; a total of £3,962. On the statement Mr. Van der Spuy owed witness £350. He paid witness nothing on that day, saying something about there being between £3,000 and £4,000 to come from Mr. Faure. One day witness again asked Van der Spuy for money, and the latter said that he had not yet received money from Mr. Faure, and further said: "I will give you a promissory note, but don't make it too much." Then Van der Spuy made the promissory note for £100. Since then he had made no payment on account. Van der Spuy had never lent witness money in connection with the building of a house. Afterwards witness had given a receipt for £400. That came about through witness asking him for money. Van der Spuy asked how much witness wanted, and the latter said: "If I get £300 that will do so long." Van der Spuy then said: "Make it £400, and give me £100." Witness did so, and gave Van der Spuy a £100 by cheque, payable to Van der Spuy. That cheque was given to Somerville, and passed through witness's bank-book. Witness did not charge a share of the discount because it was said that that could be settled afterwards. A few days before the bill fell due Van der Spuy came to witness's house at Kuil's River, where witness was sick in bed, and said: "Here's my £100; you have got your money already." Witness questioned that, and Van der Spuy replied that he had been finding out from his books that he did not owe witness any money. Van der Spuy said they would have to make some arrangement about the bill, and that he had no money. Witness was sick, and did not want a bad name at the bank, and therefore gave Van der Spuy

£50 to get a renewal of the bill. He did not give that £50 as any obligation, and only did it because he was sick, and did not want a bad name at the bank. The note purported to be for value received, but witness had never in any way received from Van der Spuy any consideration for that note of £400. Witness took steps to see that Van der Spuy took up the bill. Witness purchased mules with Mr. Hofmeyr on May 11, and sold them to Mr. Van der Spuy. Van der Spuy paid all the money for these mules with the exception of £148. Witness had often mentioned that transaction to Mr. Van der Spuy, and he had never repudiated the debt or said that he had paid the money. On the day of the settlement he said that as soon as he got the money it would be all right, and he would pay that amount. Witness, at Van der Spuy's request, had tried to get a purchaser for some bullocks. He saw Mr. Woodhead, who got a purchaser in Graaff, and witness had paid Mr. Woodhead 2½ per cent commission, amounting to £43 5s. Witness had no personal interest in that business at all. Witness paid the commission because Van der Spuy said he had no money. Van der Spuy said he would see that witness got the money. Witness never tried to prevent Somerville giving evidence for the plaintiff. Somerville came to him and spoke about his expenses, saying that they would be £10. Witness said that he would see that Somerville got his expenses. As a matter of fact, Somerville was called and gave evidence for the plaintiff.

Cross-examined: Witness had not now the cheque for £100 payable to Van der Spuy, which he had given to Somerville. He had his cheque-book with Van der Spuy's name on the counterfoil.

Peter Johannes Hofmeyr said he was a farmer residing at Kuil's River, and knew defendant and plaintiff. Witness and defendant used to buy mules and sell them to plaintiff. The last transaction was settled in May, after plaintiff and defendant had gone in for the joint venture.

Cross-examined: Kets settled with witness for the £148 account before the end of May.

Re-examined: Kets always settled with Van der Spuy, and witness had nothing to do with the latter.

William Thomas Wilson, of the firm of R. Wilson, Son and Co., said that on July 14 his firm received the bill for £100, which was afterwards retired by Mr. Van der Spuy.

Laurence Woodhead, of the firm of Woodhead, Plant and Co., said that he knew defendant, who came to him and asked him to find a purchaser for 300 oxen which were coming from Caledon. Witness said that he would undertake the business for 2½ per cent. commission. That was agreed to, and witness offered the oxen to several people, including the military, his firm being contractors to the military for other lines. Witness then communicated by telephone with the South African Cold Storage Company, who were the meat contractors for the military, on the matter of buying the oxen, and afterwards confirmed his telephone message by writing. They replied, and a meeting was arranged for a certain day at Kuil's River, but then the oxen did not turn up. On the second day they turned up, and Mr. Muller, who was in the employ of witness's firm, went to Kuil's River as their representative, and arranged the matter with Mr. Graaff, a certain number of the oxen being purchased. After that witness sent in the account for commission. Witness only knew Kets in this matter, and did not know Van der Spuy at all.

Cross-examined: Kets paid the commission on November 27, 1900. The commission was for introducing the purchaser.

By the Court: Witness's firm were contractors to the military for general hardware. His firm often sold cattle, wool, buchu, etc., for customers up-country.

Hendrik J. Muller deposed to being present, as the representative of Woodhead, Plant and Co., at the sale of the cattle. He took Mr. Graaff from D'Urban-road to Kuil's River in Mr. Van der Spuy's cart.

This concluded the evidence.

After argument on the facts,

Buchanan, J., in giving judgment, said: There have been considerable business transactions between the parties, and the evidence led before the Court has left the questions in dispute in a very great uncertainty. The parties are not even in accord as to when these transactions commenced. It is vaguely stated in the plea that they

commenced in the year 1900. The plaintiff says they commenced somewhere about January or February, and the defendant says they did not commence until April or May. These transactions were connected with a joint venture in purchasing mules for the military. Plaintiff supplied the money, and defendant supplied the labour, and the parties were to divide the profits. The sum of £4,254 was advanced in cash by plaintiff to the defendant, and the latter bought some 136 mules for £3,290 odd. He also afterwards bought more horses and mules for another £600 odd, leaving a balance in his hands of £292. At the termination of the venture there were twenty-two mules left, and these were divided between the parties. The mules bought by the defendant were paid for at prices ranging from £22 odd to £26 2s. 6d., roughly speaking, an average of something over £24 each, and sold to the military at prices ranging from £26 to £31. The only evidence as to the price is the plaintiff's statement that they averaged £28. On the transaction, therefore, as far as the mules were concerned, there was something like £450 or £460 profit to be divided between the parties. But there are other transactions between them. The parties kept the merest memoranda of the different transactions, and one Somerville, who was a clerk in the plaintiff's employ, was understood to keep accounts between the parties. This Somerville has now left, but both parties agree that they met with Somerville, went over the accounts, and came to a settlement. This was some time in May or June, when a balance was struck, and according to the defendant, there was an amount in his favour of £350, but according to plaintiff's evidence, £100 only was due by him to defendant. It is admitted that a £100 bill was given by plaintiff in favour of Wilson, Son and Co. in July. This both parties admitted was equivalent to a payment by plaintiff to defendant. Then in October there was a promissory note for £400, signed by plaintiff in favour of defendant. This note *prima facie* is an acknowledged liability by plaintiff to defendant, but both parties admit that it was to some extent at least, if not altogether, an accommodation bill. Plaintiff alleges that it was altogether an accommodation bill, while defendant says it

was only part's accommodation, in so far as it concerned plaintiff. Defendant contended that the bill was intended as payment to him of £300, and that the additional £100 was to be repaid to the plaintiff, as the latter was in need of money. Plaintiff, on the other hand, says that he got £100, and that the £300 was an accommodation to the defendant. Admitted that there was a settlement of accounts between the parties, it is very difficult now, in the absence of books and the absence of Somerville, to arrive at a clear understanding how that statement was arrived at. It would seem, however, to be a fact that Somerville, the clerk, met the parties, that they went over the accounts, and that afterwards Somerville kept the memoranda and papers connected with the accounts. Some balance seems to have been struck between the parties. When the bill for £400 was given, a very curious kind of receipt was taken from Kets, in which he simply acknowledged receiving £400 from plaintiff. Now this receipt is in no way corroborative of the allegation that it was an accommodation bill for the £300, nor on the other hand of Ket's statement that it was to the extent of £100 for the accommodation to the plaintiff. When the £400 bill matured, plaintiff paid £100 towards taking up the bill, while defendant paid £50, and the bill was renewed for £250. When this £250 bill matured, defendant repudiated any liability for the amount, and the plaintiff was obliged to retire the note, and now bases his case upon it being an accommodation note. Now, as Mr. Schreiner has very fairly pointed out, in the conflict of testimony, in the absence of documents, and in the absence of any clear statement of account, we must to some extent be guided by the document itself. Now the form of the note does not assist the plaintiff in any way in his claim for £250. I think that it is quite possible that this £250 is really the balance of the amount which was arrived at when the statement of account took place between the parties. Under these circumstances, as far as the claim in convention is concerned, the least we can do is to give absolution from the instance; we might almost give judgment for the defendant. Then as to the claim in reconvention. On this claim the defendant says that when he and plaintiff settled the account, there was a

balance struck showing £350 due by plaintiff to him. After this balance was struck he admits getting the £100 on Wilson's bill, and he admits getting the benefit of £250 out of the £400 bill, making £350. So that according to his own evidence the balance struck between the parties has been paid to defendant by plaintiff. Defendant also says there are some other items still open, more especially two, one for £148 and the other for £61, reduced now to £43, as commission defendant paid to Woodhead, Plant and Co. Now both these payments had been made by defendant before the statement of accounts between the parties. As to the £148, it was for mules which defendant said he and one Hofmeyr sold to plaintiff before the joint transaction took place, and his share of amount Hofmeyr says was actually paid to him by defendant, while he admittedly had funds of plaintiff's in his hands. In my opinion, at the time of the settlement this amount was brought up in the settlement. As to the discount paid to Woodhead, Plant & Co., if this had been the sole claim, on the evidence, I should have very great difficulty in saying that there was any authority for paying this amount to Woodhead, Plant and Co. at all, but as at that time also defendant had moneys in hand belonging to the plaintiff, I think that this also was brought up in account at the time of the settlement. Then there is a balance of £50 further claimed as the amount paid by defendant on the £400 note. If my view of the figures is correct, then this also was included in the balance struck after these payments were made in May, 1900, and that no demand was made at any time upon the plaintiff until an action was brought. When an action was intimated and a demand in August, 1900, defendant replied that the plaintiff owed him a large sum of money, and that he will furnish a statement of claim. Immediately a statement of claim was requested, but it was not supplied to the plaintiff, who then proceeded with the action and filed a declaration, and it was only when the plea was filed for the first time was there any allegation as to what was the amount outstanding. I am convinced from the evidence that had plaintiff not instituted any action at all, we would never have heard anything of the counter-claims made in this case. I think on the evidence, in the absence of the accounts and in the absence of corro-

boration of the statements of defendant, that these amounts were brought up and settled between the parties, and that there is no further liability. Taking defendant's own statement that there was a balance of £350, that has been paid; and taking the plaintiff's statement that this was partly an accommodation bill for his own benefit, in the absence of figures it is impossible for the Court to say that it was altogether an accommodation bill for the benefit of the defendant. If the statement showed £800 profits, the defendant got the benefit of at least £400, and he therefore received a very handsome profit. I think, therefore, that absolution from the instance must also be given in the claim in reconvention. There is a small amount for £10 discount on this bill. If it was for the mutual accommodation of the parties, at the utmost it is a matter of a couple of pounds or so, and therefore a small amount not worth discussing. On the main items in dispute I am inclined to the opinion that the plaintiff has failed to prove that this was a note for defendant's accommodation, and that the defendant has failed to show any claim against plaintiff after the settlement in May between the parties, when a balance was struck of £350, which amount has been paid. Judgment will therefore be absolution from the instance in the claim in convention, with costs, and absolution from the instance in the claim in reconvention, without any order as to costs.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

In re THE BARQUE { 1902.
"MARGA." } Feb. 11th.

Ship—Attachment—Delivery of
Goods—Delay—Damages.

Mr. Searle, K.C., moved as a matter of urgency for an order attaching the German barque Marga as security for the claim and costs in an action about to be brought. The petitioners were the con-

signees of cargo by the Marga, which arrived in Algoa Bay with a cargo from Hamburg. On the 28th January an application was made by the master of the vessel for the attachment of the cargo, pending an action to be brought against the consignees for moneys alleged to be due for demurrage. No order was then made, the applicants (then respondents) undertaking forthwith to give security for any sum that might be awarded to the plaintiff by judgment of this Court, the delivery of the goods not to prejudice any right of the applicant in respect to the goods, which were to be judged as if no delivery had been made, the applicant to give security for costs in case of his proceeding further by action; all costs heretofore incurred to be costs in the cause. Petitioners stated that they had complied with that undertaking. Proceeding, petitioners said that they had claims against the Marga to the amount of £250, and costs, including the costs of the previous application. They had now been applied to, as agents of the ship, by the master of the Marga to clear the ship, in order that she might proceed to Natal, but there had been no offer to find security for petitioner's counter-claim, in the action to be brought by the master. It was therefore asked that the ship be attached.

Mr. Schreiner appeared for the respondent, and said that the amount of the claim was excessive, as it was impossible that £250 damages could have been incurred, even if through the captain's action, as alleged, the cargo had been delayed in delivery for a few days. There was nothing to show that the goods would have been delivered immediately, even if there had been no delay by the ship, in the congested state of the port of Algoa Bay. He suggested that the amount for which security was asked should be reduced.

De Villiers, C.J., said that £250 was rather excessive, and the Court would therefore grant an order attaching the vessel, unless security was forthwith given for £200 to cover the claim and costs, costs of this application to be costs in the cause.

MALCOMNESS AND CO. V. A. } 1902.
R. MCKENZIE AND CO. } Feb. 11th.

This was a case set down on the roll for the previous day, and not reached.

The matter was one in which the plaintiffs claimed from the defendants certain cases entrusted to them by the plaintiffs for delivery to the Colonial Government, or their value, £397 15s. 6d. It now appeared that the goods had been delivered, and consequently the matter, since the pleadings were filed, had been reduced to a question as to who should pay the costs of the action. It appeared that Messrs. A. R. McKenzie and Co. had agreed with the plaintiffs to deliver on their behalf certain 500 cases of sheep dip to the Colonial Government, the defendants undertaking to store, look after, forward, and take receipts for these cases. From what could at first be ascertained, it appeared that receipts had been obtained for 414 cases delivered, but there were none for the other 86 cases, although, as previously mentioned, it had since been discovered that these cases also had been delivered.

Mr. Searle, K.C. (with him Mr. Benjamin), for plaintiffs; Mr. Schreiner, K.C. (with him Mr. Buchanan), for defendants.

Mr. Searle asked to be allowed to take the evidence of a witness from East London, who was anxious to return as soon as possible. Mr. Schreiner raised no objection.

Mr. Searle then called

Walter Gustav Alven Kadow, who said that he was in Messrs. Malcomess's employment, and arrived in Cape Town from Europe early in March last. When he arrived here, he found out that this sheep dip had arrived, and was in the hands of defendants. Witness was instructed by Malcomess to go and see McKenzie about it, and on three occasions in March he went down to McKenzie's, where he saw three clerks. He would recognise them if he saw them, but he did not know their names. He asked about the receipts for the sheep dip, and whether they had received and delivered everything, and they told him distinctly that they had. After he had called three or four times he got receipts for 414 cases out of the 500. They said they would send the other receipts over to witness's firm as soon as they could get them. Witness could not swear to it, but he believed they said they had mislaid the receipts. The 414 receipts witness posted to East London and followed the next day by steamer.

Cross-examined: Malcomess did not go with witness to McKenzie's. He was distinctly told by McKenzie's people that all the goods had been delivered.

Re-examined: Witness asked what number of cases there was, as he did not know himself. They could not give him that. They could not trace it in their books at all.

The Chief Justice: If you knew all the cases were delivered, why was the action brought?

Witness: I did not know how many cases there were, nor did Mr. Malcomess.

And you supposed because they did not give you the receipts for the 500 cases that the rest had not been delivered?—I told Mr. Malcomess that all the 500 cases had been delivered to the Government.

Mr. Searle said the position was that they could not get payment from the Government until they got these receipts. They never got these receipts, but they ultimately got a document, and settled the matter all right with the Government later on.

The further hearing of the action was postponed till next term.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

TURREIN v. TURREIN. { 1902.
{ Feb. 12th.

This was an action by Louise Turrein against her husband for restitution of conjugal rights, failing which for divorce.

The parties were married in New York in December, 1895. The wife had handed her marriage certificate over to a person connected with the case. In the latter's office a fire occurred, and up to the present the certificate had not been found.

Mr. Wilkinson for the plaintiff.

Louise Turrein, the plaintiff, said she was married in New York in December, 1895. She resided with her husband in New York for a year, and then they came to Cape Town, where they lived for four or five years. During that time defendant treated her badly, and as-

saulted her on more than one occasion. On the 7th January last year defendant left her, first breaking open a drawer and taking some money. Witness earned the money by working as a dressmaker. It amounted to £80 or £100. Defendant did not tell her he was going. Witness heard her husband was in Paris or London. She had not been able to find him.

By the Court: Since he left, her husband had sent her a letter from London. She gave this letter to a Mr. Lynch. In the letter he said he had to go to Paris. He said nothing about coming back. He gave an address, to which witness sent a letter for him.

Mr. Wilkinson said that he had no instructions as to the letter. Lynch was the person into whose custody the marriage certificate was given.

A decree of restitution was granted, defendant to return to or receive plaintiff by the 15th May, failing which, a rule nisi for divorce would be issued, returnable on the 31st May. The Court directed efforts to be made to effect personal service; otherwise publication as before.

BARRON V. MCKENZIE. { 1902.
Feb. 12th.

This was an action for damages for loss of personal luggage.

Mr. Searle, K.C. (with him Mr. Benjamin), appeared for the plaintiff, and Mr. Buchanan for the defendant.

M. Searle said that there was an application on the roll for the 1st February for a postponement of the case, and for a commission. This had not yet been reached. The plaintiff asked for a commission to take the evidence of Captain Webb, a material witness, who had gone to Australia.

Mr. Buchanan objected to the postponement.

Mr. Searle said it was now only a question of costs, the goods having been recovered. They did not now know the exact whereabouts of Captain Webb. If the Court did not think that a commission should issue, he was prepared to go on with the case on the correspondence.

Buchanan, J.: I think it is better to go on with the case. It is only a question of costs, and you will be incurring further costs.

Mr. Buchanan said that unfortunately his witnesses were not here at present. The matter might be allowed to stand until the end of the roll for the day.

The case was ordered to stand over until the first day of next term, Mr. Searle saying that a commission would be applied for if it were found possible to take the evidence of Captain Webb.

COLONIAL GOVERNMENT V. { 1902.
TOWN COUNCIL OF CAPE { Feb. 11th.
TOWN. { „ 18th.

The sea-shore—Lands reclaimed from the sea—Alluvion—Act 26 of 1893.

Land reclaimed from the sea intentionally and by artificial means belongs to the Crown, and cannot be claimed as an accession by alluvion by the owner of land adjoining that portion of the sea which has been so reclaimed.

Where the Town Council of Cape Town has so reclaimed land it is not entitled to the ownership unless it has obtained the consent of the Colonial Government and of the Table Bay Harbour Board to such reclamation, for the purpose of acquiring the ownership under the 154th Section of Act 26 of 1893.

This was an action for a declaration of rights.

The plaintiff's declaration was as follows:

1. The plaintiff is the Hon. Dr. Thos. William Smartt, in his capacity as Commissioner of Public Works, and as such representing the Government; the defendant is a corporate body elected under the provisions of Act No. 26 of 1893.

2. For some time past builders and others have deposited clay, stones, and other material upon the foreshore of Table Bay, and upon land formerly covered by the sea, immediately adjoining thereto, at a spot near the Central Jetty, at the foot of Adderley-street.

3. In consequence of the deposits aforesaid, the said foreshore and land have become suitable for building and other purposes.

4. The defendants claim this land as their property, and have commenced the erection of certain buildings thereon.

5. The plaintiff contends that as regards the foreshore it is vested in the Government by section 5 of Act No. 20 of 1858, and as regards the land formerly covered by the sea, it is the property of the Colonial Government by common law.

6. The said foreshore and land is required by the Colonial Government for the purpose of railway extension, and the erection of the said buildings would cause great damage to the said Government.

7. The plaintiff has obtained a temporary interdict restraining the defendants from proceeding with the said buildings, pending the decision of an action to be brought by the plaintiff.

The plaintiff prays for a declaration (a) that the said foreshore and land is the property of the Colonial Government; (b) that the said interdict may be made perpetual; (c) alternative relief, and (d) costs of suit.

Defendants excepted to the declaration as follows: Before pleading to the declaration the defendant Council excepts thereto on the ground that the same is vague and embarrassing in that it is not clear therefrom whether the whole of the foreshore of Table Bay or only portion thereof, and if so, what portion thereof, is claimed as the property of the Government, whilst under and by virtue of section 110 of Act No. 26 of 1893 the foreshore within the Municipal limits is expressly vested in the defendant Council, excepting in so far as the same is situated between the north side of the Breakwater and the mouth of the Castle moat or ditch. Wherefore they pray that the declaration may be quashed or amended with costs.

For a plea to the declaration, the defendant Council said:

1. It admits the capacity of the plaintiff, but says that the defendant Council is a body incorporated under Act No. 26 of 1893.

2. As to paragraphs 2 and 3, it says that the said clay, stones, and material have from time to time, both prior to and subsequent to the year 1893, been de-

posited by builders and others, inhabitants of the Municipality, by and with the consent of and under arrangements with the defendant Council as a matter of Municipal improvement, and in consequence thereof by gradual accretion the position of the shore has from time to time advanced, and land has been reclaimed from the sea, and has become suitable for building and other purposes, the consent of the said Government and of the Harbour Board has been given to the said operations, in so far as the same is necessary and required by law, and the said land reclaimed as aforesaid being within Municipal limits, is now the property of and vested in the said Council under Act No. 26, 1893, sections 110 and 111.

3. It admits paragraph 4, but denies paragraph 5, and says that the foreshore within the Municipal limits is by virtue of section 110 of Act No. 26 of 1893 expressly vested in the said Council, excepting in so far as the same is situate between the north side of the Breakwater and the mouth of the Castle moat or ditch.

4. It does not admit paragraph 6, nor that the plaintiff has a right to appropriate any portion of the said land for railway purposes, and says specially that no notice of expropriation as required by the Railway Acts has been served upon it, relating to the land now claimed.

5. As to paragraph 7, it craves leave to refer to the order of Court and the documents filed of record.

6. And in case this Hon. Court should find that the formal consent required by law was not given by the said Government to the reclamation of land as aforesaid, the defendant Council says that the land referred to in paragraph 2 of the declaration and now claimed by the Government has been reclaimed from the sea after and in consequence of an arrangement arrived at with the Government in or about the year 1896, whereunder the Government agree not to make any claim in respect of the said ground, and the Government is now and by its action and conduct estopped from raising any claim thereto.

Wherefore the defendant Council prays that the plaintiff's claim may be dismissed with costs, and for a claim in reconvention the defendant Council, now plaintiffs in reconvention, says:

1. It craves leave, in so far as necessary, to refer to the matters above pleaded, and says that the foreshore of Table Bay within Municipal limits is by virtue of section 110 of Act No. 26 of 1893 vested in the plaintiffs in reconvention, save in so far as the same is situate between the north side of the Breakwater and the mouth of the Castle moat or ditch.

2. For many years past portions of land within Municipal limits have been from time to time reclaimed from the sea partly by plaintiffs or by the inhabitants of Cape Town, and partly by natural causes, and the plaintiffs have expended large sums of money for the said purposes, and have rendered portions of the said ground suitable for building purposes and for Municipal improvements; the said reclamation and expenditure, in so far as the same has been made or defrayed by the plaintiffs in reconvention, has been so made or defrayed with the consent, knowledge, and approval of the defendant in reconvention, and in so far as is necessary, of the Table Bay Harbour Board.

3. The plaintiffs in reconvention further submit that the inhabitants of the Municipality have by law a right of access to the foreshore within Municipal limits, and say that from time immemorial the said inhabitants have exercised the said right and used the foreshore for purposes of health and exercise, and the plaintiffs in reconvention claim on their behalf that they are entitled to enjoy the said right.

4. The defendant in reconvention now asserts the right of the Colonial Government to the whole of the foreshore and the said reclaimed land, and claims the right to exclude the inhabitants of the Municipality from access thereto.

5. In or about September, 1896, the Colonial Government now represented by defendant in reconvention served a notice on the plaintiffs claiming to expropriate the whole of the ground reclaimed as aforesaid or such portion thereof as the said Government might require. The plaintiffs deny the right of the Government to expropriate as claimed, and submit that the said notice is illegal.

6. On or about 22nd May, 1900, the defendant in reconvention obtained a temporary interdict, restraining the plaintiffs from proceeding with buildings upon

portion of the land reclaimed as aforesaid, in consequence whereof plaintiffs were compelled to cancel a contract which they had entered into for the erection of the said buildings, and have sustained damages in the sum of £1,162 1s. 2d. Wherefore the plaintiffs in reconvention claim: (a) A declaration of rights as to the property in and control over the foreshore of Table Bay within Municipal limits; (b) a declaration that the said foreshore is vested in them, excepting in so far as the same is situate between the Harbour Board enclosure on the north side of the Breakwater and the mouth of the Castle moat or ditch; (c) a declaration that the inhabitants of the Municipality are entitled to free access to the said portion; (d) a declaration that the land reclaimed as aforesaid is now vested in them; (e) a declaration that the notice served on them by Government in September, 1896, as to expropriation of the land reclaimed as aforesaid is illegal, and of no force and effect; (f) an order discharging the said interdict; (g) £1,162 1s. 2d., damage sustained by reason of the said interdict; (h) alternative relief; (i) costs of suit.

For an answer to the exception, the plaintiff said the same is bad in law, and prays that it may be quashed, with costs.

For a replication, the plaintiff said:

1. Save as to the depositing of clay, stones, and material, the plaintiff denies the allegations in paragraph 2 of the plea, and as to paragraph 4, the plaintiff begs to refer to the terms of the said section 110.

2. The plaintiff denies paragraph 4, and says that notice of expropriation was served on the defendant in September, 1896.

3. Save for admissions, the plaintiff denies the allegations in paragraphs 3, 4, 5, and 6, and joins issue thereon.

For a plea to the claim in reconvention, the plaintiff begs to refer to the pleadings in convention, and says:

1. That he admits paragraph 1, save that he says the words "Harbour Board enclosure on" should be inserted between the words "between" and "the" in the 5th line of the said paragraph.

2. The plaintiff admits that portions of land have from time to time for years past been reclaimed by the defendant and others, but he denies the other allegations in the said paragraph. He has no

knowledge of any sums spent as alleged, and does not admit. He denies the alleged consent, knowledge, and approval of the Government, and he says that no approval or consent of Parliament has ever been given.

3. The plaintiff admits the right of the public to the foreshore situated within Municipal limits, as it originally existed, and claims the right to exclude the public and the defendant from such portions of the foreshore and the reclaimed land situated between the Breakwater and the Castle, as may be required for public purposes. Save as above, the plaintiff denies paragraphs 3 and 4.

4. As to paragraph 5, the plaintiff admits the allegations of fact, but denies the defendant's legal contention, and says the said notice referred to the land situated between the said Breakwater and the Castle moat.

5. The plaintiff admits that he obtained an interdict in May, 1900, and begs to refer to the terms thereof, but denies all the other allegations in paragraph 6.

Wherefore he prays that the defendant's claim may be dismissed, with costs.

For a rejoinder to the plaintiff's replication, the defendant says that he joins issue with the plaintiff upon the said replication, and denies the allegations of fact and conclusions of law therein, and prays that plaintiff's claim may be dismissed, with costs.

And for a replication in reconvention, the defendant (now plaintiff in reconvention) says that, save in so far as the plea in reconvention admits any of the allegations in the claim in reconvention, he denies all and singular the allegations of fact and conclusions of law in the said plea contained, and joins issue thereupon, and again prays for judgment upon the said claim, with costs of suit.

Mr. Ward (with him Mr. H. Jones and Mr. Benjamin), for the Government; Mr. Searle, K.C. (with him Mr. Gardiner), for the Town Council.

Mr. Ward said that perhaps the exception to the declaration would be disposed of first.

Mr. Searle: In view of the replication I would suggest that it is better that the whole matter should be settled at once. It was not quite clear from the declaration what plaintiffs claimed, but the replication was clearer.

Mr. Ward: I am quite willing it should be so. We do not claim any of the foreshore, save what has been reclaimed by Government. By Act 20 of 1858, as well as by common law, the foreshore is vested in the Colonial Government.

[De Villiers, C.J.: What is the foreshore?]

The usual definition is the space between high and low water mark. English and Roman authorities do not quite agree as to the definition, but the difference is not material to this action.

[De Villiers, C.J.: Are the parties agreed as to the meaning of "foreshore" ?]

Mr. Searle: Yes, I think so; but a portion of the foreshore is by statute vested in the Town Council.

Mr. Ward: We do not claim to exclude the public from the foreshore, save in so far as it may be required for public purposes.

Mr. Searle: We think there is more in dispute than the land marked red on the plan (see paragraph 5 of the replication). If this land is expropriated there will be no access to the foreshore.

[De Villiers, C.J.: People can go to Woodstock and get on the beach there.]

The Government are bound to give us reasonable access.

[Buchanan, J.: You can get to it from the foot of Adderley-street.]

The point is that in September, 1896, the Government served notice of expropriation of this reclaimed land. They took up the position that we might reclaim it, and that then they could step in and take it.

[De Villiers, C.J.: The question is: whether this land is the property of the town or of the Government ?]

[Buchanan, J.: The Government cannot expropriate their own property.]

Mr. Ward then called

Charles H. Hepp, who said he was a pensioner of the Table Bay Harbour Board. He had been in the employment of the Board from 1860 until 1900. From 1872 he was foreman of the excavations, and had direction of the tipping in connection with the reclamation of land in Table Bay. At that time, as far as he could remember, the water came up to the back of the shambles, where the railway is now. The reclamation work commenced about the latter end of 1872. That was the ground between Adderley-

street and what was called the watering jetty. A tramline was laid down from the Docks, and this was used to bring the soil excavated from the Docks to the back of the shambles. In addition, rubbish was occasionally deposited there by building contractors in the town. These builders required to have a proper permit from the Harbour Board before they could deposit rubbish there. Witness had to see that that was carried out. A retaining wall was built, so as to secure stuff from washing into the Bay. That would be nearly opposite where the present road joined Adderley-street. It cut across where the Sea Point Railway-station now stands. That wall was constructed by the Harbour Board, and they filled in the whole space between the old shambles and the wall. When the wall was finished, the water was continually up to it. There was always water up to the wall. The reclamation was completed about 1876. From the time witness stopped until the Town Council began, no reclamation was carried on. At low water there were 4 feet of water at the wall. When the wall was finished, witness's duty at that spot ended, and he could not swear as to what was afterwards done.

Cross-examined: Some of the debris used in the reclamation came from Cape Town; not a great quantity. There were not persons depositing rubbish there every day. Witness was on this particular work about three years, and in that time they reclaimed the land from the shambles to the stone bank. Behind the wall it was pretty well levelled.

The Chief Justice pointed out that the Council would have admitted everything the witness had said, and that therefore the evidence was no help to them.

Frank Robb, assistant general manager of the Table Bay Harbour Board, said that he knew the ground which had been reclaimed by the Corporation at the foot of Adderley-street. Before they started the reclamation, there was a rubble bank at that particular spot, and the tide was always up to that spot, so that the Town Council really began by depositing rubbish, etc., into the sea.

Cross-examined: Witness was speaking about the time of the agreement between the Harbour Board and the Council, at the end of 1893 and beginning of 1894. Previous to that, persons wishing

to tip rubbish there had to obtain a permit from the Harbour Board.

Mr. Ward said he had more evidence as to the reclamation work by the Board, etc., but in view of the expression of opinion of the Court, he would not call it, but would now close his case.

Mr. Searle called

Francis Frederick Gooderham, who said he had been superintendent of roads under the Town Council since 1896, and knew the portion of land reclaimed at the foot of the Central Jetty, where the Electric Lighting Station was started. In 1896 the coast line was 20 feet at the back of Fillis's Circus. Some 250 feet had been reclaimed by the Council, who had tipped waste material there. They had been continuously engaged there, and that morning there were an overseer and four men employed at the place. Tipping had been done by the Town Council and by other people under permission of the Town Council. Nothing offensive was tipped there.

Cross-examined by Mr. Ward: The stuff was still being tipped, notwithstanding the action.

Joseph Fock said he was born in 1849, and was a member of the Town Council for eleven or twelve years. The Town Council first began to reclaim in about 1893, and had been going on ever since. As to the work by Mr. Teague, he had to make a wall coming out from the Central Jetty. The work shown on the plan was done. This was covered up, land all round having been reclaimed. The portion shown dark on the plan was done, and was afterwards covered in. Witness was well acquainted with the foreshore from the Central Jetty on towards Fort Knokke. When the wall was built they intended to make a pier and also to carry out the drainage pipe further into the sea. There used to be a road leading from Tennant-street down to the beach some years ago. This was now blocked up. There was no way now to the foreshore except at the Central Jetty.

John Thompson said he was chief draughtsman in the Town Council office. He entered the office in April, 1894. He had prepared a plan (produced) showing the work of reclamation done during particular years. There was not now a road as shown on the plan. This road was sketched from an old map. The plan showed the extent of the reclamation in

different years. The plan was made from records in the Town Council office, and was correct.

Cross-examined by Mr. Ward: Witness had made no survey.

Alfred M. Thorpe said he was in the treasury department of the Town Council. The records in the office showed that in 1894 £636 4s. 6d. was spent in the reclamation of land, in 1895 £122 10s. 6d., in 1896 £73 17s. 3d., in 1897 £128 10s., in 1898 £319 11s. 11d., in 1899 £685 14s. 8d., in 1900 £1,928 6s. 9d., and in 1901 £534 13s. 3d., the total being £4,429 8s. 10d. This included cost of cartage. It represented the actual costs.

Cross-examined by Mr. Ward: The amounts were made up of costs of cartage and supervision. It included the amount for the foundation of the station. The ground was occupied by the merry-go-round and circus. He could not tell the revenue from these.

By Sir John Buchanan: The place was a convenience to the Town Council.

Re-examined by Mr. Searle: The ground at present was good; £1,128 was paid to cancel the contract, and for work done in connection with the building of the Electric Lighting Station, which was interdicted. This was included in the £4,000. Witness would prepare a statement showing what amount had been paid to Teague, and what rents had been received from the property.

Thomas Ball said he was a member of the Town Council, and was Mayor when the Electric Lighting Station contract was entered into with Small and Morgan. The amount of the contract was £7,000. After some of the work had been done the Council was interdicted at the instances of the Government from proceeding further. The cost of the work done was something over £700, and 7½ per cent. on the remaining portion was paid as compensation to the contractors, this amounting to £450. Witness was a builder and contractor, and looked into the matter in the interests of the Council. He thought this was a very fair settlement with the contractors.

Mr. Searle put in correspondence and plans, and closed his case. Among the correspondence was a letter from the Harbour Board written in 1893, setting forth

the conditions upon which the Council could reclaim and retain the land in question.

Mr. Ward (for the Government): As to the ownership of the land reclaimed, a portion of it was the property of the Colonial Government. *Voet* (1, 8, 9). That applies directly to building on the sea shore, but a reference to passages there cited shows that the principles there laid down apply no less to reclamations from the sea.

[De Villiers, C.J.: To whom did the land beneath the sea belong?]

To the Crown.

[De Villiers, C.J.: How far out?]

We need not go into that, for this is a port. *Voet* (49, 14, 3).

[De Villiers, C.J.: Has the Government merely the supervision of these places, or has it *dominium*?]

The passage referred to gives much more than supervision. Under the Roman Law it was considered advisable to get the sanction of the Government before building on the sea-shore, but what was merely a matter of prudence under Roman Law was a matter of necessity under the Law of Holland. In *Anderson and Murison v. Colonial Government* (1 Sheil, 259) it was laid down that that the public have a right to use the sea-shore from the sea but it does not follow that they have a right of access from the land. *Grotius* (2, 1, 25, and 2, 9, 9), *Censura Forensis* (1, 2, 17), *Grone-wigen ad Instit.* (2, 1, 2), *Voet* (49, 14, 3). *Grotius* (3, 3, 2.).

[De Villiers, C.J.: Have you any authority to show that the Crown is the owner of land reclaimed from the sea? That is on a different footing from the bed of a Harbour.]

It is all the same as land which has been built upon. *Voet* (41, 1, 17), *Grotius De Jure Belli ac Pacis* (2, 3, 2). Roman Dutch authorities are not very explicit on this particular point, as these questions did not often arise 300 or 400 years ago; but, according to modern English Law this land certainly belongs to the Crown. *Stephen's Blackstone* (2, 1, 13, near the end of the chapter.) The bottom of the sea adjoining the coast belongs to the Crown. *Benest v. Pipon* (1 Knapp, p. 60). See judgment of Winford L.J. (p. 68).

Hence below low watermark the bottom of the sea belongs to the King. *Blundell v. Catterall* (5 Barn and Ald,

268), but I refer more particularly to p. 298, where it is stated that the sea-shore belongs to the King and that subjects have no right to appropriate it without licence. The King can seize any structure erected on the foreshore. See also *Johnson v. Barret and Others* (Alyn's Rep. of 22 Car, p. 6). See also *Chitty on the Prerogative* (p. 206) and *Addison on Torts* (7th edition, p. 438). Clearly in Roman Dutch Law the sea coast and the land contiguous thereto belong to the Crown, and this is also the case in the law of England. See *Grone-wegen ad Instit.* (2, 1, 22 and 23) as to land rising in a river. But this particular is claimed also upon other grounds and not merely on the ground that it is reclaimed from the sea. The Town Council seem to claim this land as *alluvium*, but *alluvium* is not the result of any artificial process, and, moreover, the land increased by *alluvium* belongs to the owner of the adjoining land and not to anybody who may have carried on the work of reclamation. *Attorney-General v. Chambers and Attorney-General v. Rces* (4 De Gex and Jones, 55). But the adjoining owner is not entitled to the increase, if he have increased his land by artificial means. Again, this ground is not waste ground within the limits of the Municipality. The limits of the Municipality are determined by Sec. 2 of Act 26 of 1893. If the Town Council has artificially driven back the low water mark they are not entitled to the increment thereby obtained. If there is a natural boundary which is destroyed by artificial means, the boundary-line remains the same. On no ground can the land be called *alluvium*, and even if it were so, it would not belong to the Town Council, as it is outside Municipal boundaries.

Mr. Searle (for the Town Council): Counsel for the Government has quoted authorities as to the right of the Sovereign with regard to the sea. But this is a question of land, not of sea. Counsel for the Crown holds that this land is outside the limits of the Municipality. If this be the case the Municipality has no jurisdiction and could not prosecute for offences committed on the land in question. The Roman Dutch authorities all say that one may help *alluvium* by artificial means. A large portion of this land abuts—not on Government land—but on Adderley-street.

[Buchanan, J.: That might give you land at the bottom of Adderley-street, but no more.]

The rest of the land we are claiming abuts on our own property. These lands are waste lands. *Attorney-General v. Hanmer* (67 W.R., 804); where see judgment of Watson, B. We say, "we made the land and the foreshore receded. We do not claim the foreshore, but land which we have reclaimed. That land, may it is true, belong to the Crown in English Law, though not in Roman Dutch Law. See *Voet on Alluvium* (41, 1, 15). The only question is whether the land in question is *ager limitatus*.

[De Villiers, C.J.: The Municipality are not the owners of the land adjoining the shore.]

They are the owners of the streets.

[De Villiers, C.J.: Who are the owners of the land opposite the Goods' Shed?]

The Railway Department; but we have a better title than the Government for we made the land. The land having been made is treated as waste land within the Municipality.

[De Villiers, C.J.: That is another point.]

The authorities on *alluvium* say that if you add to your property you can claim the addition. *Van Leeuwen and Grotius*.

[Buchanan, J.: Yes, if you add to your own land by *alluvium* you can claim the addition, but not if you add to somebody else's.]

All vacant land within the Municipal limits is vested in us. We have a statutory right to this land.

[Buchanan, J.: If the foreshore is not waste land the Act which gives you waste land excludes the foreshore.]

The foreshore is not waste land. By statute the foreshore is vested in the Crown, and waste land in the Municipality. See Secs. 140 and 148, Act 26 of 1891. Sec. 2 defines what are Crown lands. The term "waste Crown lands" is used in certain private Railway Acts, e.g., in the Green Point Railway Act. Waste lands are also dealt with in Sec. 3 of Act 11 of 1857, and Sec. 4 of Act 20 of 1858. See also Ord. 1 of 1848. Subsequent Acts vested waste lands in His Majesty, and Act 44 of 1882 vested all waste lands within the Municipality in the Municipality. Sec. 55 of Act 36 of 1896 vested lands contiguous to the Docks in the Harbour Board. Sec. 65 of the Harbour Board Act vests land reclaimed

from the sea by the Board in the said Board. *Demonstratio unius est exclusio alterius*, so that if other people reclaim land such land reclaimed will not vest in the Harbour Board. If it be held that Act 36 of 1896 repeals Sec. 110 as to reclaimed lands, *a fortiori*, it repeals it as to the foreshore between the Castle Ditch and Fort Knokke.

[Buchanan, J.: If you had reclaimed land adjoining your own land there might be something in it, but you have reclaimed land adjoining Government property.]

If the Court is against me on that, I say that we have Sec. 154 of the Statute on our side. The Harbour Board consented to our reclaiming the land. Government officials knew what was going on, and there was a long correspondence as to the expropriation of Strand-street and the reclamation of land. The Town Council wished to form a promenade on this reclaimed land and the Harbour Board consented to this being done. By such consent they are now estopped from objecting to our going on with these works. The Town Clerk's letter of November 26, 1892, shows that a promenade was contemplated and his letters of October 29, 1894, show that the Council sanctioned and approved of the project. They knew we were doing this work and were consulted about it.

[De Villiers, C.J.: That may give you a title to compensation if they consented.]

We did not get an actual consent in writing, but Elliott's letter of October 12, 1895, and a prior letter show that Government agreed to the principle at the time, and that we were practically led to go on and do the work. So far did the Government regard this as our property that in 1896 they gave us an ordinary notice of expropriation. Subsequently they sent one worded in a very peculiar manner. If they ever had a right to this property they have waived their rights and cannot dispute our title. Elliott, in his affidavit, says that this land was reclaimed by the Town Council with the consent of the Government. In the face of that statement and of the notices given by the Government they cannot now contend that they have any right to the property. Another point is, the public right of access to the foreshore. We do not claim the foreshore

but we do claim a right of access, and from this we are now cut off, since Government claim to take for railway purposes down to low-water mark. If this foreshore is vested in the Government, they have no right to exclude the public, and we cannot get access to it even below the Castle moat. There will be absolutely no access to it whatever if the Government take the land they now claim. We furthermore object to their notice stating that they mean to expropriate hereafter, and then to pay us only what the land is worth now. We say that such notice is bad, under Act 19 of 1874.

[Buchanan, J.: They can prevent you from reclaiming ?]

No. See *Scrutton v. Brown* (4 Barnard and Cresswell, 485), particularly the judgment at p. 498.

[Buchanan, J.: You say that the present foreshore is vested in Government. If so, they can prevent you from going out any further seawards.]

I submit not, if the increase is by *alluvium*. In Roman-Dutch law *alluvium* may be increased by artificial means. *Voet* (41, 1, 15); *Censura Forensis* (2, 4, 13); *Grotius* (2, 9, 23).

As to damages, if the land is vested in us, we are entitled to damages.

Mr. Ward, in reply: We are willing to repay the Town Council what they have expended.

In English law "waste" has a very special signification, which it does not bear in our law. If this land was "waste" in the ordinary sense, it would be absurd to suppose that the proprietorship thereof would have been granted to the Municipality (as alleged). The land is admittedly valuable, and the Act could not have referred to this land, as it was not in existence at the time the Act was passed. On the question of consent, see *Collector of Customs v. Cape Central Railway* (6 Juta, 402).

Cur. adv. vult.

Postea, February 18.

Judgment was delivered of rights as to land covered by the sea.

[De Villiers, C. J.]: The question to be determined in this case relates to the ownership of certain land reclaimed from the sea along the shore of Table Bay. The reclamation was undoubtedly effected by the defendant Council, which from the year 1893 to the present time has allowed con-

tractors to shoot rubbish into the sea to the south-east of the Central Jetty, and has itself gone to considerable expense in carting materials and constructing works towards reclaiming the land. The work was done with the knowledge of the Government, but no formal consent was ever given by the Government. For a long time a correspondence on the subject was carried on between the Government and the Council, and at times the parties seemed about to come to some agreement as to the terms upon which the Council should be allowed to own part of the reclaimed land, but no definite arrangement was ever arrived at. The Council treated the land as its own, and proceeded to construct a building upon it, whereupon the Government obtained from this Court a temporary interdict to restrain the further carrying out of the work. The object of the present action is to have it declared that the Government is the owner, and to have the interdict made perpetual. The first ground upon which the Council claims the ownership of the reclaimed land is that, as it has itself done the work of reclamation, no one else can claim the title to the ownership. It is a well-known doctrine, however, that title to land cannot be acquired merely by constructing works thereon. There may be a right of retention until compensation has been tendered, but unless there has been adverse occupation for the period of prescription, the owner does not lose his rights of ownership. The same doctrine, in my opinion, applies to land adjoining the coast and covered by the sea. The Crown is not the owner of the land in the same sense that it owns Crown lands above high-water mark, but it enjoys the supreme right of control, which carries with it the right of claiming the ownership of the land itself whenever the land ceases to be covered by water. Whatever the ancient rule may have been, it is now well established that this supreme right of control extends to a distance of at least a marine league from the shore. As to harbours like Table Bay, it was undoubted law, as far back as the time of *Groenewegen* (see De Leg., Abrog. ad Inst., (2, 1, 2) that they formed part of the *regalia* or *state domains*, and that, consequently, the ruler of the adjoining land had full control over the rights of fishing in such harbours. There are

authorities in the Dutch law to the effect that an island rising in the sea belongs to the first occupier, but they obviously refer to the case in which such islands are situated beyond the territorial jurisdiction legally claimable by any State. If an island were to rise within Table Bay, there would be no doubt whatever as to the right of the Crown to claim the ownership. If such an island were raised by artificial means, the right of the Crown would be equally clear. The land now in question has been added to the mainland, but, on principle, the Crown appears to me to be equally entitled to the ownership, subject, of course, to the obligation, which the plaintiff does not deny, of paying to the defendant, at whose expense the addition has been made, reasonable compensation for his expenditure. The second ground upon which the Council claims the land is that, as owner or occupier of the adjoining land above high-water mark, it is entitled to any accession by what is known in the Roman law as alluvion. There is nothing, however, to show that the Council is the owner or occupier of the adjoining land. It has indeed the control over Adderley-street, but as that street runs down at right angles to the sea, and does not form part of the land running parallel to the reclaimed sea-shore, its occupation of Adderley-street can give it no right in respect of the land in question. But even if the Council had been the owner of the adjoining land, it could not, in my opinion, claim any right by virtue of alluvion. According to *Justinian's Institutes* (2, 1, 20), "whatever addition is made by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time." In the case of *Attorney-General v. Rees* (4 De Gex and Jones 71) the Lord Chancellor quotes with approval a passage from Lord Hale in the following terms: "The *jus alluvionis* is *de jure communi*, by the law of England, the King's, if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est not esse et non apparere*." This doctrine was obviously derived from the Roman Law.

The Lord Chancellor added: "Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this general acquisition of the seashore, however difficult such proof of intention may be." In the present case no such difficulty arises, for the operations of the Town Council were conducted with the avowed purpose of reclaiming a portion of the sea. The addition to the land, moreover, was not so gradual as to be imperceptible to the senses. The claim to title by means of alluvion therefore fails. As a third ground the Council relies upon the 111th section of Act 26 of 1893, which vests in the Council, among other things, "all the waste ground or land situate within the Municipality." The reclaimed land, it is said, forms such waste ground or land, which the Council may now claim as its property. It is by no means clear that the section was intended to apply to land becoming waste after the passing of the Act, but this point need not now be decided, because I am of opinion that the land in question was not waste in terms of the Act. The word "waste" has different meanings, according to the context in which it is employed. As employed in the 111th section, the term "waste land" appears to me to mean land which is not registered in anyone's name, and to the occupation of which no one has a *bona fide* claim. It could not have been intended to apply to land reclaimed by the Council from the sea for the purpose of carrying out some work of public utility, for such land is specially dealt with in the 154th section of the Act. Under that section the Council may, "in order to make embankments, promenades, or buildings, or carry out any other work of public utility, upon obtaining the consent of the Government and of the Table Bay Harbour Board, reclaim land from the sea in Table Bay, and all such reclaimed land shall be vested in the Council." It is clear, therefore, that in regard to such reclaimed land it was not intended to be vested in the Council without the consent of the Government, and the Harbour Board, and that the Council has no claim to it merely on the ground of its being in one sense of the term waste land. The last ground

upon which the Council claims the ownership is that the consent of the Government and of the Table Bay Harbour Board was given in terms of the 154th section. I have carefully read the voluminous correspondence which the Council relies upon to prove such a consent, but I am unable to find that any definite consent was ever given. The Harbour Board seems to have consented so far as its own interests were concerned, but its consent was always subject to an approval by the Government. As to the Government, the matter was dealt with by several successive Commissioners of public works, but not one of them would commit his Government to a definite line of action. At one time the Commissioner was very near coming to an agreement, but even then the agreement was to be subject to the approval of Parliament. At no time was such an unconditional consent given to the operations of the Council as to entitle it to the benefit of the 154th section of the Act. The fact that the work was done in the belief that the formal consent would be forthcoming certainly entitles the Council to be regarded as a *bona fide* occupier who has made improvements on the land, and to be compensated accordingly, but it does not dispense with the necessity of a consent in terms of the Act to enable the Council to claim the land as its own. For these reasons the judgment of the Court must be for the plaintiff with costs, the Court declaring that the land marked pink in the diagram D is the property of the Colonial Government, and making the interdict perpetual as prayed.

Buchanan, J. fully concurred.

Maasdorp, J. said that the sections of the Act which vested the foreshore either in the Municipality or in the Government were of great importance in this case, and their effect must be considered. It seemed that under section 110 of the Municipal Act the foreshore within the Municipal limits was vested in the Council with the exception of a certain portion, and this excepted portion was vested under Act 20 of 1858 (section 5) in Her Majesty the Queen in her Colonial Government. Under Act 36 of 1896 (section 55) this excepted portion was placed under the control of the Harbour Board. Now the question arose as to whether the works constructed by the Municipality

upon this foreshore become the property of the Municipality, and several grounds had been set forth to show that it does so become Municipal property. There was some contention that power was granted to the Municipality to reclaim land, and they say that they constructed this land with the acquiescence of the Government, and that it, therefore, became the property of the Municipality, but the Act was very clear upon that point, for it provided that the land reclaimed must be reclaimed with the consent of the Government and with the consent of the Harbour Board. Now in this case, after going through the whole of the correspondence, he could find no evidence that such consent had been obtained, and mere acquiescence, even if knowledge was proved on the part of the Government, was not sufficient. Consequently upon the action of the Municipality in constructing the works, which reclaimed this land, without the consent of the Government, it was clear that they had no right in such land. It was further contended that in this case there was a kind of alluvion, the result of which was that this land becomes the land of the Municipality. Now after considering the question carefully, he had come to the conclusion that almost all the grounds, all the properties of alluvion, were wanting in this case. No portion of this land had been produced by the action of the sea; the whole of it had been artificially constructed, and the very definition of alluvion excluded any right of the Municipality to the land on this ground. As to the question of a claim under the section which vested waste land or ground in the Municipality, this land was clearly reclaimed land, and when they referred to section 154 it appeared that reclaimed land was dealt with in a different manner to waste land. He had, therefore, come to the conclusion that on this ground also the claim of the defendant must be disallowed.

Mr. Searle said that the Court had not dealt with the claim in reconvention with regard to the right of access to the foreshore from Adderley-street.

The Chief Justice said that at present there was nothing to show that the Government intended to bar access. On the claim in reconvention absolution from the instance would be granted.

[Plaintiffs' Attorneys: Messrs. J. and H. Reid and Nephew; Defendants' Attorneys: Messrs. Fairbridge, Arderene and Lawton.]

KELLY AND WIFE V. MAC- { 1902.
KENZIE AND CO. { Feb. 12th.

Delivery Agent—Limitation of Liability.

Plaintiffs were passengers by steamer from England to Cape Town, and when they landed they delivered certain baggage to the defendants, who were landing and delivery agents. Defendants admitted the loss of a portion of this baggage, but contended that they had contracted themselves out of any liability in excess of £5 per package lost.

Held, that as the attention of plaintiff had not been called to the notice at the head of the document he had signed, and that as defendants' servant's attention had been called to the fact that the package subsequently lost was specially valuable, defendants were fully liable to plaintiffs for the amount claimed.

This was an action to recover a certain trunk, with the contents thereof, and failing delivery of the said trunk, judgment for £43 7s. 6d., being value of trunk aforesaid and of contents.

The declaration set forth:

1. That plaintiff resides at Kimberley, and that defendant carries on business as a landing and delivery agent in Cape Town.

2. On or about December 2, 1901, the plaintiff arrived at Cape Town on board S.S. Mohawk, having with him certain baggage, his property, including a certain black leather trunk, hereinafter more particularly referred to.

3. Plaintiff, on or about the said day, entered into an agreement with defendant, through the latter's agent, whereby defendant undertook and agreed for valuable consideration to land, clear, and

deliver to him at the White House, the said black leather trunk, with other baggage.

4. The said black leather trunk contained jewellery of the value of £30 7s. 6d., and clothing of the value of £10, and plaintiff specially declared to defendants' agent that the said black leather trunk contained the said jewellery and clothing, and told him that he desired to take the jewellery and clothing out of the said trunk, but defendant, by his said agent, thereupon specially undertook and agreed that the said jewellery and clothing would be "all right," that he would take care of them, and they would be quite safe; upon which plaintiff agreed to leave the said jewellery and clothing in the said trunk.

5. Defendant took and had possession of all plaintiff's said baggage, including the said leather trunk, containing the said jewellery and clothing, and thereafter delivered to the plaintiff his said baggage, save and except the said leather trunk and the contents thereof.

6. Defendant has wrongfully, unlawfully, and negligently failed and neglected to deliver to plaintiff the said black leather trunk and the contents thereof, and upon demand has tendered to the plaintiff, in lieu of such delivery, to pay the sum of £5, which tender is wholly insufficient.

Wherefore plaintiff prays for an order compelling defendant forthwith to deliver to him the said leather trunk and the contents thereof, and failing compliance with such order, judgment for the amount of £43 7s. 6d., being the value of the said leather trunk and the contents thereof, or that he may have, etc.

To this declaration defendant pleaded as follows:

1. Defendant admits paragraphs 1 and 3.

2. Defendant says that on September 2, 1901, he entered into a written contract with plaintiff, copy of which is annexed.

3. By the terms of the said contract defendant was not, and did not, become liable for any baggage beyond £5 per package, unless specially declared.

4. Plaintiff did not, in terms of the contract, declare the value of the said leather trunk or its contents. Defendant admits that he has not delivered the said leather trunk to the plaintiff, but save as aforesaid, he denies the allega-

tions in paragraphs 3, 4, 5, and 6 of the declaration.

5. Defendant, before action was brought, tendered to the plaintiff the sum of £5, and hereby again tenders it. Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

The replication was general.

Contract referred to in paragraphs 2 and 3 of the plea:

A. R. MCKENZIE AND CO.

No responsibility is assumed for Baggage beyond £5 per package, unless specially declared, nor for packages landed from steamers discharging in the Bay, or hold baggage of any steamer, until same has been taken delivery of by A. R. McKenzie & Co. from Table Bay Harbour Board at Baggage Warehouse.

I hereby authorize the undermentioned Packages to be cleared ex "Mohawk" by A. R. McKenzie & Co., and delivered to White House.

2/9, 1901.

[A list follows which is signed "L. Kelly."]

The facts appear from the judgments.

Mr. Schreiner, K.C. (with him Mr. Buchanan), for plaintiff: McKenzie received our goods. He got them from us under a contract to deliver. He could not differentiate the contract by getting us to sign a list of goods. That acknowledgment was signed in the upper space of the paper. See the judgment of Ashbourne, L.C.J., in *Richardson and Others v. Rowntree* (1894 Ap., 217). Defendants' whole case is that we have signed a contract, and are bound by it, but they never drew attention to the fact that no agreement was required. Their driver had not only been shown to have been suspected of negligence, but had been convicted of intemperance.

Mr. Benjamin (for defendants): Plaintiff's counsel has mixed up two things, viz., the passport system of the railway and the ticket system. If a man has once signed a receipt, he must be held to have known what he was signing. *Watkins v. Rymill* (10 Q.B.D., p. 178). All we had to do was to hand over this document and ask him to sign it. *Palmer v. Grand Junction Railway Co.* (4 M. and W., 749), *Wyld v. Pickford* (8 W. and P., 462). The plaintiff knew very well what he was about, and cannot now go back on his own signature. *Harris v. G.W. Railway Co.* (1 Q.B.D., 515). Then, as

to the value of the property. Kelly is supposed to have said, "I have a watch, which I value very highly." We cannot accept any mere sentimental valuation. See *Marsh v. Horne* (5 B. and C., 322). If plaintiff knew that defendants had only a limited liability he would have no case. There was no declaration of value of this watch and chain, and therefore plaintiff cannot recover more than their original value. As to the tickets, there is a very considerable conflict of evidence.

Mr. Schreiner (in reply) quoted Bagally, L.J., in *Parker v. S.E. Railway Co.* (2 C.P.D., 424). We never signed any conditions. See *Naylor v. Munnik* (3 Searle, 187).

Buchanan, J. : The plaintiffs in this case are Mr. and Mrs. Kelly, who arrived in Cape Town by the Mohawk in September last, having with them a certain amount of luggage. This luggage was brought ashore and placed on the quay, and while there it was taken charge of by a representative of the defendant McKenzie. Part of this luggage was certain two trunks. McKenzie's representative, after receiving charge of the luggage, cleared the same and delivered it at the plaintiffs' residence, with the exception of these two trunks. This case differs from some others which have come before us with reference to the delivery of luggage, in that here defendants admit that they received the goods; they admit that they did not deliver them, and they admit liability for the missing goods, and the only question left for decision is the amount of the defendants' liability. The defendants have tendered £5, while the plaintiffs claim £43 7s. 6d. The value of the goods not delivered has been very fairly stated, and I think the claim made is quite within the value. There has been no cross-examination as to the value, and the list put in, with supporting evidence, shows that the plaintiffs have given a very moderate estimate of the value of the goods. The tender is founded upon a paragraph placed at the head of a printed document which was used on the occasion. After McKenzie's representative had received the goods he made a list upon a certain form, which McKenzie kept. This form seems to me to be in two portions. The upper portion contains the paragraph, printed in small type, saying that no responsibility would

be assumed for any package to the value of over £5, unless specially declared. Then follow some other exceptions as to exemption from liability when the goods are being brought ashore in the tug, etc., but these do not apply to this case. This first part of the document is not signed by either of the plaintiffs. Then the document contains a second part, the object of which is to facilitate the identification of the packages and to specify any of the goods in a package which may be liable to pay duty. On this second portion of the document McKenzie's representative wrote a list of the packages which he had to take over, and got the plaintiff to put his signature at the bottom. The document was thereupon immediately given back to McKenzie's representative, and not left in plaintiffs' custody at all. Plaintiffs' attention was not called directly to the clause on the upper part of the document. What is required in all these cases where there is a special provision like this, limiting the liability or introducing special clauses into a contract, is that the party to be bound should be aware, either directly or presumptively, that he was entering into a conditional contract. Sitting as a juror in this case, I should have to regard all the circumstances, and say whether in regard to this condition at the head of the contract there was mutuality between the parties. It is admitted in this case that no special attention was called to the condition, and it is not denied that the plaintiffs did not see it. The plaintiffs also state that they had no idea there was any special condition. This is not a ticket or receipt given to the plaintiff, which the latter would keep in his custody, and so have ample opportunity of becoming acquainted with any conditions on it. As far as the plaintiff was concerned, I think he might be taken to have considered he was only signing a list of the luggage he was handing over to defendants' representative. I would therefore say that the circumstances surrounding the case are not sufficient to make the contract subject to this special condition. But it is not necessary to rely upon that, because, even assuming that this was part of the contract, the evidence is all in favour of the plaintiffs. The condition is that no responsibility would be assumed for packages over £5 value, unless specially

declared. It does not appear that it is necessary that the amount should be stated, but just that the attention of the person receiving the package should be called to the fact that it was a valuable package, requiring special care. There was no extra charge made for packages above £5 in value, and the utmost the condition seems to be inserted for is that the attention of the person who receives the package should be directed to the fact that it is a valuable package. In this case there were two packages missing, one belonging to Mr. Kelly and the other to Mrs. Kelly. We have it that McKenzie's representative asked for the keys of the boxes, explaining that it might be necessary to have the boxes opened for examination by the Customs officials. Thereupon Kelly took out some money he had in his box, and Mrs. Kelly said: "In my box I have my gold watch and chain and my jewellery." She wanted to do as Mr. Kelly had done, and take these things out of her trunk, but McKenzie's representative said that this was unnecessary, that the things were perfectly safe, and that he would see that she got them all right. So that, even if there was this condition binding upon plaintiffs, there was a special declaration and a special undertaking on the part of the agent that he knew there were valuables in the box, and that they would be perfectly safe in his custody. Under these circumstances, I cannot see on what grounds it can be held that McKenzie and Co. are not liable for this property. It has been argued that this undertaking was a verbal one, and entered into before the document was signed. There is a great deal of force in this argument, but having the written document between the parties before us, one would rather look to that. Even looking at the document, I am not prepared to hold that there was a condition binding upon the plaintiffs; but I am further of opinion that even if there was a condition, it was met, and in this case the defendant cannot be relieved of his liability by a payment of £5. I am therefore of opinion that judgment should be given for the plaintiff for the full amount claimed, with costs.

Maasdorp, J., said he took the view that this was one document containing the conditions under which the

parties entered into a contract which was binding upon both parties. It had been argued that the condition should not be binding upon the plaintiff, because of the nature of the print, and the way in which he signed the document; but it seemed to his lordship that it was very legible and very easily understood, and on all the authorities that had been cited, he had come to the conclusion that the clause must be deemed as binding upon the plaintiffs. Then the further question arose as to what effect it had upon the contract. McKenzie undertook to carry and deliver the goods to the plaintiffs, and thus undertook certain responsibility in regard to the goods, but by the condition he limited his liability to £5, unless the package was specially declared to be over that value. Under these circumstances, the question arose as to whether he could take advantage of that exception. No authorities had been quoted to show what special meaning should be put upon the words "unless specially declared," and it seemed to his lordship that they meant nothing more than that the particular parcel should be pointed out as not coming under the exception limiting the responsibility to £5. Here the evidence of both Mr. and Mrs. Kelly was to the effect that they specially pointed out this parcel to McKenzie's agent as containing valuables, and they further had the special undertaking by McKenzie's agent to see the goods safely delivered. Under all the circumstances, his lordship was of opinion that the box had been sufficiently declared, and that therefore McKenzie was liable for its value, seeing that it had been lost while in his custody.

[Plaintiffs' Attorney, Mr. G. Trollip; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

HART V. JOHN. { 1902.
Feb. 12th.

This was an action for the recovery of money advanced on certain furniture. The declaration of Barney Hart and Alfred Hart, trading as B. and A. Hart, of Cape Town, set forth that defendant was a fruiterer, carrying on business in Cape Town. On March 30, 1901, plaintiffs bought from defendant certain furniture, which defendant stated was his property, and for which plaintiffs paid to defendant the sum of £60. Plaintiffs

took possession of the said furniture, and sold a portion thereof by public auction. The value of the unsold portion was £32 13s. 3d. In October last, one Jean Rosing (or Rosin) was convicted at the Criminal Sessions of the Supreme Court of the theft of the said furniture from one Willy Petersen, the true owner thereof, and sentenced to a term of imprisonment. Thereupon the said Willy Petersen claimed from plaintiffs, and again took possession of the said unsold portion of the said furniture. Plaintiffs incurred damage and expense in and about the removal and storage of the said furniture, and in costs and charges in reference thereto to the amount of £5. Plaintiffs claimed: (a) The sum of £32 13s. 3d.; (b) the aforesaid sum of £5; (c) alternative relief; (d) costs of suit. Defendant had been barred for default of plea.

Mr. Wilkinson (for plaintiff) called

A. Hart, the plaintiff in the action, who said that in March last year he purchased some furniture from Mr. Johns for £60, paying him by cheque and receiving from him the receipt produced. About three weeks afterwards they sold a portion of the furniture, and afterwards it came to witness's knowledge that a man had been convicted of stealing this furniture. He had to return the balance of the furniture to the rightful owner, Petersen. Afterwards, acting under Petersen's power of attorney, he sold that portion of the furniture, and it realised £28. Witness had been put to £5 or £6 expense in connection with this furniture, in carting, storing, etc.

By the Court: Witness did not know defendant as the agent of one Lennie. He did not know Lennie. Before witness bought the furniture a gentleman came and asked witness to buy the furniture. Witness did not know the gentleman. Defendant was not with him. Witness went to the place mentioned in Long-street, and made the agreement with Johns. He did not know Lennie at all in the matter.

Frederick Perle, a clerk in Messrs. Friedlander and Du Toit's office, said he served the declaration on defendant. The latter said he was not responsible for all the furniture, but would have to pay for it. He said he only got £5 out of the business, and Lennie got the remainder of the profit. Defendant afterwards came to the office, admitted the

debt, and offered to pay the amount by instalments.

The Court gave judgment for the plaintiff for £28, the value of the furniture returned, and £5 expenses connected with the removal and storing of the furniture, and costs of suit.

[Plaintiffs' Attorneys, Messrs. Friedlander and Du Toit.]

COOK AND SONS V. MAC- } 1902.
KENZIE AND CO. } Feb. 12th.

Landing Agent—Responsibility for goods.

When a landing agent has placed the goods entrusted to his custody in the warehouse of the Harbour Board he is functus officio, and is therefore no longer responsible for such goods.

This was an action for the recovery of the value of certain goods.

The plaintiffs' declaration was as follows:

1. The plaintiffs are Frank Henry Cook, Ernest Edward Cook, and Thomas Albert Cook, carrying on business in Cape Town as Thomas Cook and Sons; the defendant is Andrew Richard McKenzie, carrying on business as a landing agent under the style or firm of A. R. McKenzie and Co.

2. The defendant was a landing agent duly appointed by the Board, and in accordance with the Harbour Board regulations was by the master or agent of the steamship Umzinto appointed as agent for the consignees of all cargo from the said vessel at Cape Town docks.

3. In or about the month of May, 1900, a certain case containing one double-barrelled shotgun and one double-barrelled rifle, was consigned to the plaintiffs by the said vessel.

4. The defendant received and landed from the said vessel the said case, but although he had been called upon to make delivery thereof he has failed or neglected to do so.

5. The value of the said case, with its contents, is the sum of £70.

The plaintiff claimed: (a) delivery of the said case with its contents or the value thereof, payment of the sum of £70; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows: The defendant admits paragraphs 1, 2, and 3, save that he denies that the guns were consigned to the plaintiffs by the vessel, and says that as landing agent he received from the said vessel at the ship's side two guns.

2. He says that it was not part of his contract to deliver the said guns to the plaintiffs; after receipt as aforesaid of the guns from the vessel he duly placed the guns in the Harbour Board's warehouse, which was, and is, under the sole control and jurisdiction of the Table Bay Harbour Board; the defendant never contracted to become, nor was he appointed the delivery agent to the plaintiffs, and he says that upon his placing the said guns in the said warehouse his contract and duty terminated; the said guns have never been delivered to him from the said warehouse, nor were they ever again in his possession after he had placed them in the said warehouse.

3. Save as above he denies paragraphs 4 and 5; wherefore he prays that the plaintiffs' claim may be dismissed with costs.

The replication was general.

Mr. Searle, K.C. (with him Mr. C. W. de Villiers), for plaintiff; Mr. Schreiner, K.C. (with him Mr. Buchanan), for defendant.

Mr. Searle called

John Patrick McIlvenner, who said he was manager of the Cape Town branch of Messrs. Cook and Son. The firm received some advices from the branch in Calcutta, showing that a certain case was consigned to Cape Town. Messrs. Yule and Co. acted as the firm's correspondents for clearing goods. A letter was sent direct from Calcutta to Messrs. Yule. The vessel came in about August, 1900. The case belonged to Lieutenant Riddell, 16th Lancers, and was marked T.C.S. 1985.

The affidavit of Lieutenant Riddell, as to the contents of the case, was read. He said the case contained two guns, for which he paid £70.

Witness, continuing, said he communicated with Messrs. Yule and Co. several times with reference to the non-delivery. He sent in a claim to McKenzie's, and also went to see the manager. The latter said that probably the case was at

the Docks, in the dumping shed, and that he would make inquiries. Afterwards witness put the matter in the hands of solicitors. Witness's firm was responsible to the owner for these goods.

Cross-examined by Mr. Schreiner: Witness received a receipt from the Calcutta office marked "duplicate." This stated: "Said to contain personal effects." The special receipt was lost by Messrs. Yule. Attwell and Co. were agents for the ship. Inquiries were made of them, and they stated that they had a clean receipt. Witness had had a letter from the Calcutta office referring to the case of guns lost. There was only one parcel by that vessel for Cook and Sons. Witness was not aware that Yule and Co. cleared the case (referred to as containing personal effects) as containing clothing. There was a letter written from Calcutta, stating that a telegram, supplemented by a letter, had been sent to Messrs. Yule from Calcutta, informing them that the case had been wrongly stated as being for Hutton Hall, and that this should be Hutton Riddell.

Robert Wm. Small, clerk to Messrs. Attwell and Co., ships' agents, produced a receipt for the delivery from the ship of a case marked TCS, 1985.

Arthur Hy. Brays, clerk in the employ of Messrs. Wm. Watson and Co., said that when the vessel arrived, he was in the employ of Messrs. Yule and Co. This case marked TCS 1985, was the only package witness had by that ship for Cook and Sons. Efforts were made to find the case, but they had not been able to find out anything about it. A *pro tem.* order was given.

By the Court: The order described the case as marked TCS, no number. It gave no description of the goods, so far as witness knew.

Cross-examined by Mr. Schreiner: Witness had no knowledge as to how the entry was made. Witness looked for a case marked TCS.

Mr. Searle closed his case.

Mr. Schreiner said that it had now been discovered that the case had been delivered to the Army Service Corps. The reason why the case could not be traced was due to the error in name which the letter referred to by the first witness disclosed. It was clear from the

Customs documents that the case had been delivered to the Army Service Corps. Mr. Schreiner called

Warren Sexton, manager of the baggage department of Messrs. McKenzie and Co., who said that he had tried to trace the case reported as lost. He looked for the case in the name of Hutton Riddell. To-day witness found a record of a case being cleared in the name of Hutton Hall. He only discovered this since the case commenced. Witness produced documents, including the ship's manifest and *pro tem.* orders. He said he could only see the *pro tem.* orders, and on the *pro tem.* order the name appeared as that of Hutton Hall. There was only one case by that vessel, either in the name of Hutton Hall or Hutton Riddell. There was nothing else for Cook and Son. The Army Service Corps passed the entry.

Cross-examined by Mr. Searle: All the other ship's goods were accounted for, so that this package cleared by the Army Service Corps was the only one for Lieutenant Riddell. That was to say, the Customs books showed all the other goods as having been delivered.

Asked by Mr. Justice Maasdorp how he accounted for a parcel addressed to Yule and Co., and marked TSC, being taken by the Army Service Corps, witness said that for the last year the Army Service Corps had been taking parcels without any authority whatever. This had been the subject of correspondence between McKenzie and the Harbour Board.

Merville Backwell, examining officer in the Customs Department, produced certain Customs documents, showing a parcel from the Umzinto received by the Army Service Corps. Witness would not see the case. A document was brought to witness asking for delivery of a case ex Umzinto for Lieutenant Riddell. The paper stated that the case was a present from a friend, and contained clothing.

Cross-examined by Mr. Searle: The document was signed by Captain Edmondson. This was given to the Customs authorities, and signed. This was produced before a *pro tem.* order was given; it was usually produced before the ship arrived. Yule and Co. might have brought that order.

Re-examined by Mr. Schreiner: The examining officer before whom a party

appeared, gave the *pro tem.* order. On the *pro tem.* order produced there was an entry of one case of effects for Lieutenant Hutton Hall, ex Umzinto.

By the Court: Witness could not say that the package delivered to the Army Service Corps was the one marked on the ship's manifest.

James John Kelly, a Customs official, said he was in charge of the portion of the Docks where the Umzinto was berthed. From the ship, goods came to the *pro tem.* warehouse, over which witness had charge, and they were removed from there when somebody came with a *pro tem.* order. With regard to the *pro tem.* order produced, the package for which it was issued had actually been received from the ship, and at the back of the order, when checking the books, witness had put down "delivered."

Cross-examined: The writing "delivered" meant that the ship had actually delivered the package. Witness could only say of his own knowledge that that package figured in the Customs books. After detailing the system of working in connection with such goods, witness said he had just been called that afternoon to go into this matter, and his remembrance of things was only now coming back to him. He now believed that the Umzinto was removed from the one berth to the other, and that he had personally seen this package. As far as he could remember, it was a wooden case about 2 feet long and 12 or 15 inches deep, and as to colour it was a dirty-looking case.

Mr. Searle: Unfortunately it was not a case at all, but a canvas package.

Mr. Searle then called

Edward L. Kitch, who said he was a clerk with Yule and Co. when the Umzinto arrived. The *pro tem.* order produced was made out by the chief clerk. The goods were never delivered to witness's knowledge. Yule and Co. used to get entries for goods for military officers signed in the same way as the entry produced, by Captain Edmondson. He was unable to say which of these two documents was made out first. Yule and Co. never received any parcel from the Umzinto for Riddell.

By the Court: Witness did not know of any entry having been passed other than that by the Army Service Corps.

After argument,

Buchanan, J.: The plaintiffs in this case carried on business in Calcutta, and also

have an agency in Cape Town. Their Calcutta house received a case which they sent by the ship *Umzimto* to Cape Town, consigned to order. From the ship the plaintiffs received a parcel receipt—not an invoice—for it. This ticket was an acknowledgment by the ship that they had received this case, and that the ship was bound to deliver to the proper persons at the port mentioned. The Table Bay Harbour Board regulate the manner in which goods are to be delivered from vessels arriving at this port. We know from previous cases in which the Harbour Board regulations have been before the Court, that under the Harbour Board regulations the agent of the ship must appoint one landing agent for the purpose of receiving the goods from the ship on behalf of the consignees, and they require that the receipt of this agent shall be a sufficient discharge of the ship. McKenzie accepted the office of landing agent from this vessel, and under the Harbour Board regulations he undertook to receive goods from the ship's slings and put them in such place as the Harbour Board might direct. There was no liability upon McKenzie on his receiving goods in this way to keep the goods in his custody until delivered to the owners. He was acting simply under the Harbour Board's regulations, and he discharged his liability as soon as he handed these goods over to the Harbour Board or placed them in such place as the Harbour Board might direct. The missing case, which was shipped from Calcutta, according to the parcel receipt, was stated to contain personal effects. The plaintiffs now say that they contained two guns, which they received for one Lieutenant Hutton Riddell. When this action was commenced the first question was raised as to the right of the plaintiffs to sue, the defendants denying the fact that the goods were consigned to Messrs. Cook and Son in Cape Town. Since the parcel receipt has been produced it is shown that the plaintiffs were the persons to whom the goods were consigned, and McKenzie and Co. being the agents of the consignees, cannot now deny liability to them. Assuming, therefore, that McKenzie was answerable to these persons, the onus is upon him of showing that he has put these goods where he is bound to put them. In previous cases where McKenzie could not satisfactorily show that he placed goods in the

warehouse it has been held that he is liable for the goods. But in this case I think it is beyond all dispute that these goods have been placed in the warehouse of the Harbour Board in accordance with their regulations. We have the evidence of the Customs officials, which is very clear and distinct on this point. Kelly said that from the records in his office and from the records supplied by his subordinate officials he was perfectly satisfied that the goods were received in his warehouse. I do not wish to say anything now as to the liability of the Harbour Board. As Mr. Searle says it is very hard on the consignees that the consignees should not know against whom to go, and that hardship has been acknowledged in previous cases, but if they go against the proper persons and show liability of these persons, the Court will give judgment against such persons. We have given judgment against McKenzie in many previous cases, but we have never had a case against the Harbour Board before us, and we cannot say what their liability is. Supposing the goods found their way into the warehouse, McKenzie was no longer the custodian of the goods. He had charge of them only from the time of taking from the ship's slings and putting into the warehouse. I consider McKenzie has discharged the onus upon him of showing that he has performed his duty. In addition to this, we have singular facts in this case. It is alleged in the pleadings that this case contained guns. It is a most singular thing that they were shipped as personal effects, and more singular still, that when they arrived here, Yule and Co. went and made a *pro tem.* entry that this case contained personal effects. There was not a word about guns. Of course, guns are effects, but that is not the usual way of describing guns. There are two documents required by the Customs. One is a *pro tem.* order, and the other a Customs entry, upon which the *pro tem.* order is granted. The practice at the Docks is to put together all documents relating to the cargo of each vessel. Here we have all Customs entries and *pro tem.* orders filed in one set of papers attached to the manifests. The Customs officials have produced the documents filed with the manifest of this ship, and say that every item in the manifest is accounted for except

this one case marked TOS in a diamond, and the two documents which they produce they say refer to this particular case, and can refer to no other. On one document, the *pro tem.* order, Yule and Co. says that the importer is Lieutenant Hutton Hall. This *pro tem.* order, filed by Yule and Co., is not dated, but must have been passed some time in the early part of August. We cannot fix the actual date. The correspondence shows that Yule and Co. made a mistake in stating the owner to be Lieutenant Hutton Hall; it was Lieutenant Hutton Riddell. About the same time this *pro tem.* order was made out, a bill of entry was made out by Yule and Co. in the name of the Army Service Corps. No other entry had been filed by Yule and Co. in connection with this package except this bill of entry on behalf of the Army Service Corps. This document specified Lieutenant Hutton Riddell as the importer. On these two documents the Customs authorities have marked the case as having been delivered. I will not say this is proof positive that the case has been delivered to any particular person, but it is very strong corroborative evidence to show that McKenzie deposited the case as he was required to do, and therefore discharged his liability. As the case now stands, the only persons entitled to this case were Cook and Sons, as consignees; but the bills of entry show that there was delivery by the Customs to persons who were not consignees, and who had no right to receive the goods. The only use of these documents in this case is to corroborate the defence set up by McKenzie that he discharged his liability. Taking all the circumstances into consideration, I think it is impossible to hold McKenzie and Co. liable for these goods, which they did not have the custody of after delivery to the warehouse. It may be that when the consignee came for delivery of the goods, McKenzie were bound to load them on to the consignee's wagon, but the custody did not remain with McKenzie after the goods were placed in the warehouse. Under the circumstances disclosed, we hold that McKenzie and Co. have discharged the onus which lay upon them of showing that they deposited the goods in the proper place, and performed the duties imposed upon them by the Harbour Board. Judgment will be given for defendant, with costs.

Maasdorp, J. concurred.

[Plaintiff's Attorneys, Silberbauer, Wahl and Fuller; Defendant's Attorneys, Fairbridge, Arderne and Lawton.]

SUPREME COURT

GABRIEL V. HOFFMAN. { 1902.
Feb. 13th.

Civil imprisonment—Decree refused—Act 8 of 1879, sec. 6.

Mr. Benjamin moved for a decree of civil imprisonment on an unsatisfied judgment for £25, together with costs. A certified copy of the judgment and the return of *nulla bona* were put in.

Defendant appeared in person, and said that he had made the promissory note upon which judgment had been given against him, but he had not made it in favour of the plaintiff, but in favour of the latter's son. When the note was presented he had no means to meet it. He was out of employment at the present time, but hoped to get employment shortly. He had lately returned from England, whither he had gone after being eighteen months at the front. At the present time he had actually no means, and was living upon what he could get advanced to him by friends. His ordinary occupation was that of a miner, and he had been employed as such for some years in Rhodesia. The debt was due for some dentistry work done for him by plaintiff's son, who would never have sued him, but he was away at present.

Witness then went into the witness-box, and repeated on oath that he had no means, except some personal clothing and the sword and belt he had had at the front.

Cross-examined by Mr. Benjamin, defendant said he was formerly in Driscoll's Scouts. At one time he thought he had a gratuity of £37 10s. coming to him from the military, but on making further inquiries, he found that he had not, he having resigned his commission of his own free will. Defendant was living at the Waverley Hotel, Three Anchor Bay, and his board was £10 a month, but he was not paying it, but owing it at present. He had been

living there previously, and the proprietor knew him. The debt on which the decree of civil imprisonment was asked had been owing for two years. He had gone to England after being at the front, but he got a free passage, and coming out, he was given an indulgence passage. He had instructed his attorneys to make an offer of £5 per month in payment of the debt, but he could not make that offer now, as the case coming into court spoiled his chance of getting the money.

De Villiers, C.J., said that the defendant had stated on oath that he had no means to satisfy the debt in whole or in part, and that statement had not been contradicted. The application would therefore have to be refused, but the plaintiff would have leave to apply again if he could show that the defendant had means to satisfy the judgment in whole or in part.

ANDREWS V. CHARLEY.

Mr. Bisset moved for provisional sentence on a promissory note for £150, with interest at the rate of 10 per cent.

Provisional sentence granted as prayed.

Two similar applications were also granted.

CLARK V. JOSEPH JACOBSON. { 1902.
Feb. 13th.
Civil Imprisonment—Act 8 of
1879, sec. 6—Decree granted.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £118 9s. 3d, together with £57 costs. Mr. Buchanan recapitulated the facts of the case in which judgment was given against the defendant. The plaintiff Miss Clark, had been in partnership with the defendant, and some difference arising it was resolved that the partnership should be dissolved. A day or two before that could be carried into effect, the defendant reported that his shop where he slept had been broken into and the jewellery in the partnership, to the value of several hundred pounds, stolen. Afterwards, plaintiff brought an action against defendant for the recovery of half the value of the goods remaining in the partnership, and got judgment for the amount stated, with costs.

Defendant appeared in person to oppose the application, and said that he had nothing. The remainder of the stock had been attached and sold to pay a judgment for the rent, and the sheriff's return showed that there was not sufficient to do that. The property had realised £103. He had not disposed of any property after the judgment.

Defendant went into the witness-box and stated on oath that he had no property.

Cross-examined by Mr. Buchanan, defendant said that after the partnership was dissolved he went on trading, but he made no money at all. He could not tell what he had been living upon. He had no money put away in the bank or elsewhere. He had no house, but lived casually among his friends, often getting a shake-down for the night. Before the partnership he had lived with plaintiff's parents, and they took care of the jewellery which he afterwards put into the partnership.

De Villiers, C.J.: What has become of that jewellery?

Defendant said that, as he told the Court at the time the case came on, there had been a burglary, and all the jewellery was stolen. It appeared to him, as far as he could see, that there had been a great mistake. The burglary looked for all the world like a fake, coming on the eve of the dissolution of the partnership. He wished it was a fake. The case in which the jewellery had been kept was afterwards found in an alleyway about 100 yards from defendant's place, smashed to pieces. At a low estimate, the jewellery was worth £475, but he would not have taken £900 for it. He was offered £700 for it long before he went into partnership.

Mr. Buchanan: And your partner put in £300 actual cash, and now she gets nothing?

Defendant: That is just what I have got. Continuing, defendant said he occasionally got a job collecting a few accounts, and wrote letters for other people and sometimes he got a commission for selling something for other people.

In answer to the Court, defendant said he could make no offer. He would pay if he could but get a chance to earn anything.

Buchanan, J.: At the trial of the case it was shown that you had had a large lot of jewellery, and I was not

satisfied then that you had not still got it; however, the judgment was for half the amount of the property still remaining.

Defendant: I also saw that your honour had the idea that I still had the jewellery. The same idea promulgated through the town, and even the police had the idea that it was a fake. I wish it had been.

Buchanan, J.: The circumstances are that a large case of jewellery was taken from the room in which you were sleeping, and you knew nothing about it.

Defendant said that he was not at all sure but that by a diligent search he would yet find the jewellery in some second-hand shop.

De Villiers, C.J.: The 6th section of the Act Provides that no writ of civil imprisonment shall be granted if the party against whom the writ is sought shall prove to the satisfaction of the Court to which such application is made that such party has not property or means sufficient to satisfy in whole or in part the judgment. My learned brethren, before whom the previous case was heard, are satisfied that at that time the defendant was in possession of property, and defendant can give no satisfactory explanation as to how he lost that property. He gives some account as to that property being stolen from him, but not in a way which perfectly satisfies us. He has not satisfied the Court that he has no means sufficient to pay the debt, and under the circumstances a decree of civil imprisonment will be made, but an opportunity will be given him of paying the debt by monthly instalments. A decree will therefore be granted as prayed, but execution stayed pending payment of the debt at the rate of £10 per month until the whole debt is satisfied, the first payment to be made on March 1.

ILLIQUID ROLL.

SAWKINS V. H. WHITE.

Mr. Buchanan moved under Rule 319, for judgment in default of plea on a declaration, which claimed £63 16s. 6d., being balance of amount due for work and labour done, with interest *a tempore morae* and costs of suit.

Judgment as prayed.

KERBYL V. A. BONICCI.

Mr. B. Upington moved for judgment, under Rule 329d, for £82 5s. 3d., being balance of account for goods sold and delivered, with interests and costs.

Judgment as prayed.

JACKSON V. H. ISAACS.

Mr. Bisset moved for judgment, under Rule 329d, for £750, with interest and costs of suit. The amount was the purchase price of certain land, of which transfer was duly tendered.

Judgment granted as prayed.

GENERAL MOTIONS.

GETHIN (IN HIS CAPACITY)
OF MANAGER OF THE } 1902.
SOUTHERN LANDS COM- } Feb. 13th.
PANY, LTD.) V. COLONIAL }
GOVERNMENT.

Company's Agent — Service of Summons.

Where, after certain correspondence as to quitrent between the attorneys of the Colonial Government and the Manager of a certain Company, the Government issued summons against the Manager N.O. and had it served upon him.

Held, that although a member of a certain firm of attorneys held a general power as the Company's representative, the aforesaid service was good, as the General Agents had, with full knowledge that summons would be issued, lain by and not informed the Government of the position in which he stood towards the Company.

This was an application on notice to set aside the judgment obtained under Rule 329 (d) by the Government on the 13th January last, as also the subsequent proceedings therein.

The applicant alleged in his affidavit that he was the defendant mentioned and referred to in the above suit, that he was the manager of the company's properties in Vryburg and Kuruman;

that the company was an English company, duly incorporated with limited liability under the English Companies Acts of 1882 and 1886, having its registered office at No. 19, St. Swithin's-lane, London; that the company had no registered office in this colony; that Daniel Johannes Haarhoff, solicitor of Kimberley, is the general agent and attorney in this colony of the company, and he (Gethin) did not hold any power or other authority from the company; that in November last he received a demand for payment of the amounts claimed in the action which he forwarded to Haarhoff; that on the 7th December, the Deputy-Sheriff of Vryburg attempted to serve him with the summons, but he refused to accept service and informed the Sheriff that he had no power or authority from the company, and that on the 21st January the Deputy-Sheriff of Vryburg served him with notice of seizure in the suit of cattle and moveables of the company, valued at £1,224 1s.

Mr. Haarhoff, in his affidavit, corroborated the statements made by the applicant, and referred to a letter which his firm had addressed to the Government attorneys on the 23rd November, in which they informed them that they were acting for the company, and that they would have availed themselves of the sitting of the Commission appointed to investigate the question of the reduction of quitrents, but owing to the war the Commission did not sit as regards the Vryburg farms, but that when it did, they hoped to obtain a substantial reduction on the farms in the Mashowing and Kuruman districts. They concluded their letter by trusting that the Government would see their way to allow the matter to stand over for the present, if not, they would require time to communicate with the company in London. Mr. Haarhoff went on to allege that the Commission referred to in his firm's letter had not yet sat. That on the 2nd January last his firm addressed a letter to their Cape Town correspondents requesting them to ascertain whether any further steps had been taken in the above suit, and pointing out the irregularities above referred to, and at the same time informing them that on receipt of a telegram a power to defend would be forwarded, to which a reply was received that no

further steps had been taken in the matter. The next intimation he received was a telegram from Gethin, on the 21st January, that the Deputy-Sheriff of Vryburg had attached movable property of the company at Vryburg. He finally alleged that the company disputed the correctness of the amount claimed in the summons issued in the above suit.

Mr. Marais, a clerk in the employment of the company's local attorneys, alleged that on the 7th January he interviewed Mr. Allan Reid, one of the Government attorneys, who informed him that nothing further had been done in the matter, and deponent explained to him that the summons had been served on the wrong party; that from the conversation he inferred that the company's local attorneys would be informed before further proceedings were taken in the matter.

In reply to this Mr. A. Reid alleged that he had no recollection whatever of ever having seen Marais with reference to the case.

Mr. Searle, K.C. (for applicant): The service of this rule was bad. It is admitted that the money was tendered under protest, but the Sheriff would not accept it. The real question is, has there been proper service?

[De Villiers, C.J.: What authority have you to make this application?]

That of Mr. Haarhoff, applicant's attorney. Gethin is only the manager of the property, therefore service on him cannot be good service. It should have been on Haarhoff, who is the general agent of the company—*Paterson v. Pearson* (Buch., 1875, 45)—in which it was held that the Standard Bank, being a public company, was entitled to be sued in its corporate name. The Court will always set aside a judgment if service is bad. Marais certainly went to Reid's office, and was there told that the Government did not intend to take any further steps. See *Bank of Africa v. Rose-Innes Diamond-mining Company* (1 H.C., 425), and *African Diamond-mining Company v. Eden Bros.* (1 Ap., 379). Service may be at an office of the company registered in this colony, but that is quite a different thing from serving on a manager. The case of the *African Diamond-mining Company* is not on all fours with this. Here Government never attempted to serve Haarhoff, our accredited agent.

[Buchanan, J.: But the manager communicated to Haarhoff the fact that he had been served.]

Haarhoff ought to have been served, more especially as the Government knew from his letter of November 23, that he was the accredited agent. The summons was not taken out till November 28, and was served much later. Gethin told the Sheriff that he had no power to accept service of summons. He also told Haarhoff what was being done. Haarhoff told Van Zyl and Buissinne, and they told Reid. Reid does not deny this.

[De Villiers, C.J.: Haarhoff had no right to lie by when he knew that summons had been issued.]

He did all he could; he sent Marais down.

[Maasdorp, J.: What would Haarhoff have done if the summons had been served on him?]

He would have defended.

[Maasdorp, J.: How would it have been if a summons in Gethin's name had been served on Haarhoff?]

That would have been bad service, unless the summons were amended.

Mr. Sheil, K.C. (for Colonial Government): The Government were never told that Haarhoff held the general power of attorney of the company. They knew that Haarhoff and Hertzog were the company's attorneys, but the only representative we knew was Gethin. He was therefore served, and I submit that service was good. *Westlake, Priv. Internat. Law* (section 310). The only officer of the company whom we had knowledge of was Gethin. No doubt it would have been better if the summons had been directed against the company, but it was nevertheless good against Gethin in his capacity as manager. The only objects of a summons are to bring a defendant into court, and to tell him what is alleged against him. These ends were served by service on Gethin, who communicated with Haarhoff. Reid denies the alleged interview with Marais, and if the alleged communications between them ever took place they ought to have been in writing, and to have been placed on the record. The point raised by the applicants is of a highly technical character. Haarhoff knew that summons had been issued, and yet he lies by and does nothing. The only benefit the applicants can derive from the granting of this application will be to retard the

action of the Government; as it would seem from the correspondence that they have no defence on the merits.

Mr. Searle (in reply): It was the duty of the Government to have found out who were the agents of the company. They could easily have got the information at the Deeds Office. The company was not really before the Court, and therefore were not bound to enter appearance.

De Villiers, C.J.: Before the summons in this case was issued there was a correspondence between the parties, which, in my opinion, has an important bearing on the case. On November 12 the Government's attorney wrote to Gethin demanding on behalf of the Assistant Treasurer payment of quitrent, and informing him that unless payment was made legal proceedings would be instituted against him. This letter was sent to Haarhoff, who on November 23 wrote to the Government's attorneys stating that his firm was acting for the company, and that they would have availed themselves of the sitting of the Commission appointed to investigate the question of the reduction of quitrents, but owing to the war the Commission did not sit as regards the Vryburg farms, but that when it did they hoped to obtain a substantial reduction on the farms in the Mashowing and Kuruman districts. The writers trusted that the Government would see their way to allow the matter to stand over for the present; if not, they would require time to communicate with the company in London. Haarhoff did not say that Gethin was not the man to sue; he said: "We are acting for the company." The Government's attorneys replied that the quitrent was considerably in arrear, and that they were issuing a summons. A summons against whom? Clearly against Gethin. Then one would have expected that Haarhoff, if Gethin was not the man to be served, would have replied: "In case you issue a summons, issue it against me," but he did nothing of the kind, whereupon summons was issued against Gethin, who communicated the fact to Haarhoff. Haarhoff lies by and does nothing, and there was no clear written proof that any objection was made. Now, however, after judgment is given, and the money paid—it is true the money was paid under protest—it is sought to set aside the judgment. No

sufficient ground has been shown for setting aside this judgment. In my opinion the summons was not invalidated in its present form, seeing that Haarhoff allowed the Government's attorneys to believe that no objection would be made to the service of the summons on Gethin. Of course, if defendants can show proof upon the merits that the money was not due, they can still file an affidavit upon the merits. The refusal of the present application will not prevent any further application being made on the merits to have the judgment set aside.

The present application must be refused with costs.

Their lordships concurred.

[Applicant's Attorneys, Van Zyl and Buissinne; Respondent's Attorneys, Reid and Nephew.]

[Before the CHIEF JUSTICE and Mr. Justice MAASDORP.]

MUSGROVE V. MUSGROVE.

Mr. Buchanan moved for a decree of divorce. The defendant had not obeyed an order of Court to return to her husband by the stated time. The affidavits showed that the petitioner had offered to provide funds to enable respondent, who was in England, to return to him in South Africa.

Granted.

DAVIES V. WOODSTOCK MUNICIPALITY.

Mr. De Villiers moved to fix a day for trial by jury.

The Chief Justice said it was at present impossible for the Court to fix a date. The Court would consider the arrangement of the work, and would try to fix some day in term. If they could not fix some day in March, it would have to go to the next term.

KANNEYMEYER V. HAVINGA AND OTHERS.

On the motion of Mr. Searle, K.C., Mr. Maasdorp, land surveyor, was appointed arbitrator between the parties.

IN THE MATTER OF THE PETITION OF MARY J. BARNARD.

Mr. Benjamin moved for authority for the Master to pay out certain moneys, to

be devoted to the maintenance of the minor child of petitioner.

Granted.

IN THE MATTER OF THE PETITION OF RICHARD W. WRIGHT.

Mr. Buchanan moved for confirmation of the sale of certain property.

Granted.

Ex parte BRINKMAN, N.O. { 1902.
Feb. 13th.

Municipality—Derelict land—Sale

—Arrear rates—Transfer.

This was a motion for an order: (1) Declaring the Municipality of Victoria West entitled to take possession of lots 140 and 146 of land within the limits of the said municipality, and to receive transfer thereof; (2) ordering the Registrar of Deeds to pass transfer of the said lots, and to make such alterations and amendments in the records of the Deeds Office as might be necessary for the registration of such transfer; (3) confirming the sale by the Municipality of the said lots to certain parties—to wit, Charl Andries Cilliers and Gerhardus Petrus Kempen.

The petition of Lambert Hendrik Brinkman, in his capacity as the chairman for the time being of the Municipality of Victoria West, showed that by Act 45 of 1882, the said village was constituted a municipality, having been previously vested in and under the control of the Dutch Reformed Church of Victoria West. In 1880 the churchwardens of the Dutch Reformed Church, who were the commissioners at that time of the Municipality of Victoria West, were empowered to sell as building allotments any part of the waste and hitherto unsurveyed land belonging to the churchwardens, and situated either in the village of Victoria West or at Kapoksfontein, with the exception of such part of such ground as lies to the south of the public watercourse of the said village of Victoria West. When giving instructions to the auctioneer, in 1900, as to the sale of certain plots, the Town Clerk (now deceased) included (at the request of the Council) the two plots (140 and 146) now in question. These lots were accordingly sold—140 to C. A. Cilliers, and 146 to P. Kempen. The lots have been greatly improved, 140 more particularly.

When the conveyancers proceeded to transfer they found that both these properties were still registered in the respective names of their former proprietors. No records could be found in the books of the Municipality of the sale of these lots to the registered proprietors above referred to, and it was only after considerable delay and much trouble that the exact amount of rates due in respect of these properties could be ascertained. The two lots in question have been derelict for the last thirty years and more, and the owners cannot be found. In respect of lot 140 the rents due and unpaid amount to £6 5s., and in respect to lot 146 to £8 2s. 6d., in both cases exclusive of interest. The Municipality is willing to deposit the balance of the amounts realised as aforesaid, after deduction of arrear rates and expenses, with the Master of the Supreme Court, for account of the registered owners aforesaid, or their representatives. Wherefore petitioner prays *ut supra*.

Mr. Benjamin moved.

The Court granted a rule *nisi*, calling on all concerned to show cause, on April 12, 1902, why an order should not be granted confirming the sale of lot 140 to C. A. Celliers, and of lot 146 to G. B. Kempen, and authorising the payment of the proceeds to the Master of the Supreme Court for the benefit of those concerned. Rule to be served on D. P. Blaine and P. J. H. Liettig or their respective executors, and to be published twice in the "Government Gazette" and the "Victoria West Messenger" in the Dutch and English languages.

De Villiers, C.J.: This is a very unusual application, but at the same time a mistake seems to have been made, and something will have to be done to assist the Commissioners. An order will be granted calling on all interested to show cause why the sale shall not be confirmed, and payment of the balance lodged with the Master of the Supreme Court for the benefit of those concerned. The Court will direct that the order be served on the registered owners or their executors, and that it be published twice in the "Government Gazette" and in the "Victoria West Messenger" in the English and Dutch languages. If no executors can be found, the applicant will have to apply again for some other persons to be served, because it is essential that the registered owner should have notice, and

then the Court can consider what form of substituted service is necessary.

On the return day (April 12) the rule was made absolute.

[Applicant's Attorney, C. H. Herold.]

IN THE MATTER OF THE MINORS TARDUGNO.

Mr. Wilford moved for the confirmation of the sale of certain property in which the above minors were equally interested, and in which their mother had a life interest. It was desired to sell the property, which was situated in Cape Town, for £2,500, and to purchase instead property in Port Elizabeth, where the minors and their parents now reside. Sworn appraisers had valued the property at £1,800. The rents were £175 4s. per annum, and after deducting rates, insurance, and repairs, the net income from it was from £100 to £110 per annum. The Master's report was favourable.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE CAREL P. SNYMAN.

Mr. Buchanan moved for an order for the completion of a certain mortgage bond. The late Carel P. Snyman had been arranging a mortgage bond for £2,900, to consolidate other bonds and to cover certain debts. Owing to complications and unavoidable circumstances, the passing of the bond was delayed, and before it was completed Snyman died. The executor testamentary now petitioned for leave to complete the bond, and pointed out that if the property had to be sold to strangers, he and the other children interested would be left without a home. The Master's report was favourable.

Order granted as prayed.

TOWN COUNCIL OF CAPE { 1902.
TOWN V. SHENKER. { Feb. 13th.
 " 18th.

Municipal Building Regulations.

The provisions of the 4th clause of the Municipal Building Regulations of Cape Town requiring streets to be of a width of 40 feet cannot be

made to apply to a street laid out before the regulations came into force.

This was an application upon notice given to the respondent to show cause, if he had any, why an order should not be granted restraining him from erecting certain buildings on a piece of land at the corner of De Villiers and an unnamed street in Cape Town beyond the building line fixed by the City Engineer, and also until the consent of the Town Council shall have been obtained under Building Regulation No. 112, and why he should not pay the costs of the application.

The affidavit of the City Engineer (Mr. Wynne Roberts) was as follows:

1. Certain plans for buildings proposed to be erected on a certain piece of ground situate at the corner of De Villiers and an unnamed street, Cape Town, were submitted to me for my approval on the 13th December, 1901, under Building Regulations Nos. 110, 111, and 112, of the Town Council of the City of Cape Town.

2. Thereafter certain communications (both written and verbal) took place between myself and the respondent regarding the building line, and on January 7, 1902, I addressed a letter (marked A) to the respondent's architect, asking for certain information, which I required for the purpose of dealing with the application.

3. I did not receive the required information about the streets, but the diagram of the property was sent to me, and I ascertained from it and the dimensions of the buildings proposed to be erected, that the said buildings would project beyond the building line laid down by me in terms of Regulation No. 159, to an extent of about 7 feet.

4. For the above reasons I am unable to pass the plans; the buildings in question would have the effect of narrowing the street on the one side to an extent of about 7 feet, in contravention of Building Regulation No. 4.

5. The respondent called at my office on January 30 last, when he stated that he intended proceeding with the erection of the said buildings, and a notice was served upon him calling upon him to desist in the erection of the said buildings until the plans had been approved and passed.

6. I have ascertained that the respondent is proceeding with the erection of the said buildings, and owing to the fact that the matter is an urgent one, longer notice of this application cannot be given.

The letter to respondent's architect, referred to in the above affidavit, stated: "In reference to Mr. Shenker's plans, I should be obliged if you could submit the diagrams of Mr. Shenker's property for inspection. I informed the owner some ten days ago verbally that I require some evidence of the Council having approved the sub-division of this land before I can approve of the plans, but this information has not been forthcoming, and I therefore return the plans for the present."

There were affidavits by building surveyors of the Council to the effect that the buildings were being proceeded with, and that notice calling upon respondent to desist had been duly served.

To this the respondent, Herman Maurice Shenker, made the following affidavit, stating:

1. That I have perused the notice of motion and affidavit of the City Engineer and the two building surveyors.

2. That the plans for my proposed buildings at the corner of De Villiers-street and an unnamed street were submitted to the Town Council on December 13, 1901, and in terms of Regulation 112, the City Engineer should have signified within fourteen days his approval or disapproval of the plans.

3. That I received no communication from him on the subject, so, together with my architect, I called on him on January 3, 1902, to inquire about the plans. We had an interview with the City Engineer and the Assistant Building Surveyor. The only information asked for was a proof that the original sub-division which was made in or about the year 1875, of the land on which my proposed building was to be erected, had been approved by the Town Council at that time. We informed them that we were not in a position to furnish such proof, but that, as the plan of sub-division was in the possession of the Town Council, and they had already recognised it by allowing other proprietors to build on the land dealt with under the plan, we did not see how they could question it.

4. Thereafter, on the succeeding day and again on Monday, January 6, we called at the Town-house, and on the

latter day were informed by the Chief Building Surveyor that he intended returning the plans under Regulation 11. We pointed out that he was not entitled to do so, and subsequently he admitted that the regulation did not apply.

5. Thereafter on January 7 my attorneys addressed a letter to the City Engineer. After receipt of this letter the plans were returned with a letter from the City Engineer, addressed to my architect. In reply thereto my architect wrote on the same date.

6. That I received no further communication from the City Engineer or the Town Council until January 29, when I received a letter of that day's date, and I beg to point out that the objections therein recorded were entirely different to those which had been the subject of our previous interviews.

7. That as to paragraph 4 of the City Engineer's affidavit, I wish merely to point out that the street in question was laid out in 1875; that buildings have within the last four or five years been erected on the opposite side to that on which my property is, and that these buildings have been erected right up to the boundary of the said street. There are no buildings at present on the side of the street on which my property is situated.

8. That as to paragraph 5 of the City Engineer's affidavit, I have to point out that the notice referred to therein was given on January 29, and that I merely called at the Town-house to obtain my diagrams, and not for the purposes stated. The diagrams had been lent to the City Engineer during the week, after receipt of same from the Deeds Office, as previously promised in the correspondence.

9. I say further that the buildings as set forth in my plans fall entirely on my own property, and that the street in question has been in existence, and has been used as a street for many years, and that my plans comply in all respects with section 100 of the regulations of the Town Council of Cape Town.

The City Engineer, in a replying affidavit, said:

1. I have perused the affidavits of the respondent and Henry Rowe Rowe.

2. There is a plan of sub-division showing the street in dispute, which is now in the City Engineer's Office, but there is nothing to show when it came there

or when the sub-division was made, but it is apparently many years old. I was unaware of the existence of this sub-division. I considered it to be my duty before passing the plans to require proof that the sub-division had been approved of by the Council. I required this information within the fourteen days to which the respondent refers, and I say that it was a proper and reasonable request, and that under the special circumstances it was not possible for me to deal with the matter within the said fourteen days.

3. My principal and actual objection to passing the plan is that the building will project beyond the building line which has been laid down by me and approved of by the Council.

4. In laying down the building line in question, I proceeded upon the following principle: When the buildings were about to be erected on the side opposite to respondent's property, I took a line down the centre of the street, and placed the building line 20 feet from this. When, in consequence of the respondent proceeding to build, it became necessary to lay down the building line on his side, I placed this also at 20 feet from the centre of the street.

5. There are at the present time no other houses on the respondent's side of the unnamed street in question from which a building line can be taken, and therefore a line has to be placed down on the ground.

6. The 7th paragraph of the respondent's affidavit, which states that the buildings on the opposite side of the street have been erected up to the boundary of the said street, does not explain the matter properly. Those houses are not erected up to the private boundary of the lots. There is a space of about 8 feet in width between the front of the houses and the edge of the street by which extent the owners have not been allowed to set forward their properties.

7. With reference to the 9th paragraph of the said affidavit, I say that the street in question has been used as an approach to Hope Cottage, which is not in the same street.

8. I do not object to the plans in question as being building plans, apart from the other objection that I have raised.

With regard to the regulations mentioned in the affidavits, No. 110 provides

for every person intending to erect a building giving notice to the Corporation in writing, upon a form supplied by the Corporation; regulation 112 provides that no building shall be erected until the sanction in writing of the Corporation shall have been obtained, but the City Engineer shall, within fourteen days after the receipt of notice in writing and plans, and all necessary particulars in respect of a proposed new building, signify to the person giving or sending the same his approval or disapproval, and in the event of disapproval, he shall give to the person intending to defray the costs of erection, or his duly authorised agent, notice in writing of the alterations in the plans, sections, or schedules, or specifications which he requires to be made. Regulation 159 provides that no building, structure, or erection shall, without the consent, in writing, of the Corporation, be erected beyond the general line of buildings in any road, street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the back line of the footway does not exceed 50 feet, etc. Regulation 4 provides that every new street intended for vehicular traffic shall be laid out and formed so that the width thereof shall be 40 feet at least. The carriage way of such street shall be 24 feet in width at the least, and the footway on each side of the street shall be 8 feet in width at the least. The 100th regulation, referred to by the respondent, states that every person who shall erect a new building shall provide in front of such building an open space, which, measured to the boundary of any lands or premises immediately opposite, or to the opposite side of any street, which may not be less than 24 feet in width at the point where such building may front thereon, shall, throughout the whole line of frontage of such building, extend to a distance of 24 feet at the least.

Mr. Schreiner, K.C. (for the Town Council): Quia a new point of law is raised in this case. A new street has been formed and the City Engineer, looking to regulation 4, laid down the line of building at 20 feet from the edge of the street. Now respondent (who is the first to build on his side of the street) puts forward his building to the verge of his property, and thus deprives the people opposite of 7 feet. It is ordered that all new streets should be 40 feet

wide. Respondent wishes to ignore this regulation. He may place a stoep on his own land in front of his house, but must not advance his building line. The case of *Short v. Town Council of Cape Town* (15 S.C.R., 190), shows that the Court never laid it down that in case of new streets the City Engineer cannot lay down a building line. If roads on subdivision plans are not shown to be 40 feet wide, I admit that the Town Council cannot insist on their being widened, but it is a reasonable contention that if no buildings have been erected in a new street, or on one side of the new street, the City Engineer can settle the line of building.

Mr. Searle, K.C. (for respondent): Under Section 175 the Town Council have power to take land for widening streets, but they now insist on people giving up 7 or 8 feet of their own ground. This they cannot do. Regulation 100 has been followed by us, and the only question is whether it does not conflict with Section 175. The street in question is not a new street, but a very old one. Short's case is in favour of respondent. Respondent should have had an opportunity of objecting before it was attempted to deprive him of a part of his property. Even in the case of a new street there is no power under the Act to take away a man's property. If the Town Council want a wide street, they should proceed under section 175.

[Maasdorp, J.: Regulation 159 allows the Town Council to deprive a man of the use of his property for building purposes.]

In Short's case the question was discussed as to whether this rule of the Town Council was not *ultra vires*. They have raised no objection to our building plans, as such. It is now admitted that we might even put a stoep in front of the property, but that would interfere with the guttering, etc., quite as much as if we were to advance the line of our house. Section 112 must be read as a whole. The City Engineer has not complied with the regulations, as he did not serve us with the legal notice required. Under the regulations the rule as to streets being 40 feet wide cannot be put in force in the case of streets marked on a subdivision plan. We are quite prepared to go into the matter more fully in an action.

Mr. Schreiner (in reply): I do not question the *bona fides* of respondents, but I cannot admit that if the City Engineer lies by for 14 days parties may do as they please.

[De Villiers, C.J.: Does Mr. Searle hold that these regulations are *ultra vires*?]

I understood him to do so but I contend that not only must the open space regulation (as to the 24 feet) be observed, but that the Town Council has power to insist on 40 feet. See Regulation 11.

[Maasdorp, J.: This is not a new street.]

They say it is, but even if it is the road can be widened under section 11; and if it is not under section 4, respondent has no right to say, "We are going to build because you have not put your objections in writing." Regulation 159 is also in our favour.

Cur. ad vult.

Postea.

De Villiers, C.J., in giving judgment, said it was clear upon the affidavit filed by the City Engineer that the ground upon which the whole proceedings before the action were founded, and the ground upon which the action was brought was that the street was a new street. The fourth clause in the Building Regulations provided that every new street intended for vehicular traffic shall be laid out and formed so that the width thereof shall be 40 feet at least. The carriage way of such street shall be 24 feet in width at the least, and the footway on each side of the street shall be 8 feet in width at least. Now if the street now in question had been a new street, the Town Council would have been within their rights in insisting upon the provisions of the fourth clause being complied with. But in his affidavit, the respondent said that a sub-division of the property was made as far back as 1875, and according to that sub-division, a street of different width entirely was laid out. That plan seemed to have been in the City Engineer's office all the time, and apparently the present City Engineer was not aware of it when he made his first affidavit. In making his second affidavit he did not deny that this was an old subdivision, but he still claimed that he was entitled to treat this as though it were

an entirely new street. In his lordship's opinion that contention could not be upheld. If in regard to existing streets laid out many years ago the Town Council said that such streets must be 40 feet wide, they must compensate the owner whose land was taken. The respondent had not bought on the supposition that a road 40 feet wide would be required. Therefore he (the Chief Justice) thought the City Engineer had no right to insist upon this property going back 8 feet. In strictness, perhaps, the respondent ought to have stayed his hand, and ought not to have gone on after he received notice from the City Engineer, but he said that fourteen days had elapsed without further proceedings having been taken by the City Engineer, and he, therefore, thought he was justified in proceeding with the work. Under ordinary circumstances, his lordship thought that the fact of respondent proceeding might be a reason in giving costs against him, but he thought that the respondent honestly believed that he had a right to proceed after fourteen days, not having received an objection within that period. The application would, therefore, be refused with costs.

Their Lordships concurred.

[Applicants' Attorneys, Fairbridge, Arderne and Lawton; Respondent's Attorneys, Tredgold, McIntyre and Bissett.]

THE LAW SOCIETY V { 1902.
BADENHORST. { Feb. 13th.

Attorney — High Treason — Suspension.

An attorney who had been convicted of high treason was suspended from practice pending the further order of the Court.

The summons in this case called upon Evert Nicholas Badenhorst (an attorney of the Supreme Court and a notary public) to show cause, if any, why he should not be struck off the roll of attorneys and notaries by reason of having been found guilty of professional misconduct, in that he was tried at Colesberg by the Special Court during November, 1901, for high treason, and being found guilty, was sentenced to 18 months' imprisonment.

The affidavit of Gideon B. van Zyl stated that he was the secretary of the Incorporated Law Society; that E. N. Badenhorst is an attorney and notary, duly sworn and admitted to practice in this Honourable Court, and still entitled so to practice; that the said Badenhorst is a British subject, and that when admitted he took the oath of allegiance; that at the Criminal Sessions held at Colesberg in November last he was indicted for high treason, was found guilty on November 30, and sentenced to 18 months' imprisonment.

The affidavit of Evert Nicolas Badenhorst admitted the conviction aforesaid. It however, set forth the following facts:

"Colesberg was occupied by the Federal forces on November 14, 1899, and on the 15th the Hoofd Kommandant issued a proclamation placing the district under martial law. The Kommandant further intimated that British subjects who remained would not be interfered with, provided they did not interfere with the military operations of the Federal forces. Respondent thereupon remained in Colesberg, but the aforesaid proclamation notwithstanding was on November 19 commandeered to be in the Hoofd Laager properly equipped on November 21, 1899. Respondent went there to explain matters, and having done so, he returned to his house and remained there. On November 25, 1899, respondent received a second commandeer brief to be in the laager the same day, whereupon the respondent wrote to the Field-cornet that he could not obey, as his duties did not allow him, whereupon he received a reply from the Field-cornet that no notice would be taken of his (respondent's) excuses, and if he did not obey steps will be taken against him according to law. Respondent did not obey, and remained in his house. Respondent craved leave to refer to the two commandeer briefs and letters referred to in paragraphs 3 and 5. The Special Court were good enough to accept the two commandeer briefs and two letters as genuine documents. On November 26, 1899, a patrol of some 15 burghers of the Free State and of the S. A. Republic came to respondent's house in town and took him to laager. Respondent there saw General Schoeman, and again told him (Schoeman) that he (Badenhorst) was a British subject and

a J.P., and that he could not join them, whereupon General Schoeman told respondent that he (respondent) was not required to fight, but to do the writing work for the Colesberg laager, and that if he (respondent) refused to do so all his property would be confiscated, and himself be sent to Pretoria as a prisoner. As respondent was helpless, and had a wife and four children for whom to provide, as also an aged father and mother, and not knowing how long he might be kept prisoner by the Federal forces, he submitted to their threats. As to the charge of treason, respondent craves leave to refer to the records of the Special Court, where it was fully proved that respondent was fetched by the patrol of the Federal forces and compelled by them to do clerical work. This plea was accepted by the Special Court. Respondent admits that he carried a "Mauser" rifle and some cartridges between the laager and the town, but he was made to do so by the officers of the Federal forces. He did not carry the rifle aforesaid with any hostile intent towards the British. He was never in any fight, nor did he ever go out on patrol. As to the charge of taking up arms in defence of the S.A. Republic and of the Free State, the Special Court found respondent guilty of having carried arms and of having assisted the free and independent republics aforesaid. The Court, however, found that he did not take a leading part in the rebellion, and that his behaviour was not such that a heavy sentence could be passed on him; but as he was a J.P., the Court felt compelled to pass a satisfactory sentence on him. The Court found that respondent had assisted the enemy by arresting one Thomas Jackson, a British subject, and taking him in custody. On the remaining four counts of the indictment respondent was found "not guilty." On January 2, 1900, respondent placed the Mauser and cartridges on one of the wagons in the laager of the enemy and went home, where he remained. Respondent prays (1) that applicant's application be dismissed; (2) for alternative relief.

Mr. Searle, K.C., moved.

The Court suspended the respondent from practice pending its further order, and ordered him to hand his certificates to the Registrar.

SEALE V. SEALE.

Mr. De Villiers moved to make absolute a rule *nisi* giving leave to sue *in forma pauperis*.

Granted, Mr. De Villiers being appointed counsel, and Messrs. Dempers and Van Ryneveld attorneys.

**IN THE MATTER OF THE PETITION OF
JAN C. LEGRANGE AND JOHANNA
W. LEGRANGE.**

Mr. Schreiner, K.C., moved for leave to sell and transfer certain property.

Granted.

**IN THE ESTATE OF THE LATE MICHAEL
H. KAPP.**

Mr. Bisset made application for an order authorising the Registrar of Deeds to pass transfer of certain property.

Granted.

**STANDARD BANK V. THOMPSON, RAT-
CLIFF AND CO. AND OTHERS.**

Mr. Upington applied to fix a day for trial by jury.

Mr. Scarle, K.C., appeared to consent.

The Chief Justice said the Court would consider the fixing of a day.

ROYTOWSKI V. TOWN COUNCIL.

Mr. Benjamin moved for the award of arbitrators to be made a rule of Court.

Mr. Upington consented, and the application was granted.

**IN THE MATTER OF THE PETITION OF
ELIZABETH J. G. HUDSON.**

Mr. Bisset moved for leave to transfer certain property.

An order was granted in terms of the report of the Registrar of Deeds.

**Ex parte UNION-CASTLE CO., (1902.
LTD.) Feb. 13th.**

**Company—Title Deeds—Amend-
ment.**

This was an application on the part of the above company (until lately known as the Castle Mail Packets Company, Limited) for leave to amend certain title deeds or deeds of transfer of property in this Colony belonging to it, by altering the name therein from the "Castle Mail

Packets Company, Limited," to the "Union-Castle Mail Steamship Company, Limited."

The petition of Duncan Campbell Andrew, one of the managers in South Africa of the Union-Castle Mail Steamship Company, Limited, showed that on February 28, 1900, the said Castle Mail Packets Company, Limited, having previously acquired by purchase the whole of the assets of the Union Steamship Company, Limited, changed its name to that of the Union-Castle Mail Steamship Company, Limited. That there was no formation of any new company, but merely a change of name to denote, in all probability, the absorption by the Castle Mail Packets Company, Limited, of the Union Company, Limited. That such change of name was duly entered in the books, and allowed by the Board of Trade in London on March 8 last. That the Castle Mail Packets Company, Limited, is the registered holder of certain property at present occupied by them in Cape Town, and also of certain other properties situate in Cape Town, in Port Elizabeth, and in East London. That as all the business of the Castle Mail Packets Company, Limited, is now carried on under the name of the Union-Castle Mail Steamship Company, Limited, and all their assets have been transferred into that name, it is desirable that the properties aforesaid should be conveyed out of the name of the Castle Mail Packets Company, Limited, into the name of the Union-Castle Mail Steamship Company, Limited. That no monetary consideration has passed, or will pass, in respect of such conveyance, necessitated by the said change of name. That an application was made to the Treasurer-General of this Colony, requesting that the Registrar of Deeds might be instructed to allow such conveyance to pass without the payment of transfer duty. In reply to this application the Treasurer-General has written to petitioners' solicitors to the following effect: "That as the Transfer Duty Act does not provide for the passing of transfer under the circumstances mentioned, it will be necessary to approach the Supreme Court for an order authorising the amendment of the name in the existing deeds," wherefore petitioner prays for an order authorising the Registrar of Deeds to effect a conveyance of from the

Castle Mail Packets Company, Limited, to the Union-Castle Mail Steamship Company, Limited, of the aforesaid properties, free of transfer duty, or may authorise the name of the Union-Castle Mail Steamship being substituted in the deeds of transfer thereof in lieu of that of the Castle Mail Packets Company, Limited, or for alternative relief.

The Registrar of Deeds, in his report, after setting out the facts above detailed, stated "that under the circumstances he did not consider it clear that there had been no change of ownership in regard to the properties in question. He continued: "In order to have brought that about, the Castle Company would, I take it, also have had to be dissolved and an entirely new company formed. That course was not adopted. I have therefore no objection to the proposed alterations, but cannot effect them unless I am authorised by the Court to do so."

In a further report the Registrar of Deeds states: "The fact that applicants' petition included a prayer for an order authorising a conveyance free of duty escaped my notice. To effect a conveyance there must have been a change of ownership, and as no provision for exemption exists, transfer could not in that case be effected free of duty. The agreement between the two companies, however, appears to me to show that the business and property of the Union Company were acquired by the Castle Company, and that as the latter company was not dissolved, no change of ownership in the property took place. A change of name and increase of capital only were effected and although a large number of persons became in a body shareholders under the agreement, yet it seemed to me that the company itself remained identically the same.

For these reasons I did not consider, as will be seen from my report, that I would be justified in opposing the application. I may add that there is no question as to the payment of duty by the Castle Company on the property acquired from the Union Company.

Mr. Searle, K.C., moved.

The Court ordered that the title deeds or deeds of transfer of the properties referred to in the petition should be amended by having the insertion after the name of "The Castle Mail Packets Company, Limited," of the

words "now known and registered in London as the Union-Castle Mail Steamship Company, Limited,"

[Applicants' Attorneys, Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

BLAKE V. ESTATE OF BLAKE. } 1902.
 } Feb. 14th.

This was an action for a declaration of rights in respect of the estate of plaintiff's husband, deceased.

The parties were Anna Susanna Blake (born Van der Westhuysen), plaintiff, and (1) Johannes Henoch Neethling Roos, in his capacity as secretary of the Board of Executors of Cape Town, and as such *curator ad litem* of the minors Robert da Costa Blake and Aurora Elizabeth Blake, (2) Jan Hendrik Hofmeyr, in his capacity as secretary of the Paarl African Trust Company (Limited) and Anna Susanna Blake (born Van der Westhuysen), in their capacity as executors dative of the estate of the late Robert Blake, jun., defendants.

The plaintiff's declaration was as follows:

1. The plaintiff is the widow of Robert Blake, jun., who before his death was domiciled at the Paarl, in this colony, and there died intestate on the 15th day of October, 1900.

2. There are two minor children in being, born of the marriage of the late Robert Blake, jun., and the plaintiff, which was duly solemnised at Moria, in Veenen county, Natal, on or about the 22nd day of June, 1893, and the first named defendant, in his capacity as secretary of the Board of Executors of Cape Town, has been appointed by this Hon. Court, by order dated the 12th day of January, 1901, to be the *curator ad litem* of the said minors for the purposes of this suit.

3. The defendant Jan Hendrik Hofmeyr, in his capacity as secretary of the Paarl

African Trust Company (Limited), and the plaintiff have been duly appointed executors dative of the estate of the late Robert Blake, jun., and are joined in that capacity as parties to this suit.

4. Before the marriage aforesaid, and upon the 14th day of June, 1893, the said Robert Blake, jun., and the plaintiff duly entered into and executed before the notary, Ryno Johannes Louw, of Johannesburg, an ante-nuptial contract, whereof a true translation is hereunto annexed and marked A, and to which the plaintiff craves leave to refer as though here inserted.

5. By clause 5 of the said contract the said Robert Blake, jun., declared that, in consequence of the love which he cherished for the plaintiff, and in consideration of their intended marriage, he thereby gave, ceded, and assigned over to her as her free, lawful, and exclusive property, the various claims, shares, and interests in the said clause detailed under the numbers 1 to 8 inclusive.

6. One John James George van der Byl, of Boksburg, was instituted and appointed by the parties to the said contract as curator and trustee for the protection of the plaintiff of the aforesaid claims, shares, and interests, but, although the said Van der Byl appeared before the said notary and declared to accept the said trust, he at no time acted therein, and has no interest in this suit.

7. After the celebration of the marriage and upon the 1st day of October, 1893, the plaintiff signed and executed the general power of attorney, a true translation whereof is hereunto annexed, and marked B, by which she constituted her husband, the late Robert Blake, jun., her general agent, and then and thereafter until his death her said husband, acting under the powers by the said power of attorney conferred upon him, as well as in the exercise of the *jus mariti*, represented the plaintiff in all matters concerning her estate, including the claims, shares, and interests so given, ceded, and assigned over to her by him as aforesaid by the said contract.

8. Save and except the interest numbered 8 in the aforesaid clause 5 of the said contract, which proved to be of no value, her said husband, on her behalf, sold or otherwise realised all the claims, shares, and interests aforesaid, receiving on her behalf large sums of money,

amounting to £55,000 and upwards, besides shares and interests of great value, also subsequently realised on her behalf.

9. From time to time her said husband made further most profitable investments of, and speculations with, the money by him so received on her behalf, and he remained until his death in full possession on her behalf of all her property from time to time so invested.

10. The plaintiff annexes hereunto marked C, a list or inventory of cash, shares, claims, and other property found after his death in the possession of her late husband, which she believes to constitute property received and held by him for her and on her behalf acquired for her in manner aforesaid, and now representing the sums of money and interests received by him as aforesaid upon realisation of the claims, shares, and interests given, ceded, and assigned over to her by the said contract, which is of the value of £200,000 and upwards, and to which the plaintiff is lawfully entitled.

11. The plaintiff is entitled to a declaration of her rights in the premises, and claims that she should be declared entitled to (a) all amounts of money and all properties, shares, claims, or other interests received by her late husband upon the realisation by him of the several claims, shares, and interests mentioned in clause 5 of the said contract; and (b) all profits, whether in cash, shares, claims, or other property, derived from her husband's administration of her estate and affairs on her behalf; and she therefore claims (c) an account of her husband's administration of her estate and affairs, and (d) judgment for the amount found due to her at foot of such account when duly debated, including judgment for such claims, shares, or other property as may be found due to her.

Wherefore the plaintiff prays for: (a) An order declaring her to be entitled to all amounts of money and all properties, shares, claims, or other interests received by her late husband upon the realisation by him of the several claims, shares, and interests mentioned in clause 5 of the said ante-nuptial contract, dated the 14th day of June, 1893; (b) an order declaring her to be entitled to all profits, whether in cash, shares, claims, or other property, derived from his administration of her estate and affairs on her behalf; (c) an account of her husband's said administration of her estate and effects, and

debate of such account; (d) judgment for the amount found to be due to her at foot of such account when duly debated, including judgment for such claims, shares, or other property, as may be so found; or that she may have such further or other relief in the premises as to this Hon. Court may seem meet, together with costs of suit.

The claims, etc., referred to in the ante-nuptial contract were as follows:

1. Certain block of Deep Level (Main Reef) claims, known as the South Glencairn Block, situate on the farm Driefontein, Witwatersrand Gold-fields, at present under option to Mr. J. S. Curtis, of Johannesburg, for £130 sterling in cash per claim, which option expires on the 31st August, 1893.

2. Certain 63 claims known as the Emerald Block (Deep Level), situate at Elandsfontein, No. 1, of the Simmer and Jack Gold-mining Company.

3. Certain claims A Block on the farm Driefontein (Deep Level).

4. A lot of shares to bearer in the Golden Fleece Gold-mining and Exploration Company (Limited).

5. Five thousand shares in the Main Reef Developing Company (£1 fully paid up), as per agreement with Messrs. Barratt and Brayshaw, Johannesburg. These shares are to be delivered as soon as the Blake Leeuwpoort Block claims are floated by the abovenamed firm.

6. A (3-5th) three-fifths share in the Blake Deep Level Block claims, more or less on the farm Driefontein, as per agreement with the Salmon Prospecting Company.

7. Twenty claims in F. A. English's large block on Elandsfontein, No. 1, Simmer and Jack Gold-mining Company.

8. A claim or interest to one-third (1-3rd) share in the Blake Block, 150 claims, on the farm Elandsfontein (portion Geldenhuis Estate).

The following was the plea of the defendant, Johannes Henoch Neethling Roos, in his said capacity:

1. The defendant admits paragraphs 1, 2, 3, 4, and 6 of plaintiff's declaration.

2. As to paragraph 5, the defendant does not admit it, and refers this Hon. Court to the terms of the ante-nuptial contract.

3. As to paragraph 7, the defendant admits the execution of the said power of attorney, and that the *jus mariti* was

not excluded by the ante-nuptial contract, but denies the rest of the paragraph.

4. The defendant has no knowledge of the allegations in paragraphs 8, 9, and 10, and does not admit them, and puts the plaintiff to the proof thereof, and he specially denies that the plaintiff is entitled to the £200,000 and upwards in paragraph 10 mentioned, and he denies that the plaintiff is entitled to the claims set up by her in paragraph 11.

5. The defendant says that the claims, shares, and interests mentioned in paragraph 5 of the ante-nuptial contract were never legally delivered, ceded, assigned, or accepted, and never became or were at any time the property of the plaintiff.

In the alternative, in case this Hon. Court should hold that the said claims, shares, and interests did become the property of the said plaintiff:

1. The defendant says he denies that the property contained in schedule C represents the shares, claims, and interests in the ante-nuptial contract mentioned, or that they are the result of investments and speculations by the plaintiff's late husband on her behalf, or with her money, and puts the plaintiff to the proof thereof.

Wherefore he prays that the plaintiff's claim may be dismissed, with costs.

The plaintiff's replication was as under:

For a replication to the pleas of the defendants, the plaintiff says that, save in so far as any of the allegations in the declaration are admitted in the said pleas, she denies all allegations of fact and conclusions of law therein contained, joins issue thereon with the defendants, and again, as before, prays for judgment, with costs.

Mr. Schreiner (with him Mr. C. W. de Villiers) for the plaintiff; Mr. Currey for the executors in the estate; Mr. Searle, K.C. (with him Mr. Benjamin) for the *curator ad litem* of the minor children.

Mr. Schreiner said that at the death of the late Robert Blake the estate was valued at £200,000, but it had since, in certain respects, increased in value. The husband dealt with the whole of the claims, shares, etc., and it was found from letters left that he had realised a very great profit in respect to seven of the eight interests he settled on the plain-

tiff. These seven could be traced with approximate exactness. Mr. Kearns, who acted as the deceased's business man after he had realised some of these interests, and who held his power of attorney, had gone into the matter fully, and he would be called. Mr. Nash was also appointed to frame an account and report, and had done so. Mr. Kearns very largely agreed with the views Mr. Nash arrived at in his report.

The Chief Justice asked if there was no prospect of a settlement being arrived at.

Mr. Schreiner said that Mrs. Blake was quite prepared, rather than have enormous involved inquiries, to take one-half of the estate, as though she had been married in community. The matter had now been hanging over for two years, and there were no creditors interested.

Mr. Searle said there was no delivery to Mrs. Blake of the interests, claims, etc., in question, but she could claim for breach of contract.

The Chief Justice: As her husband was agent, surely under all principles of the law of agency, he was bound to pay her the amount of profit made with these interests?

Mr. Searle: Yes, the profits perhaps. I don't know whether damages would not include that.

The Chief Justice: The point is this. Is it not exceedingly likely that if you take these profits, they will amount to more than half of the estate? Supposing there had been no marriage at all, wouldn't she get from her general agent the full amount of everything he has realised, not only what he realised from these claims, but what he realised from the proceeds?

Mr. Searle: He has always dealt with these as his own property. There is no transfer, and here is a power of attorney signed months afterwards. The point is whether, under this contract, anything vested in her at all, except the right to enforce this contract. Is it not necessary that at the time of the contract there should be some delivery?

The Chief Justice said that the non-delivery would have an important bearing if it were a question of creditors. But here there were no creditors. The Court would hear Mrs. Blake's evidence, and in the meantime Mr. Searle could consider the matter.

Mr. Schreiner called

Anna Blake, who said she was married on the 22nd June, 1893. Before the marriage, an ante-nuptial contract was executed in the Transvaal. They were going to live in the Transvaal after marriage. Witness signed a power of attorney in October, 1893. Witness's late husband told her that he was going to settle everything on her. After signing the power of attorney, witness left the matter entirely in her husband's hands. She knew nothing of the business aspect of the affair. There were two children, a boy and a girl, aged seven and five, who were now living with witness at the Paarl. Witness wanted her legal rights determined. She wished to do nothing that would take away from the children any of their rights.

By Mr. Searle: Witness was not consulted about business by her deceased husband.

The Chief Justice: Are you prepared to take one-half of the estate and let the children have the other half?

Witness: Yes, my lord.

Mr. Searle said he confessed that the suggested settlement did not seem to him to be an unreasonable one under the whole circumstances of the case.

The Chief Justice: I think it is a very fair settlement that this lady should have the one-half of the estate and the children the other. It is quite possible that if we went into the accounts it would be shown that she is entitled to more than a half. I think therefore it is very fair on her part to be willing to take one-half, and the Court will make an order in terms of this suggestion that the plaintiff is entitled to one-half and the children to the other. Costs will come out of the estate.

[Attorneys, plaintiff, J. J. Michau; trustees, Van der Byl and Van der Horst; *curator ad litem*, Van Zyl and Buissinne.]

JOOSTE V. VAN DER MERWE. { 1902.
Feb. 14th.
Marriage—Breach of promise.

This was an action for breach of promise. The parties resided at Colesberg, and the defendant's wife was alleged, before marriage, to have made a promise of marriage to the plaintiff. The promise was alleged to have been made in 1896, and

plaintiff said that he had agreed, in consideration of the intended marriage, to give up a farm leased by him in the late Orange Free State, and to go and reside at Colesberg. He stated that he had cancelled the lease on payment of £60, and he claimed £400 damages. Defendant said that before the action was brought she tendered £5, and taxed costs to date of tender.

Mr. Benjamin for plaintiff; Mr. Searle (with him Mr. Buchanan) for defendant.

Andries Jacobus Christian Jooste said he was a farmer, and resided at Colesberg. He had been living at Colesberg for three years. Previously he lived in the late Orange Free State. Witness met the lady, who is now Mrs. Van der Merwe, in 1895. They became engaged in August, 1896. She was a minor at the time. She was between 15 and 16 years of age. Witness saw her mother, who consented to the engagement on condition that witness gave up his ground and business and went to live with them on the farm. The ground was leased by witness, and was in the Free State. Witness gave up his farm in the Free State at the end of 1896. Mrs. Van der Merwe asked him frequently to give up the farm in order to come and live in Cape Colony. He paid £63 to cancel the lease. He came to Cape Colony at the end of 1897. She did not break off the engagement before she married her present husband.

By the Court: She was married in 1901, when she was 20 years of age. A number of letters from Mrs. Van der Merwe written in 1900 were put in at the commission. It was not true that she broke the engagement in 1897.

Mr. Benjamin referred to letters addressed by Mrs. Van der Merwe to the witness in June and July, 1900, in one of which she addressed the plaintiff as "Very dear and never-forgotten Andries," and concluded: "Now with best love to you all, again I send my best love and kisses." Other letters were in similar terms.

Witness said that the first intimation he received of the breach of the engagement was in a letter in which Mrs. Van der Merwe wrote, on the 15th April, 1901: "Further, I must answer your letter. I wrote you last that you must put everything out of your head, and to that I hold, for my heart is with another,

and all has become clear to me." The defendant had stock.

Cross-examined by Mr. Searle: Mrs. Van der Merwe was not related to witness by marriage. It was not true, as Mrs. Van der Merwe said at the commission, that her mother did not give her consent; that she became engaged in 1896, when between 14 and 15 years of age; that she broke the engagement in 1897; or that witness knew about her engagement to defendant in 1897. He did not know the defendant until after the marriage.

Nicholas J. van der Walt, Colesberg, said that plaintiff had lived at Colesberg since the end of 1896. Witness heard plaintiff speak to Mrs. Van der Merwe's mother, who said she could not consent to an engagement unless plaintiff gave up his ground and came to live in Colesberg. The mother said that the present Mrs. Van der Merwe was her youngest child, and she meant to keep her at home. Plaintiff said it would cost him £60 or £70 in damages, but that he would give up the ground if it was a certain engagement.

Cross-examined: The conversation referred to between the plaintiff and defendant's mother took place about the end of 1896. Before plaintiff went to Quaggasgat he went speculating.

This closed the case for the plaintiff.

The evidence for the defence had been taken on commission.

At this commission, Johanna van Vuuren said that she was married to the defendant in May, 1901, and was now 19 years of age. Her father died when she was six years old, and since then she had lived with her mother. She knew the plaintiff very well. He was a relation. They became engaged in the year 1896, when she was fourteen or fifteen years of age. Her mother did not give her consent to the engagement, nor did she know about it. She broke off the engagement in 1897, and returned to plaintiff his ring and letters. Plaintiff sent them back by post, and subsequently told her she could keep the ring as a present. She then became engaged to the defendant. Plaintiff never told her that he had the lease of a farm in the Free State, and she never promised to marry him if he would give up the lease of that farm. She never knew he had a farm there. She had had two letters from plaintiff, which he wrote her after her marriage. All the letters

she had received from plaintiff had been lost, her box having been broken open while she was away from the farm, and all their money was also taken out. In one letter he had asked her to break off her engagement to defendant and re-engage herself to him. He wrote later on in the same terms. In cross-examination, witness said that she did not remember plaintiff speaking to her about the farm in the Free State and plaintiff telling her that he would have to pay £50 if he cancelled the lease. She did not remember his saying that he would do it if she would give him no cause to regret it. The engagement was broken off in 1897. After that she wrote to plaintiff in affectionate terms, but they were not engaged. She only wrote to plaintiff and not to other gentleman friends in these terms. When she wrote the letter of April 15, 1901, she was not engaged to plaintiff. She was not engaged to him shortly before the war broke out, and she did not say in November, 1900, that he must marry her then.

Petrus van der Merwe stated before the commission that he became engaged to his wife in 1897, and after that he saw plaintiff once or twice at her place. On one occasion he told plaintiff that he was engaged to Miss Van Vuuren, and plaintiff said that he also was engaged to her. Witness took a letter from plaintiff to the lady, and asked her to break off the engagement with him (defendant), but she would not do so. Witness saw the letter which plaintiff sent her (Miss Van Vuuren). In this letter plaintiff asked her to break off her engagement to witness and re-engage herself to him. Witness and his wife were now living with Mrs. Van Vuuren (his wife's mother), and they were not well off. He had not other property except a few sheep. They had just sufficient money to pay the expenses of coming to Cape Town to give evidence. Before the war witness just made sufficient to pay the rent of the farm he and his father had. He hoped to make something in the future. He married his wife because she would not give him up.

Mr. Benjamin, in the course of his argument, referred to letters which defendant's wife had written to plaintiff before her marriage. A letter dated June 8, 1900, commenced "Very dear, never-forgotten Andries," and wound up with "Now with best love to you all; again I send you my love and kisses."

[The Chief Justice: In the body of the letter she says: "I love you, but in this matter I am in the hands of the Lord; we must just trust in the Lord." That looks as if there was some hesitation about the matter.]

Mr. Benjamin said that was a different letter to the one he was referring to, which was written later. Proceeding, Mr. Benjamin said that then there was the letter of July 24, 1900, which began "My dear Andries," and concluded "With ten kisses." In another letter dated July, 1900, she addressed plaintiff as "Very dear Andries," and concluded in the same affectionate terms, "Best love and kisses. Good-bye, again with kisses." In a letter dated August 17, 1900, she addressed plaintiff as "Very dear and never-forgotten Andries." In the body of that letter she wrote, "You ask me about love; I love you, and I cannot give you up. I leave this in God's hands," and concluded, "Good-bye; ten love kisses; give Annie two kisses; I cannot think of breaking it off; it would be too hard for me."

[The Chief Justice: The original letter read, "I love you heartily," but the word "heartily" had afterwards been struck out.]

The first hint that plaintiff received that the lady did not feel the same towards him was in a letter of November, 1900. In that letter she also addressed him affectionately at the beginning, saying, "Very dear, ever-remembered Andries," but in the body of the letter she said that she wanted to write him something which she hoped would not make him angry when he answered that letter, but she did not exactly say what she meant. On April 15, 1901, however, she wrote to plaintiff saying, with regard to the engagement, "You must put everything out of your head, for my heart is with another, and all has now become clear to me." Upon these letters Mr. Benjamin contended that it was clear that the engagement was not broken off in 1897, as defendant's wife had said.

[The Chief Justice: Here is a minor and we will say that she engages herself with the consent of her mother or guardian; if during her minority she breaks the engagement, can you bring an action against her?]

I submit that I could if it was a valid engagement entered into with consent of the parent or guardian. If she broke off the engagement during her minority they might have to sue her mother as guardian, but now that she was married, they were entitled to sue her husband. If she had broken off the engagement before the marriage I think they would have had an action against her, assisted by her mother as guardian.

[The Chief Justice: If you sue a minor for breach of contract, have you not to prove that that contract was for the benefit of the minor?]

We would not have to do so if the contract was entered into with the consent of the minor's guardian. One might have to show that it was for the benefit of the minor if the contract was entered into without the consent of the minor's guardian. I am, however, not prepared to quote any authorities on that point, as the question of minority has never been raised in the pleadings. Therefore the defendant is estopped from setting up the defence that the contract was not for the benefit of the minor. If that had been pleaded, we might have brought witnesses to prove that the contract was for the benefit of the minor.

Mr. Searle: I submit that the £5 tendered were ample damages, as from the evidence produced it has not been proved that the plaintiff has sustained any damages in this matter. As for the defendant's wife being a minor, that was a fact well within the knowledge of the plaintiff, and it was for him to come prepared to prove that the contract was for the benefit of the minor. I also submit that it is clear that the mother's consent to the engagement was never given. It is most unfortunate that the evidence of the defendant's witnesses when they came down here before could not be taken by the Court, but had to be taken on commission. That, however, was not their fault, but arose through the plaintiff not being able to go on with his case, and it was accordingly agreed to take the evidence on commission.

Mr. Benjamin: The case was not proceeded with when defendant's witnesses were in Cape Town, because the plaintiff could not get a permit to come down here.

Mr. Searle: I submit that the letters did not prove that the engagement continued up to 1901. They were certainly addressed in affectionate terms, but then the plaintiff and the defendant were very old friends, and related to one another. Moreover, the girl was very young, and even after her marriage in her letters she sent her love to plaintiff. They were not the letters of a girl who was engaged to a man, and regarding the near prospects of marriage. Then there were clauses in the letters which showed that to understand them they should have the plaintiff's letters, which were not available, to which they were written in answer, and then they could put two and two together.

Mr. Benjamin, in reply, submitted that plaintiff had sustained material damages in canceling the lease of the farm, and in such a case, some sentimental damages should also be allowed.

De Villiers, C.J.: In this case no exception was taken in the pleadings on the ground that the defendant's wife was a minor at the time of the engagement is said to have been entered into, and therefore I shall say no more upon this point than this: that any decision given in this case will not affect any future case in which the defendant may except to the action on the ground of the minority of the defendant. But although the minority of the defendant does not go to the root of the action in this case, it may fairly be considered by the Court in estimating the amount of damages which the plaintiff is entitled to claim. The evidence shows that this lady was only about 15 years of age when she entered into this engagement, and that she broke it off before she was 19 years of age. Under such circumstances, I think that no Court would be eager to give very heavy damages against the defendant. She could hardly have known her own mind at the age of 15, and when she came to a maturer age she changed her mind, because she found that she could not have that affection for the plaintiff which a wife ought to have for her husband. She thereupon broke off the engagement. There is also the circumstance that the lady seems to have met another man whom she loved, and considering her tender age at the time, it is clearly not a case in which heavy damages should be given. Then there are additional circumstances in the case which the Court

cannot lose sight of. The defendant himself and the lady whom he married are impecunious, and since the war have lived entirely with the lady's mother. The lady herself is entirely without means, and it has been stated in the evidence that whatever money they had had been stolen from a box while they were away from the farm. Whether that be the case or not, the evidence clearly shows that they are poor people, and not able to pay heavy damages, and I think this young man ought to have been satisfied with the £5 tendered. He is quite a young man, able to earn his own living, and I don't think that an action, such as this, is exactly the way a man should seek to solace his wounded feelings. The Court will therefore give judgment for the amount tendered, £5, with costs to April 19, 1901, the date of the tender, and subsequent costs must be paid by the plaintiff.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Scanlon and Syfret; Defendant's Attorney, Mr. G. Trollip.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

DE BEERS CONSOLIDATED } 1902.
MINES V. THE MASTER OF } Feb. 17th.
THE "ROUSSILLON."

Mr. Searle said that this case was down for Friday next; it was fourth on the roll, and it was unlikely that it would be reached. There were witnesses from Natal, and a telegram had been received stating that it was impossible for these witnesses to come. He asked that the case might be postponed.

Mr. Schreiner consented to a postponement.

Buchanan, J., said that application could be made next week to fix a day.

CAMP V. CAMP.

{ 1902.
{ Feb. 17th.

This was an action for restitution of conjugal rights instituted by the wife. The case was before the Court on the 25th

November, when evidence was led in proof of the marriage, and the evidence taken on commission was read. The plaintiff's evidence was taken on commission in England. At the previous hearing defendant wrote a letter to the Registrar of the Court asking for a postponement, which was granted until to day. Now a telegram had been received stating that he was taken ill with dysentery, and had to go to hospital. The defendant raised a question as to certain payments made by him prior to 1897, when the last payment was admittedly made. An affidavit had been prepared showing the total payments made from 1890 to 1897 to be about £400.

Mr. Schreiner, K.C. (with him Mr. Benjamin) for plaintiff.

Since the matter was last before the Court defendant had written to plaintiff in a very unpleasant way, threatening her that the case would end in a criminal prosecution.

Defendant was ordered to return to or receive plaintiff by the 1st May, failing which, a rule nisi would be issued, returnable on the last day of May, calling on him to show cause why a decree of divorce should not be granted.

FRISCH V. FRISCH. } 1902.
{ Feb. 17th.

This was an action for restitution of conjugal rights, failing which, divorce.

Mr. Benjamin, for the plaintiff: Defendant has been barred. The plaintiff is the husband, and resides at Cape Town, the defendant being resident at Rondebosch. The parties were married in community of property at Johannesburg on the 19th April, 1892. There are no children.

Charles Haywood Frisch said he was married to defendant on the 19th April, 1892. They lived together for about twelve months at Johannesburg. During the latter part of that period there was unhappiness, the respondent exhibiting bad temper. There were quarrels, and his wife left him. Two or three months before the war witness came to Cape Town. He intended staying here. Witness had asked his wife to come back, but she had refused. Witness was prepared to provide a home for her.

An order was made calling on respondent to return on or before the 23th February, or to show cause on the 12th March why a decree of divorce should not be granted.

DREYER AND CO. V. RED- } 1902.
LINGER. (Feb. 17th.

Mr. Gardiner for plaintiff: A plea has been filed, but I am informed by defendant's attorney that there will be no appearance. The action is one for brokerage. The declaration alleged that on the 17th September, 1900, defendant employed plaintiffs, in their capacity as brokers and estate agents, to sell a farm at Wynberg known as the Forty Acres Farm. If the sale was effected within three months plaintiffs were to receive the usual brokerage, which was 2½ per cent. Plaintiffs procured a purchaser for the sum of £2,500, and claimed £62 10s. as brokerage. The plea alleged that the defendant employed plaintiffs in or about the month of August, and that it was specially agreed that plaintiffs would be entitled to receive commission on any portion of the purchase price in excess of the sum of £2,000.

George Gasper Dreyer said that on the 17th September defendant employed him to sell the farm. He gave witness a document (produced) by which he gave plaintiffs authority to sell the farm for £2,500, or any less sum which might be agreed upon, and agreed to pay the usual brokerage. It was provided that any sum above that should be taken as commission.

Judgment was given as prayed, with costs.

IN THE MATTER OF THE PETITION OF
JOHANNES JACOBUS DU TOIT AND
OTHERS.

Mr. De Waal moved for the award of the arbitrators to be made a rule of Court.

Granted.

IN THE MATTER OF THE PETITION OF
MOHAMAT NOOR SOLOMAN.

Mr. De Villiers applied for the amendment of an order of Court granted on the 12th September, 1901, by the substitution for petitioner of Mr. J. F.

J. Wrensch, executor dative, to pass a certain bond.

Granted.

MABERLEY V. WOODSTOCK } 1902.
MUNICIPALITY. } Feb. 17th.

Mr. Benjamin moved to make absolute a rule nisi granted against the Woodstock Municipality in December last, interdicting them from paying interest on certain debentures issued in connection with the Oliphant's Hoek water scheme.

Mr. Searle, K.C., who appeared for the Woodstock Municipality, read an affidavit by Mr. W. E. Moore, Mayor of Woodstock, who annexed resolutions passed at meetings of ratepayers endorsing the action of the Council in regard to the scheme. Also annexed were copies of correspondence between the attorneys. Costs of obtaining the rule had been tendered to the applicant.

Mr. Searle (for respondent): Everything required by Act 45 of 1882, sections 144 to 151, has now been done since the rule nisi was granted. Sections 71 and 72 and 18 of Act 23 of 1897 are not limiting clauses referring to all public works.

[Buchanan, J.: What are your powers under the Municipal Act?]

They are stated in section 156 of Act 45, 1882; but after they have borrowed the money they can prosecute their works outside the municipality. There is no specific section in the Municipal Act which applies to our case. We have not constructed anything; we have only purchased a farm, and that we can do under section 156, sub-section 3.

[Buchanan, J.: Is your only point, Mr. Benjamin, that the consent of the Governor has not been obtained?]

Mr. Benjamin (for applicant): No; they require the consent of the Governor and also of the Government. See section 70 of the Public Health Act. We say that it is not competent for the municipality to spend £300,000 on this property, as that is more than ten times the amount of the annual rates. If they may carry out a scheme piece-meal, they could defeat the whole object of the Act.

Mr. Searle: I would suggest that the matter be allowed to stand over for one month.

The Court ordered the matter to stand over for one month, and that the interdict be extended till some further order is made.

In making the order, Buchanan, J., said that applicant was justified in coming into court. As was stated on the last occasion, the Municipality had no right to incur this liability without first getting the consent of the ratepayers. The ratepayers' consent had now been obtained, but all the consents required by the different Acts had not been obtained. The interdict would be extended until these consents had been obtained, and thereafter the Municipality could apply to the Court to have it discharged. Applicant was justified in coming into court, and would have his costs.

[Applicants' Attorneys, Silberbauer, Wahl and Fuller; Respondents' Attorneys, W. E. Moore and Son.]

THE TOWN COUNCIL OF CAPE } 1902.
TOWN V. THE CAMP'S BAY } Feb. 17th.
TRAMWAY COMPANY, LTD. }

Tramway Company—Non-compliance with the terms of their private Act—Waiver by Town Council—Interdict.

The C B. Tramway Company were bound (inter alia) by their private Act to give 14 days notice to the Town Council of their intention to enter upon and break up any of the Council's roads in pursuance of the powers conferred upon them by the said Act, for the purpose of constructing their line. They gave such notice, but without specifying, as they were bound to do, the day on which they proposed to make entry. The Town Council, however, accepted this notice, and approved of the plans thereunto annexed. The Town Council now applied for an interdict restraining the respondent company from proceeding with their works until they should have supplied such further information as by their Act they were bound to give, and until they should also have again sent into the Council their original specifications.

Held, that as affidavits filed on behalf of the Tramway Company showed that they were not proceeding with their works and were having plans and specifications prepared, the Council could not demand to be again furnished with the original plans and specifications, and that the application for an interdict must be refused with costs.

Semble, (1) the Company might have been interdicted had they attempted to continue their works before supplying the Council with the information which it was under the Act aforesaid entitled to demand. (2) Had the Council not waived their rights they might have objected that the aforesaid notice of entry was void by reason of non-compliance with the terms of the said Company's Act.

This was an application upon notice given to the respondents requiring them to show cause, if any, why they should not be restrained from entering upon or breaking up the Kloof-road in Cape Town, between the property of Mr. Bygott and Burnside-road, until specifications shall have been submitted to and approved of by the applicants, under section 13 of Act 34 of 1899, showing the work to be done in and about the said road and the laying of the tramline thereon, and also until they shall have given due notice to the applicants, under section 12 of the said Act, specifying in terms thereof the time at which they intend to begin such work, and why they should not be ordered to pay the costs of the application.

The affidavit of Josiah Robert Finch, Town Clerk of Cape Town, was as follows:

1. The respondents are a tramway company, formed under the provisions of Act No. 34 of 1899 for the purpose of taking over the rights and exercising the powers in relation to the construction of the tramways referred to in the said Act.

2. The said company has constructed portion of its tramlines, but amongst other works not yet carried out by it is the construction of the tramline in the Kloof-road, within the Municipality, between the property of Mr. Bygott and Burnside-road, being a road under the control of the Town Council.

3. In terms of section 12 of the aforesaid Act, before the company in question shall enter upon or break up any public road, it shall give to the road authority notice at least fourteen days before the commencement of the work, and by section 13 of the Act it is provided that, prior to the giving of such notice, the company shall submit a specification to be approved by the local authority of any intended work connected with the permanent way of the tramway, or any work in or about the street or road.

4. The aforesaid Act was submitted to and approved of by the Town Council before it passed. Before the passing of the said Act, namely, on the 6th and 8th September, 1899, an agreement was entered into between the Mills Syndicate (Limited), whose successors under the said Act are the respondents, of the one part, and the Town Council of the other part, which agreement, with the plan referred to therein, is marked A. The said agreement is covered by the terms of section 65 of the said Act.

5. By the first clause of the said agreement it was provided that the Kloof-road aforesaid was to be widened, as indicated upon the plan annexed to the said agreement, and that any differences that might arise in the interpretation of such widening should be determined by the Town Council.

6. The plan annexed to the said agreement showed that the Kloof-road, between Burnside-road and until near Mr. Bygott's property, was to be not less than 60 feet in width, including gutters; and on approaching Mr. Bygott's property, was to be reduced from 60 feet to not less than 40 feet in width, including gutter.

7. In April, 1900, the respondent company had not yet begun the work of construction in the Kloof-road, but on the 27th April the Town Clerk received a letter written by Mr. Alfred Dickinson, the consulting engineer and representative of the company, stating that he was returning to England, and although the

company would not be able to commence work within the next fourteen days, he purported to give formal notice, in terms of section 12 of the said Act, of its intention to enter upon the Kloof-road for the purpose of constructing the tramway along the Kloof-road. The letter concluded by stating that, although formal notice had been given by the letter, the resident engineer of the company would, of course, not think of breaking up the roadway without further acquainting the Council of the fact.

8. The letter referred to the obligation to widen the road in terms of the aforesaid agreement, and stated that the company would endeavour to carry out the work, not only in the letter, but in the spirit, and for that purpose the company forwarded plans in duplicate, showing the proposed widening of the Kloof-road, which, the letter stated, complied with the arrangement already entered into with the Council.

9. This lastmentioned plan shows how it was proposed to widen the Kloof-road to the aforesaid width of 60 feet and 40 feet respectively, as had been provided in the agreement and plan previously referred to, and the Town Council was satisfied that it was the intention of the company, as stated by it, to carry out its agreement.

10. On the 11th day of May, 1900, the then Town Clerk addressed a letter to the secretary of the respondent company acknowledging receipt of the letter of the 27th April, stating that the Council approved of the plans submitted, and had given the necessary consent for the construction of the tramways, but notifying that the sanction of the Council with regard to these matters was given under and subject to the provisions of the aforesaid Act.

11. The Town Council did not at any time agree to waive or abandon its right to require notice to be given under section 12 of the aforesaid Act, or to require specifications to be submitted under section 13 of the aforesaid Act.

12. Inasmuch, however, as it was stated in the letter of the 27th April, 1900, that tramway material had already been shipped, the Council was anxious to do all it could to assist the company by authorising the commencement of work.

13. Thereafter about June, 1900, the company began the work of constructing the tramlines, and had now ap-

proached the lower part of the Kloof-road. The work done hitherto, though not approved in all respects by the Council, had not led to any dispute of so serious a nature as to compel the Council to take steps to prevent work on the road.

14. A dispute has, however, now arisen with regard to the portion of the Kloof-road between Mr. Bygott's property and Burnside-road, already referred to.

15. Voluminous correspondence has passed between the Council and the company, from which the Council came to the conclusion that it was the intention of the company to commence work on the portion in dispute without further notice to the Council, and without submitting further specifications.

16. The specifications that would be required were to show how and in what manner it was proposed to widen the road to 60 or 40 feet; how the work of finishing of and making safe cuttings and embankments was to be carried out; how proper approaches across the same were to be made; and generally such specifications as would show the Council what was to be done in carrying out so important a work as the alteration of the Lower Kloof-road. The plans previously sent in did not give this information, and no specifications have been sent in at all.

17. It was also considered essential by the Council that it should have notice when the work in question was to be undertaken, in order that it might watch and supervise the carrying out of the same if necessary.

18. In the correspondence referred to the company took up the position that it had no power to widen the street, but in reply it was pointed out that under section 34 of the aforesaid Act the road could be widened with the assistance of the Council at the expense of the company.

19. The company also took up the position that it has been represented to its predecessors, the Mills Syndicate Company, Limited, that portion of the land that would be required to widen the Kloof-road to 60 feet was the property of the Council, an allegation which is absolutely repudiated by the Council. It does not seem necessary to lay before this Honourable Court the whole of the correspondence in question.

20. I, however, annex hereto a letter marked E, dated the 5th November, 1901, addressed to me by Mr. Dickinson, in which he states that the company proposes to widen the roadway for the full width of the property owned by the Council, which in some cases was 60 feet wide, and in others of less width; in other words, that the company refuses to widen the road in accordance with the aforesaid agreement and plan.

21. The Council was not able to get from the company any satisfactory assurance as to whether it intended to give notice under section 12 of the said agreement of its intention to break open the road, and whether it intended to submit specifications with regard to the questions hereinbefore referred to.

22. The matter was accordingly placed in the hands of the Council's solicitors, with the result that the company has now undertaken to submit certain specifications, but has definitely taken up the position that it will not give the Council any further notice before beginning work upon the portion of the road in dispute. The specifications which the company agreed to submit have not yet been received.

23. The Council is apprehensive that the company may at any time, in pursuance of its avowed intention, proceed to enter upon the lower portion of the Kloof-road, and may break open the same and lay down their tramlines without further notice to or communication with the Council, and have been instructed to take proceedings to restrain the company from undertaking any such work until the necessary specifications providing for the widening and finishing off of this road to 60 feet or 40 feet, in accordance with the aforesaid agreement, have been submitted and approved, and until due notice under section 12 has been given to the Town Council.

In an affidavit, W. J. Jeffries, Assistant City Engineer, stated that on January 8 he made an inspection of the Kloof-road, and ascertained that a trench for a tramway cable had been cut from the termination of the tramline, opposite Mr. Bygott's property, for a distance of 90 feet towards the Burnside property. He found that this trench had been filled up, and that the cable intended for it had been coiled up in a hole made for

the purpose, alongside the road below where the rails are at present.

For the respondents, Chester Paulton Wilson, general manager and resident engineer of the Camp's Bay Tramway Co., made the following affidavit:

1. I perused the notice of motion and affidavits sworn to by Josiah Robert Finch, Town Clerk, William George Fairbridge, and by William James Jeffries.

2. With regard to the affidavit of the Town Clerk, I say that the allegations set forth in the first and second paragraphs are correct, except that I further say that the company duly commenced its work of tramway construction on the mutual understanding with the Corporation that proper notice, under section 12 of Act 34 of 1899, had been duly given and accepted; the company carried on such work continually, and in July last, as part of such work, laid rails in part of that portion of the Kloof-road referred to in the second paragraph, and no objection was ever raised by the Corporation, but I subsequently, of my own accord, caused the said length of rails to be taken up, in order to improve the curve at the spot in question. Before I could relay the rails at this spot, the Municipal authorities requested me to do all in my power to enable the road to be placed in as good a condition as possible for the Duke and Duchess of York to pass over same. In order to meet this request in time for the Royal visit, I therefore had this portion levelled, and shifted the workmen for a time to other portions of the Kloof-road, nearer the Kloof Nek.

3. With reference to the third paragraph of the said affidavit, I beg to refer the Court to the terms of the said Act, and with regard to paragraphs 4, 5, and 6, I, in like manner, beg to refer to the terms of the agreement and the plan produced; but I say that the expression "any differences which may arise in the interpretation of such widening shall be determined by the Corporation" was meant and introduced only to provide that if differences arose as regards gradation of width from wider into narrower portions of the road, as the colouring on the plan only generally indicated that at certain spots there should be gradation, such differences should be determined by the Corporation.

4. With regard to paragraphs 7, 8, 9, and 10, I submit that the notice given in Mr. Dickinson's letter of the 27th April, 1900, was intended and given as the notice required by section 12 of the aforesaid Act, that the company intended to enter upon and break up the whole length of the Kloof-road, and no distinction was made either by the company or the Corporation between that portion lying between the Kloof Nek and Mr. Bygott's property, and that lying between Mr. Bygott's property and Burnside-road. I know of no reason why an attempt is now made to separate the Kloof-road into two such sections, and no reason to my knowledge exists.

5. The Corporation accepted the notice given in the letter of the 27th April referred to as sufficient and satisfactory, and I beg to refer the Court to the expression used by the Town Clerk in his replying letter of the 11th May, 1900, in which he acknowledges Mr. Dickinson's letters of the 25th and 27th April as "giving notice pursuant to the provisions of section 12 of the Camp's Bay Tramway Act, 1899 (34 of 1899), that the company intend to open and break up the public roads and streets along the Kloof-road, for the purpose of commencing the work of constructing and laying certain tramways."

6. At the time the then Town Clerk wrote this letter he was in possession, in addition to the plans disclosed by the present Town Clerk in his affidavit, of a certain plan and cross section, all of which, together with the specifications contained in the said agreement with the Mills Syndicate and the Act, constitute and amount to very full and complete specification, showing how the construction was to be carried out. This plan and cross-section, together with those disclosed by the Town Clerk in his affidavit, were the plans referred to in the last paragraph of the then Town Clerk's letter, dated 11th May, stating that the Council had approved of the plans submitted, and given his necessary consent for the construction of the tramways accordingly.

7. Both the Corporation and the company acted upon the notice, and the acceptance of same by the Corporation, as complete for the purposes of section 12, and as "full submission" and approved of the specification required by the first

paragraph of section 13 of the aforesaid Act, and until very lately continued to act on the understanding that the concluding sentence of the then Town Clerk's letter of the 11th May, 1900, referred specially to the last paragraph of section 13 of the Act; the company has never disputed the right of the Corporation to claim to be furnished with further plans, sections, and information, if same be duly called for by the Corporation, but the present point at issue in this connection between the Corporation and the company is that the company denies the right of the Corporation to claim that the company is bound to stop work which is being done in pursuance of the express approval of the Council, duly given whenever the Council may call for additional plans, section, and information under the latter portion of section 13 of the Act, when such have reference to works which have not been commenced, and which the work now in prosecution would not affect.

8. With regard to paragraphs 11 and 12, I say that the company has never claimed that the Council did agree to waive or abandon its said rights; but, on the contrary, I say that notice in terms of section 12 of the aforesaid Act having been given and accepted with reference to the whole of the Kloof-road, and the specification referred to in the first paragraph of section 13 of the aforesaid Act having been submitted and approved, the Council has already fully exercised its said rights as to section 12 and the first portion of section 13, and retains its full rights, under the concluding paragraph of section 13 of the said Act. The company is prepared to furnish any additional plans, sections, and information called for, in terms of the latter portion of the said 13th section, and has no intention of doing any work whatsoever beyond the construction expressly approved and in accordance with approved specification, without first complying with all lawful requirements of the Council, under the second part of section 13, and is not in default through non-compliance with any requirement in terms of the said section; on the contrary, the company has furnished additional information when asked for, as, for example, in January, 1901, when it submitted certain drawings.

9. With regard to the 13th and 14th paragraphs of the said affidavit, I say

that the company commenced the work of constructing its tramlines as stated on the Kloof-road, and is continuing with this work only in accordance with approved plans and specifications, and the dispute referred to in the 14th paragraph of the said affidavit does not affect the construction of the permanent way, but is purely connected with the widening of the road, in terms of the agreement between the Mills Syndicate (Limited) and the Corporation.

10. With regard to paragraph 15, I beg to refer the Court to the correspondence that has passed, and especially to the letter written by the company's attorneys on the 30th November, 1901.

11. I had prepared, prior to receiving notice of motion in this matter, a digest of drawings and specifications approved by the Corporation, covering construction work for tramways 12 and 13 in Kloof-road, from Burnside-road to Kloof Nek, and this digest proves that full and ample specifications have been furnished and approved. It was my intention to furnish the Corporation with a copy of this digest and the additional specifications recently requested before commencing any work about which there is or could be any dispute or difference, and I am prepared to furnish same with due diligence, but it is work which requires some field work on the part of the surveyor, and which it has not been possible to complete.

12. The allegations in the last sentence of paragraph 16 of the said affidavit and in the first paragraph of the affidavit sworn to by William James Jeffries are misleading and not in accordance with fact, and I would point out with reference to this question of road widening that plans and specifications on this point were submitted and approved as follows (plans and specifications given).

13. With regard to paragraph 17 of the Town Clerk's said affidavit I say that notwithstanding that the formal notice under section 12 of the said Act had been given and accepted, the company has always kept the Corporation authorities informed of where work was about to be done from time to time, and ever since work in the Kloof-road commenced it has been continuously carried on, and been under the supervision and observation of the said authorities.

14. A very considerable part of the company's work of construction has been finished with the exception of some guttering in course of construction about which there is no dispute and regular public traffic is being carried on over certain sections of the tramways, and in all these cases the plans and specifications, acted on and found ample and satisfactory, have been those now alleged to be non-existent.

15. With regard to paragraphs 18 and 19 of the said affidavit, I say that the dispute between the Corporation and the company there referred to requires that evidence should be led and in no ways affects the construction of the tramway, and is not affected by any question of specifications. The company maintains that position that the then Town Clerk when the wording of the agreement relied on by the Corporation was agreed to represented that the Corporation owned a road 60 feet wide for the distance in question, except at one spot at the corner of De Lorentz-street, although only a small portion of this road was made, and the company there upon agreed to widen the road to that width, but never undertook to acquire land from others to give to the Corporation a wider roadway than it then possessed except that it agreed to and did purchase the one property which so encroached on the 60-foot roadway. The Council has lately, however, passed plans, and permitted the erection of buildings encroaching, at several spots on the 60 feet roadway, originally represented to be the property of the Corporation, and now wishes the company to acquire and remove these new encroachments.

16 Section 34 of the said Act refers to roads under 30 feet in width, and the widening of same to that width or any lesser width the Council may agree to, but the encroachments on the 60 feet limit of the Kloof-road are beyond the limits of deviation shown on the Parliamentary plans, and the company has no power to compel any owner to sell any land outside the limits of deviation. I respectfully submit that this dispute is outside the question now before this Honourable Court.

17. With regard to paragraphs 21, 22, and 23 of the Town Clerk's affidavit, I refer this Honourable Court to the letter written by the Company's attorneys on

the 30th November, 1900, to the attorneys for the Corporation. The company, although notice has been given and accepted as regards the whole Kloof-road from the Kloof Nek to Burnside-road, has always been and still is willing to keep the Corporation authorities informed from time to time of where work is being done, and has so kept them informed, and the said authorities have had full knowledge throughout the work, but the Council now insists that the company shall acknowledge that it has never given notice under section 12 of the aforesaid Act, notwithstanding that considerably more than half of the total work in and on the Kloof-road has already been actually done, and has been duly supervised throughout, and is at the present date being supervised by the Council.

18. With further reference to the said affidavit of William James Jeffries, I say that the same is incorrect and misleading, in as far as it is calculated to convey the impression that the trench for the cable was cut in that portion of the Kloof-road between Mr. Bygott's property and Burnside-road, and where the road is described on the coloured plan annexed to the Town Clerk's affidavit as 60 feet wide. The trench in question never reached the 60-foot section of the road, and was and is part of the work upon the section where work has been continuously carried on under the supervision of the Council, and the said trench stopped at a point considerably short of the limit to which the work had been continued, and which is referred to in the paragraph 2 of this affidavit, and the gutters up to this point and as far as this trench was carried have been constructed under the almost daily supervision of the City Engineer, since the correspondence annexed to the affidavit of William George Fairbridge.

19. In conclusion, I say that the work of constructing the permanent way with reference to which the plans, cross-sections, and specifications are complete and approved, and with which no fault has been found by the Council, will in no way interfere with or affect or be affected by the work, with reference to which further specifications detailed in section 16 of the Town Clerk's affidavit are now asked, and the company has given every assurance it can, and I

hereby repeat such assurance, that work on the section generally called the 60 feet section will be confined to the construction of permanent way, and work fully authorised and approved, and before doing any work concerning which such additional specifications and information have been called for, the company will duly furnish the latter for the Council's approval. No reason to my knowledge exists for making the present application, and the action of the Council in so doing is, I respectfully submit, premature, and the company would be put to great loss and expense if the work on the permanent way be stopped or delayed at this stage.

Mr. Searle, K.C. (for the Town Council): The Town Council are clearly entitled to an interdict, because by section 13 of their Act they are bound to supply further information. This they admit. (See page 11 of the manager's affidavit.) They have not given us any full specifications as to the making and widening of the road, and they claim as of right to go on working before sending in their specifications. A dispute arose as to the widening of the road, and we told them to stop working until the dispute was settled. It was clear that by their agreement with the Mills Syndicate they were bound to widen the road to 60 feet, and this agreement is still binding on the company. Now they say that they will widen to 60 feet only where we have land for the purpose to give them. Unless they can show that we have been guilty of misrepresentation, we are entitled to an interdict. It is true that they say they are not going to lay down rails and construct their road within this space where they are bound to widen to 60 feet. The matter, however, cannot be dealt with piece-meal like this. The notice of motion calls upon them to show cause why they should not be interdicted pending their giving notice of plans and specifications. (Section 13 of the Company's Act.) The terms of this section show that the local authority can stop the work if the materials, etc., used are not satisfactory. Notice was given in very general terms by the company on April 27, 1900, before the work was commenced. In their letter the company admit their obligation to follow the plan they had submitted, and which had been incorporated in section 65. It can-

not be held by the Tramway Company that a mere general notice would entitle them to go on with work over any and every section of their line. Section 13 is clearly against any such intention. They admit that the information we ask is reasonable, and hence their contention that they can go on with their work before giving us this information is untenable. If they say that they entered into the agreement, having been thereto induced by misrepresentation, it is for them to prove this misrepresentation. They have given us no information as to the road-making work, and they cannot contend that they may go on with such parts of the work as have been approved, and then fight out what is disputed. They contend that they have a right to carry their work right through without having first widened the road to 60 feet at the point specified. Section 13 provides that any work may be stopped by the Town Council until the company have satisfied them as to their plans. Paragraphs 7 and 8 of the manager's affidavit admit this right of the Council to demand further plans. Then again, under Act 42 of 1895, the Government claim for themselves the power of vetoing the opening of electric tram lines. It is no doubt true that we did say that the road could be widened under section 34 of the Act with the help of the Council. This, however, would seem to have been admitted *per incuriam*, so we fall back on section 65 of the Act.

Mr. Schreiner (for defendants): It is necessary to see why we are called into Court. In the first place, we are asked to furnish specifications of work to be done, and also to file plans of this work. Both of these grounds are bad as reasons for an interdict. Section 13 of the Company's Act really consists of two parts, and the point in this case is had the Council received specifications in terms of section 13? Until we furnished these we could not give notice under section 12. We admit that the first part of section 13 obliged us to submit specifications before we began the work. This we did, and gave definite notice, together with our specifications, under section 13. The Town Council might have objected that the sections of the tram line were too long and must be broken up. The Town Council now demand a special notice and specifications for a certain section of the line. We have not carried on the trench

one inch beyond Bygood's property. Then how can they interdict us in face of our offer to give information? We have done all we could do. We cannot give what the applicants ask without further surveys, and of course these take time. With the exception of the line going over a certain piece of ground near De Lorentz-street (which we have expropriated), the whole road is 60 feet wide. It is true we undertook to excavate the bank, but we never undertook to find the land. We thought the Town Council was the proprietor of the land. Our specifications show how our work is to be cut. *Green Point Municipality v. Metropolitan Railway* (8, Juta, 61) shows that the Town Council is not entitled to an interdict. The agreement cannot be drawn in to interpret section 13. Under that section they could stop us if we refused information, but that is not their case. We actually had our rails laid before the Royal visit, and we voluntarily took some of them up because we did not like the curve. Had it been intended that the widening to 60 feet should have been done by expropriation, the Act would have been differently worded. We do not claim power to run a tramway along a narrow road; Government would not let us do that. If this interdict be granted, our whole system will be stopped.

Mr. Searle (in reply): If they have our consent to go on with this work, they got it on their promise to widen the road to 60 feet. They now refuse to do this. The specification they are now working on is not the one they put in for our approval. Section 65 shows that the agreement is incorporated in the Act.

[Buchanan, J.: You now argue that you approved of the specifications, but they are not carrying them out?]

That is a pure technicality. It is before the Court that they sent in a plan showing a 60 feet road, and now they say they are not going on with this road. The Assistant City Engineer swore, however, that 90 feet of cable had been laid along this very road. They have taken up the position that they may lay lines right through the disputed section provided they only do other work which has been approved of. This would involve a misconstruction of section 13. If the Tramway Company wanted an expropriation clause in their Bill, they ought to

have seen that it was there. It was no part of our duty to watch over their interests.

Buchanan, J.: According to the notice of motion given in this case, this is an application calling upon the respondents, who are the Camp's Bay Tramway Company, to show cause why they shall not be restricted from entering upon or breaking up the Kloof-road until specifications shall have been submitted to and approved of by the Town Council, under section 13 of Act 34 of 1899, and also until they shall have given due notice, under section 12 of the Act, specifying in terms thereof the time at which they intend to begin such work. Now section 12 of the Act requires that before the Tramway Company can enter upon any part of a road or break it up they must give notice to the Town Council fourteen days at least before the commencement of the work. In April, 1900, the engineer to the Tramway Company wrote a letter to the Town Council, in which he gave notice of the intention of the company to enter upon, open, and break up the road, but this notice was not specific in terms required by the section. He says: "Although we shall not be able to commence the work within the next fourteen days." He does not specify, as the Act requires, the date at which they intend to commence the work. But the Town Council in the reply take no objection to this, as they might possibly have done. This notice given does not strictly comply with the Act, but this want of compliance has been waived by the Council. In the letter the Tramway Company submitted certain tracings to the Town Council showing what they intended to do. The Town Council accepted the notice, and approved of these tracings, which refer to the widening of the road to 60 feet, and where the rails are to be laid down. The Town Council wrote their approval to the Tramway Company, who thereupon entered upon and broke up the road. Now the Tramway Company have not, according to the Town Council, complied with the specifications which they sent on that occasion. The notice of motion calls upon the company to show cause why they should not be restrained until they have sent in their specifications. In argument the case has been reduced to this:

That the Tramway Company have not complied with the specifications sent in, but these are two quite different matters. If notice had been framed as it ought to have been, then there would be quite a different set of affairs, and other questions might arise. But the 13th section goes on further, and says that the road authority—that is, the Town Council—may at any time require further information as to the construction of the road, respecting the routes, grades, and such other details as may be required, and in the event of non-compliance with the demand, the Tramway Company will be debarred from proceeding with the work until they have supplied this to the satisfaction of the Town Council. The Town Council have objected to their going on with a certain portion until they have supplied this information. The Tramway Company reply: "It is true we have not supplied this information, but we are getting the information ready, and we shall send it in." The only objectionable thing in their reply is the statement: "We will not bind ourselves not to go on until we have sent in this." But from the affidavits it is clear that they have not attempted to go on. If they had done so, it is quite possible that under this section they might have been restrained until the additional information and plans had been approved of by the Town Council. But that is not the question before us. The Town Council seems to want to go back to the original stage, and say the Tramway Company have given no notice, and sent in no plans to be approved of, and that they must now give that notice. The affidavits show clearly that notice was given, informally it is true, but accepted by the Council, and specifications were sent in and accepted by the Council. These specifications are not so complete as the Council might have demanded, and as they may now demand. Reading the two sections together, it is quite possible that if they had not complied with the demand of the Town Council, the latter might stop the whole work. But this is not a question for the Court to decide, nor have we to decide whether they have carried out the specifications. If the Council make out a case—and they make out, on the plans before us, a very strong case—that the Tramway

Company agreed to make the road 60 feet wide, and had not done so, the latter would certainly require a very strong case on their part to show why they should not carry this into effect, and comply with the agreement, which inferentially they entered into. Here, however, the Tramway Company have not proceeded with the work, and they say they were getting plans ready and were not doing this work. If the Council find they do go on, then they can apply for an interdict until this information is supplied. But the application which we have before us is to compel the Tramway Company to give the original notice and to send in the original specifications. It has been shown that this notice was given and these specifications sent in and approved, and it is too late therefore for the Council to seek to go back to the original position. What may take place on the action is quite another question. With a properly framed notice of motion, and with information on the points, the Court will be able to decide the case, but on the papers, as they now stand, we cannot decide the matter. The application seems to be misconceived, and will be refused, with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondents' Attorneys, Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REX V. LINK AND WENNER. } 1902.
Feb. 18th.

Prison Breaking—Martial Law—
—Civil Warrant.

The Court will not uphold a conviction for prison breaking where the prisoner who had escaped from custody was not imprisoned under any Civil

*Warrant but merely by order
of the military authorities.*

Buchanan, J., said that this case had come before him for review from the Magistrate at Worcester. The accused were charged with contravening section 23 of Act 23 of 1888, that was of committing the crime of prison-breaking, in that being unconvicted prisoners awaiting trial at the Matjesfontein lock-up, they made their escape. They pleaded guilty, were found guilty and sentenced to six weeks' imprisonment, with hard labour. Some statements made in the examination had caused me to send the case back to the Magistrate for information as to whether the accused were civil or military prisoners. The Magistrate's explanation was that the lock-up keeper at Matjesfontein occupied the dual position of civil and military gaoler. The accused Wemmer was in prison awaiting trial on a charge of horse theft, brought against him by the military authorities. Therefore he was a civil prisoner, and the conviction in his case would be confirmed. As to Link, the Magistrate said he was put in gaol by the Commandant of Matjesfontein. There was no civil warrant for his detention, and he was brought before a civil court at the instance of the military authorities. The Court had consistently laid down in all cases which had come before them that while they would not interfere with the military authorities in martial law districts, at the same time the military authorities could not expect any assistance from the civil courts to enable them to carry out their orders. The Magistrate, as a civil functionary, had no right to try this case, and the conviction in Link's case must be quashed. In Wemmer's case, the conviction would be confirmed.

WIENER AND CO. V. JAMA-
LODIEN. { 1902.
Feb. 18th.
" 19th.

This was an action brought by Messrs. Wiener and Co. against one Jamalodien, who was a general dealer, residing at Cape Town. Plaintiffs sued for £186 6s. 4d., money due upon a certain guarantee or undertaking of suretyship, signed by defendant on June 2, 1900. This document was to

the effect that defendant undertook to guarantee payment of such sums of money as might become due for goods supplied to one Ahmet Mohamet, not exceeding the full amount of his account. Thereafter plaintiff supplied goods to Mohamet, who on June 23, 1901, surrendered his estate. Defendant had been requested but had refused to pay the amount due for the goods so supplied. The plea stated that defendant had no knowledge and no record of what goods were supplied. He said that he undertook to become surety for payment for goods not exceeding £15 in value; and that the document did not at the time of signing contain the words "the full amount of his account." He stated that there was a blank after the words "not exceeding," plaintiffs promising to put in the amount of the goods supplied.

Mr. Searle, K.C. (with him Mr. C. W. de Villiers) for plaintiff; Mr. Benjamin (with him Mr. Wilford) for defendant.

Francis Bonnes, trustee in the estate of Ahmet Mohamet, gave evidence as to the surrender. The dividend payable to the plaintiffs was £61 7s. 8d.

Frederick C. Wiener, managing director of the plaintiff firm, said that in June, 1900, he had conversations with Ahmet. Witness drew out the document produced. A number of lithographic forms were kept in the office, and were filled in when required. Witness himself filled in this document. Jamalodien was an intelligent man. He had signed forms previously, sometimes for the full amounts and sometimes for fixed amounts. The document was read over. Marlow and Bowley, clerks in the office, were present. Goods were supplied to Ahmet thereafter. He bought goods to the amount of about £400 altogether. Defendant and Ahmet frequently came in together. Ahmet paid his account up to January. On May 6, defendant wrote stating that he would not hold himself liable for goods supplied to Ahmet in future. No goods were supplied after receipt of this letter. On August 17, defendant, for the first time, stated that the security was limited to £15. In consequence of a communication from Ahmet some goods were taken from the latter's store at the end of April for safe keeping. The store had to be cleaned by the plague authorities. Just at the time of the insolvency Jamalodien asked him to take the goods back. Witness said he

could not do it. He handed the goods to the trustee. Witness had no recollection of giving Jamalodien a type-written copy of the suretyship document. The typewriter only came to the office in May, 1901. Witness had some recollection of giving a duplicate form to the accountant to give to Jamalodien.

Cross-examined by Mr. Benjamin: Witness could almost swear that Jamalodien could read. There was no blank in the document, and there was no arrangement that this should be filled up afterwards with the amount of the goods purchased that day by Ahmet, the sum not to exceed £15. The copy (produced by Mr. Benjamin) was on the firm's paper, and was written by the firm's typewriter. On this copy the words "not exceeding" appeared followed by a blank. Witness was not aware that this copy was given in July or August, 1901.

By the Court: Witness was perfectly certain that the original document was not altered after signing. Witness could not explain how the words "the full amount" were left out of the copy.

Re-examined by Mr. Searle: In respect to another suretyship, Jamalodien had repudiated liability, but paid after the declaration had been filed.

Gustavus Marlow, bookkeeper, in the plaintiffs' employ, said he was present when the document in dispute was signed. It was read over to Jamalodien, and was then in the same condition as it was now. There was no question raised in witness's presence as to limiting the amount to £15, or to one day's supply. This was never done by the firm.

By Mr. Justice Maasdorp: Witness had never signed a document concluding with the words "not exceeding."

Albert Ernest Bowley, clerk, in the employ of Messrs. Wiener and Co., gave similar evidence.

Mr. Searle closed his case.

Mr. Benjamin called

Jamalodien, the defendant, who said he saw Mr. Wiener in June, 1900. Witness agreed to go surety for £15, and told Mr. Wiener to put £15 in the document. Mr. Wiener said he would put in £12 or £15, according to what the goods amounted to. Witness could not read; he could sign his name. When witness wrote the letter in May, he intended to go to India.

Cross-examined by Mr. Searle: He had no conversation with Mr. Wiener about

the goods belonging to Achmat, which Mr. Wiener had taken back into store. He was aware that in May Achmat was likely to become insolvent, and he admitted having signed securities in favour of Messrs. Spilhaus and Mr. Ohlsson.

Achmat Mahomed, examined by Mr. Benjamin, gave evidence as to going to the plaintiff's place of business with the defendant, for the purpose of opening an account.

Abdol Gagoo stated that Jamalodien agreed to stand security for the first order only, which was under £15.

After hearing Mr. Benjamin for the defendant, and without calling upon Mr. Searle, the Court gave judgment.

De Villiers, C.J.: This is an action on a contract of suretyship for the payment of all such sums of money as may become due by the principal. The defence raised by the plea is that on the day on which the writing of the document was signed, the writing did not contain the words "for the full amount of his account," the plaintiffs promising to fill in the amount not exceeding £15. Now I may say at once that the defence at first sight seems to receive corroboration from the copy of the document which was supplied by the firm to the defendant in August, 1901, because in that copy there is nothing after the words "not exceeding the full amount of his account," and if there were not other circumstances in this case strongly supporting the plaintiff's case, the fact that this copy was delivered would be almost conclusive. The copying clerk is said by counsel (and there was no objection to this statement being made by counsel) not to be in a position to explain why the copy was in this form as he remembers nothing about it. Mr. Wiener says it is quite possible that this copy was made from another duplicate which did not contain these words. But, unfortunately for the defendant, there are other circumstances in the case which must be regarded as conclusive against him. In the first place, in his letter of the 6th May, 1901, he writes: "Please take notice that I shall not hold myself liable for any further supply of goods by you to the other parties." Now if the agreement was such as he states, this letter could not have been written. He knew that much more than £15 was owing, and there could be no further liability on his

part if his statement of what occurred was true. That is an acknowledgment, therefore, that up to that time he was liable for the supply of goods to an unlimited extent. He must have known that it was for his interest to have these documents as complete as possible, because the principal was already insolvent, and he knew that he was liable. In the next place, when in August last year he was supplied with the copy, he did not go to Wiener and say at once this is a mistake, and that the words "not exceeding" ought to have been completed by adding the amount of £15. Nothing was done at the time, and that certainly is against him. On the other hand, on behalf of the firm, there really would have been no inducement to make the alteration afterwards, because the effect of this document in leaving no words after "not exceeding" seems to be legally the same as for the full amount of his account. For these reasons, I think the Court has no option but to give judgment for the plaintiff for the amount claimed, with costs. There will be judgment for £123 18s. 8d., with costs.

Mr. Searle said that the amount had not been confirmed; the plaintiff would give the defendant credit for anything which might be recovered out of the estate.

The Chief Justice said he should have thought the money was safe, and it was better to give judgment for a fixed amount.

Mr. Searle contended that the plaintiffs were entitled to judgment for the amount claimed, and they would pay over any dividend from the estate as soon as they received it; they had not yet received anything.

The Chief Justice said the plaintiff would, in that case, have to make a cession of the amount to be received; judgment would accordingly be for the amount claimed.

[Plaintiffs' Attorneys, Sauer and Standen; Defendant's Attorneys, Silberbauer, Wahl and Fuller.]

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAAS-DORP.]

TRUSTEES OF THE WESLEYAN CHURCH V. EAYRS.
KAISER BROS. V. THE TRUSTEES OF THE WESLEYAN CHURCH. 1902.
Feb. 18th.
" 19th.

Contract of Sale of Land—
Measure of Damages due to purchaser for want of occupation.

Certain Church Trustees had sold a piece of land to K. Bros. undertaking to give possession by a certain fixed date. This they failed to do for more than 3½ months after the date agreed upon, in consequence of having previously to erect a person who claimed to have a yearly lease. The present premises on the ground were stated to be worth £14 a month though let at £7. The purchasers had informed the vendors that they proposed erecting buildings worth £8,000 on this ground, and they now claimed damages for want of occupation based on this prospective value of the property.

Held, that any such damages were too remote, and that such damages only could be recovered for breach of contract as might reasonably be supposed to have been in contemplation of the parties as naturally arising out of the transaction, and that as the present value of the property was not shown to be more than £15 a month, a tender at the rate of £25 a month must be deemed sufficient.

The plaintiffs' declaration in the first case was as follows:

1. The plaintiffs are Ezra Nuttall, Charles E. B. Garland, and William Abbott, all of Cape Town, and they sue in

their capacity as trustees of the Sir Lowry-road Wesleyan Church. The defendant is Jane Eayrs, of Cape Town, married to James B. Eayrs, and duly assisted by him. Defendant carries on a boarding-house in Cape Town for her own benefit.

2. Plaintiffs are the registered owners of a certain house and premises at the corner of Sir Lowry-road and Muir-street, Cape Town.

3. In or about October, 1901, defendant was occupying the said premises as a monthly tenant of plaintiffs, and she had received due notice to quit the said premises on October 31, plaintiffs having sold the same under an agreement to give possession to the purchasers on November 1, whereof defendant had notice.

4. Defendant wrongfully and unlawfully refused to deliver up possession of the said premises, and still continues so to refuse, and plaintiffs have in consequence sustained damage in the sum of £150.

5. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle plaintiffs to demand that defendant forthwith quit the said premises and pay the said sum of £150.

The plaintiff claims:

(a) An order that defendant forthwith deliver up possession of the said premises.

(b) Payment of £150 as damages.

(c) Alternative relief.

(d) Costs of suit.

To this declaration defendant pleaded as follows:

1. She admits paragraphs 1 and 2.

2. With reference to paragraph 3, she admits that in October, 1901, she was occupying the said premises as a tenant of the plaintiffs, but she denies that she was a monthly tenant. In or about April, 1901, plaintiffs leased the premises to defendant for a term of twelve months from May 1, 1901, at a rental of £7 per month, and defendant is, and was in October, 1901, occupying the said premises under the said lease. She admits that she received notice to quit the premises on October 31, but denies that this was due notice. She has no knowledge of any sale which the plaintiffs may have made of the premises.

3. With reference to paragraph 4, she admits that she has refused and still refuses to deliver up possession of the said

premises, but denies that such refusal is wrongful or unlawful. She denies that plaintiffs have sustained any damages for which she is liable.

4. She denies paragraph 5.

Wherefore defendant prays that plaintiffs' claim may be dismissed, with costs.

Plaintiffs' replication was as follows:

1. They admit that one of the plaintiffs, William Abbott, did purport to make a verbal agreement with defendant that if she paid the rent of the said premises in advance on the first day of each month she would have a lease of the said premises for twelve months, as from April 1, 1901; but that if she made default in the payment of any instalment on the due date as above, she should become a monthly tenant. They say that the said Abbott had no authority to enter into such an agreement, or to bind plaintiffs thereby to a yearly tenancy by defendant.

2. They say, further, that, assuming that he had such authority, the said rent was not paid in advance as promised by defendant, but that she failed to pay the rent for June and July as promised, whereby she became a monthly tenant, whereof the said Abbott informed her.

3. They say, further, that the defendant acknowledged that she had failed to pay as promised, and accepted notice to quit the premises on October 31, and raised no objection thereto, and she has now waived any right she may otherwise have had by her conduct in accepting the said notice.

4. Save as above, they deny all and singular the allegations in the plea.

The defendant's rejoinder was as follows:

Save in so far as the replication contains admissions, she denies all the allegations therein contained, and specially that it was a term of the said lease that the rent should be paid in advance, and joins issue thereon, and again prays that plaintiffs' claim may be dismissed with costs.

The affidavit of Morris Kaiser and Jacob Kaiser, carrying on business as Kaiser Bros., was as follows:

1. Plaintiffs reside in Cape Town. Defendants are the trustees of the Wesleyan Methodist Church.

2. On or about August 12, 1901, defendants in their said capacity sold to plaintiffs a certain house and premises situate

at Cape Town for the sum of £3,500, £500 to be paid in cash, and the remainder to be left on mortgage at 6 per cent. for six years, and defendants agreed to give transfer and possession of the said house and premises on November 1, 1901.

3. Plaintiffs have paid the said sum of £500, and all things have happened, all conditions have been fulfilled, and all times have elapsed to entitle plaintiffs to receive transfer and possession of the said house and premises as agreed upon, but defendants in breach of their said contract neglected and failed to give plaintiffs the said transfer and possession. Since the issue of summons in this suit defendants have tendered to give transfer of the said land on which the house and premises are, but defendants still neglect and refuse to give plaintiff possession of the house and premises.

4. By reason of the said breach of contract plaintiffs have been deprived of the use and enjoyment of the said house and premises, and have been prevented from letting it as they could have done, and have been prevented from dealing with the property and with building operations thereon, for which purpose the said land was bought, as the defendants well knew, and the plaintiffs have sustained loss and damage to the extent of £2,000.

Wherefore plaintiffs pray:

(a) That defendants be ordered to forthwith give possession of the said house and premises, and to pass transfer thereof to plaintiffs, the latter tendering to perform their part of the said contract.

(b) Judgment for £2,000 as and for damages.

(c) Alternative relief and costs of suit.

To this declaration defendants pleaded as follows:

1. They admit the allegations in paragraphs 1 and 2, but they crave leave for greater certainty to refer to the broker's note passed at the date of the agreement between themselves and plaintiffs for the terms of the contract between the parties.

2. They admit that the plaintiffs have paid the sum of £500, and that they are entitled to receive transfer and possession of the said property. They have done all in their power to put plaintiffs in possession of the said property, but the tenant, one Mrs. Eayrs, refuses to quit, and wrongfully and unlawfully retains

possession, and the defendants have hitherto been unable to eject her, though they have sued her for this purpose, and the case will shortly be heard before this Honourable Court.

3. They deny that plaintiffs have sustained damage in the sum of £3,000 as alleged, but they tender to give transfer at once to the plaintiffs, and to pay the sum of £100 in full satisfaction of any damage they may have sustained, or may sustain up to February 28; then to give possession on or before March 31 next, and to pay a further sum of £50 to plaintiffs.

4. Save as above and save that they admit that they have already tendered transfer to plaintiffs as alleged, they deny all and singular the allegations in paragraphs 3 and 4 of the said plea.

Wherefore, subject to the above tender, they pray that plaintiffs' claim may be dismissed with costs.

The replication was general.

The facts appear from the judgment.

Mr. Scarle, K.C. (with him Mr. Buchanan), for plaintiff trustees: The bond bears interest from November 1, and Mr. Nuttall's evidence shows that the trustees were allowing Mrs. Eayrs to have these premises at a very low rent. The interest on the bond at 6 per cent. would amount to £120, and we have tendered £100. Something between £100 and £150 would be a reasonable sum.

Mr. Gardiner (for defendant Eayrs): There was a completed lease between Mr. Abbott and Mrs. Eayrs. Mr. Abbott says that it was agreed that Mrs. Eayrs should have a twelve months' lease. Nuttall's evidence shows this also. The lease was entered into verbally. It is true that the letter confirming it was wanting, but that was not an essential part of the lease. The trustees cannot now say that they know nothing about Abbott's affidavit. They brought the action, and they ought to have seen it. The only question is, if there was a lease, was Abbott authorised to make it? The lease was entered into on July 7, 1901, and was not confirmed until January 7, 1902. Abbott said he was acting on behalf of the trustees. The important point is: has there been any breach of this lease on the part of the defendant. Mr. Abbott did not put the conditions in writing, but we ought not to suffer for his negligence. The younger Miss Eayrs says that he told her to tell her mother

that she (Mrs. Eayrs) could have the house on the same terms that her father had had it. He and afterwards his wife had been tenants of this house about twelve years in all, and it would only have been reasonable that the same arrangements as to rent which had previously subsisted should have been continued. Abbott never objected to the rent not being paid in advance. Had he done so, he surely would not have given the letter confirming the lease after default had been made in the advance payments. If the rent was to have been paid in advance, Abbott had waived that condition by accepting rent not so paid. The first intimation Mrs. Eayrs had of any supposed breach of the lease was on the occasion of Abbott's visit on August 15. Mrs. Eayrs at once repudiated the alleged arrangement. The 15th of August was a most inopportune time for Mr. Abbott to come after the rent had been already in arrear. By then promising to confirm the verbal lease by letter he waived all previous breaches (if any) of the lease. Had the August rent been in arrear, he might perhaps have given Mrs. Eayrs notice that she was only a monthly tenant; but that was paid in advance on August 1. Mrs. Eayrs and Miss Eayrs both deny that it was a condition of the lease that the rent should be paid in advance. Another ground taken up by the plaintiffs is that defendant agreed to go out, but the only evidence of this was that she had tried to get another house. That, however, should not prejudice her. She may have wished to oblige the trustees. As to damages, they cannot claim £150, seeing that Kaiser only claims to have sustained £100 damages. Defendant was only paying £7 a month, and it would be absurd to say that even if she had held over for three months she was liable thereby in £150.

Mr. Schreiner, K.C. (with him Mr. Uppington (for Kaiser Bros.): In our case it is merely a question of damages. We have to consider how far the trustees are responsible for not having put us in position on November 1. We were going to put an £8,000 building on the ground, whereas the one there at present is worth only £3,000. The rent, therefore, paid for it is no criterion of the damage we have sustained. Our claim is based on an £8,000 value. See *Agins v. G.W. Collicry Co.* (1, Q.B.D., 1899, 413; *Had-*

ley v. Braxendale (9, Ex. 341). See particularly the judgments of Bowen, L.J., and Esher, M.R., in *Hammond v. Bussey* (20, Q.B.D., 79). As to English law, these cases conclude the matter. An older case is *Simpson v. L.N.W. Railway Co.* (1, Q.B.D., 274). The language there is very general. In our own law we have *Pothier on Sale* where he refers to his treatise on *Obligations* (part 1, ch. 2, art. 3, sec. 162). It is true that contemplation is not the same thing as contract, but it would be a novel doctrine that no damages should be given on the basis of the future use it is proposed to make of the property. See the decision of the arbitrators in the case of *Dutch Reformed Church v. Town Council of Cape Town* (8, Sheil, 13).

Mr. Searle in reply.

Mr. Schreiner referred to *Philip v. Metropolitan Railway Co.* (10, Juta, 52), and distinguished that case from the present. There *Voet* (19, 1, 20) was relied upon.

Buchanan, J.: The plaintiffs, the trustees of the Wesleyan Church, own certain of the Wesleyan Church, own certain property in Sir Lowry-road, which in 1897 they let to one Eayrs on a contract terminable at three, four, or five years. In 1899 Eayrs became insolvent, and under the Insolvent Ordinance, this lease came to an end, but the plaintiffs allowed Mrs. Eayrs to remain in possession as a monthly tenant. She remained in such possession from 1899 until 1900, when some time in the early part of the year she wished to have a lease of the property for twelve months. She was then paying rent at the rate of £7 per month. The property was managed by the Board of Trustees, and of this Board one Abbott was the treasurer, and the person authorised to receive the rent. His evidence is not clear or satisfactory, and on his evidence alone the Court might have considerably greater difficulty in dealing with this transaction; but Mrs. Eayrs herself put the case so clearly that I cannot do better than quote her evidence. She states that when she spoke to Abbott about getting a lease of the house for twelve months, Abbott said that he would mention her name to the Board of Trustees, and that he would bring the matter up at the next meeting of the Board, and that he would write her a letter. Here, therefore, was a distinct intimation that

the matter would have to come before the Board of Trustees of the church, and that Abbott would write her a letter informing her of the decision of the Board of Trustees. Now we have it that the matter never was brought before the Board of Trustees, and that no letter was ever written by Abbott to Mrs. Eayrs afterwards. A conversation took place between Abbott and Mrs. Eayrs, and I think there is very little doubt that Abbott was quite willing that Mrs. Eayrs should have the lease for twelve months, provided she paid the rent monthly in advance; but in this case, she being only a monthly tenant, and having received more than a month's notice, when she had due notice to vacate, and was now sued for ejection, she must show to the satisfaction of the Court that the monthly tenancy ended and that a contract was entered into giving her a lease of the property for twelve months. On the facts of the case it is impossible to hold that she has discharged that onus, and she therefore, having received due notice, must be ordered to vacate the premises. In this view I take of the facts of the case, I will not now go into the question as to whether if there was a lease, it was subject to the condition that she should pay the rent in advance, and whether that condition was broken; or into the further question whether, when she received notice, she agreed to give up possession of the house. On this latter point the evidence is rather in Mrs. Eayrs's favour than against her, but there is no need to discuss this as I go on the broad fact that she has not satisfied the Court that she ever had a lease from the Board of Trustees for twelve months. Although the defendant held over from the 1st of November until the present time, the plaintiffs do not claim from her rent as such, but claim damages for continued occupation. Ordinarily speaking, the damages would have been the rent the premises would have brought in during that time. She was paying £7 per month, and in most cases the damages would have been assessed at four months' rent at £7 per month—£28; but Mr. Nuttall, one of the plaintiffs, says that the premises were worth £14 or £15 per month; the defendant was further told they were sold and that the purchasers required possession. I therefore think a very fair amount of

damages for the four months Mrs. Eayrs was in possession will be £15 per month, or £60 in all. Mrs. Eayrs having held over without any justification, judgment must be given against her, and she will be ordered to give up possession of the premises within a week; and also for holding over improperly without a lease damages will be given, covering any rent due, based upon the real rent which could have been obtained for the property, viz., £60. So much for the first case. As to the other case, the plaintiffs on the 14th August sold this property through a broker to the plaintiffs in the other action—Kaiser Brothers—for a sum of £3,500, of which £500 was to be paid on transfer being given, the sellers to leave the remaining £3,000 on mortgage at 6 per cent. interest for a period of six years, possession and transfer to be taken on the 1st of November, 1901, and the mortgage bond to bear interest from that date. This contract was entered into before it came before the Board, but presumably it was afterwards ratified by the Board; at any rate, it is admitted that this contract was duly entered into, and that the Board was prepared to abide by it. Owing, however, to Mrs. Eayrs holding over, the trustees were unable to give possession on the 1st of November. They did their best to get Mrs. Eayrs out of the premises before that date, but failed. They took prompt action, and there is no evidence of negligence on their part; but that is not a sufficient answer to the claim for damages for possession not being given. Since the summons was issued in this case transfer has been effected, the mortgage bond has been passed, and Kaiser Bros. are liable to the trustees in interest at the rate of 6 per cent. per annum from the 1st of November, 1901. In the declaration, Kaiser Brothers claim an amount of £3,000 as damages—which, however, is apparently a mistake for £2,000—for the delay in giving possession, although the only ground upon which they claim these damages is that they have been deprived of the use and enjoyment of the house and premises; and that they have been prevented from dealing with the property for building operations thereon, for which purpose, they say, the property was bought, as the defendants well know. That is to say, they state that they have been prevented from letting the property for four months or from

building thereon, and on these grounds they claim £2,000 damages. The mere statement of the case shows the absurdity of asking £2,000 for being kept for four months out of possession of a property for which they only gave £3,500. There is no special value of any sort attached to the property, and if they were entitled to damages at such a rate it would be converting the property into a gold mine. The defendants, the trustees, admit that they ought to have given possession, and they acknowledge that, though it was through no fault of theirs they were unable to give possession, they are liable for damages. They tender for the delay up to the end of the present month the sum of £100 as damages if they are able to give possession at the end of the month, and the question we have to consider is whether or not this tender is sufficient. If our law expresses the principle somewhat differently, I think it is not in conflict with, but is the same as that laid down in the cases cited by Mr. Schreiner, that when parties enter into a contract and fail to comply with that contract, the damages payable for the breach of contract are such as might be reasonably in the contemplation of the parties as naturally arising out of the transaction. When we look at the contract, here we find there is nothing said about any special use of the property which is agreed to be sold. It is said that the defendants were informed that the purchasers intended to build upon the property. Well it is a presumption when any piece of land is sold that the purchaser intends to build, but it would never be held that a purchaser of a piece of land could come forward and say that he intended to spend £5,000, £6,000, or £10,000 upon the property, and could, in case of delay in obtaining possession, say, "You have delayed me, and therefore I have incurred a good deal of prospective loss in not being allowed to work, and you must pay the damage." In my opinion, damages claimed for a building not yet put up are too remote, and in a case like this, a fair amount would be the value of the property to the purchasers for letting or occupation as the case might be. In the case of Mrs. Eayrs, we have come to the conclusion that the property was worth about £15 per month, and as the trustees' tender is equivalent to £25 per month,

we are of opinion that the amount of the tender was amply sufficient. Of course, if possession was not obtained at the end of the month, the plaintiffs may have a further claim. That cannot be settled now. Judgment must therefore be given for the plaintiffs for the amount tendered only, viz., £100.

Maasdorp, J., concurred, and said, with regard to the question of damages in the case of Kaiser Brothers against the trustees, that he did not think any evidence had been given to show that anything had taken place between the parties which would take that particular contract from under the ordinary contracts for the sale of a building or the sale of land, and in damages for the breach of such contracts, the Court had never laid down that the measure of damages would be the value of some extensive buildings which might be put up. Here, from what Abbott said, it might have been anticipated that some building or improvements were intended, but it was certainly never contemplated that the improvements would take place to the extent which the plaintiffs said they intended. It seemed to his lordship that there was a simple sale of a certain house, with a certain monthly value, and therefore the plaintiffs were entitled to get possession of that house on the specified date, or its monthly value, and the tender of the trustees was ample.

Mr. Gardiner asked that the defendant Eayrs be allowed to continue in possession until the last day of the month, as it would probably be difficult for her to get a house before then.

The Court therefore ordered possession to be given up by the last day of the month.

Mr. Schreiner submitted that the plaintiffs in the second case, Kaiser Brothers, should be allowed their costs, because although there was a tender, it was impossible for it to be an effective one, as the defendants could not give possession when asked.

Buchanan, J., said the Court was of opinion that the plaintiffs in the second case were forced into court, and therefore the judgment must carry costs.

[Attorneys: For trustees, G. Trollip; for Eayrs, J. J. Michau; for Kaiser, Fairbridge, Arderne and Lawton.]

FRYER V. FRYER.

Mr. Benjamin appeared for plaintiff.

Mr. Gardiner, for defendant, applied for removal of bar. Defendant was on active service and could not attend.

The action was one for restitution of conjugal rights.

Francis Henry le Sueur, clerk in the Colonial Office, proved the marriage of the parties.

Elsie Johanna Fryer said she was married to defendant in December, 1899. She had been previously married to him in August, 1893, and obtained a divorce in 1899. She subsequently re-married defendant in December, 1899, and he left on the following January, going on active service. There were two children, to whom, on the occasion of the divorce, custody had been granted to witness. When her husband left her he left for the front. He had been at Clanwilliam for some time. The younger child was with defendant's sister at Mowbray.

Mr. Buchanan said he appeared for defendant's sister.

Witness only asked for the custody of the elder child. She asked for an order for £7 a month for maintenance. Defendant's sister had adopted the younger child.

An order for restitution was granted, defendant to return to or receive plaintiff on the 31st March, failing which, to show cause on the 12th April why a decree of divorce should not be granted, plaintiff to have the custody of the elder child, and why he should not pay £7 a month towards its maintenance; with costs.

JOHNSON V. JOHNSON.

Mr. De Villiers, for the plaintiff, called further evidence in this case, which was for a decree of divorce.

Henry Williamson was called, and confessed to the truth of allegations made concerning Mrs. Johnson and himself.

A decree of divorce, with custody to plaintiff of the children, was granted, defendant to have access to the children at reasonable times.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Sir John BRUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSION.

1902
Feb. 20th.

Mr. Buchanan moved for the admission of Frank Becker Wessels as a conveyancer.

An order was granted as prayed, and the oaths administered.

PROVISIONAL ROLL.

FICHAT V. H. M. SONDAGH, H.BON.

Mr. Alexander moved for the final adjudication of defendant's estate as insolvent, the provisional order having been made by the Chief Justice on January 27.

Order granted as prayed.

SARGENT V. MANSFIELD. { 1902.
Feb. 20th.
„ 21st.

Civil Imprisonment—Magistrate's Court—Judgment.

Where a defendant against whom a return of nulla bona had been made on a Magistrate's Court judgment had subsequently removed into the jurisdiction of another magistrate, the Court granted a decree of civil imprisonment on the judgment aforesaid.

Mr. Buchanan moved for provisional sentence upon a Magistrate's Court judgment for the sum of £60, and £2 6s. 4d., with interest *a tempore morae* and costs of suit. Counsel also asked for a decree of civil imprisonment upon the Magistrate's Court judgment, to which a return of *nulla bona* had been made.

Buchanan, J.: Can you obtain a writ of civil imprisonment in this Court upon a judgment of the Magistrate's Court? Must you not first take out a

writ upon a judgment in the Supreme Court, because if you want a decree of civil imprisonment, it must be for the disobedience of an order of that Court?

Mr. Buchanan said that the plaintiff resided in Cape Town, while the defendant now resided in Ceres, so that the plaintiff could not get a decree of civil imprisonment in the Cape Town Magistrate's Court.

The Chief Justice asked if there was any precedent for the Supreme Court granting a decree of civil imprisonment upon a Magistrate's Court judgment.

Mr. Buchanan said he had not looked into the authorities on that point.

The Chief Justice said he believed there was a case bearing upon the point, and referred to *Mostert v. Forde* (10, Sheil, 344). Counsel might again mention the matter if he could find the case referred to. In the meanwhile, the first application, viz., that for provisional sentence, would be granted with costs.

Postea (February 21).

Mr. Buchanan again moved for a decree of civil imprisonment, and cited *Mostert v. Forde* (10, Sheil, 344), *Peters v. Davis* (9, Sheil, 559), and *Van Zyl on Costs* (p. 19).

The Court granted an order as prayed.

[Plaintiff's Attorney, F. W. Greenwood; defendant in default.]

ALEXANDER V. PARKER. { 1902.
{ Feb. 20th.

Private International Law—*Lex Fori*—*Lex Loci Contractus*.

Where plaintiff sued defendant for provisional sentence on two liquid documents made 12½ years ago in a foreign country the statute laws of which did not recognise prescription, plaintiff being at present beyond the jurisdiction.

Held, that the case must be decided by the lex fori, under Act 6 of 1861, and hence that the debt aforesaid was barred by prescription.

This was an application for provisional sentence for £1,071 4s. 1d., and £164 8s. 9d. due on a promissory note for £1,096 4s. 1d., and on a cheque for £164

8s. 9d., bearing date December 2, 1889, and October 30, 1889, both made and signed by the defendant in favour of plaintiff, and whereof said plaintiff is still the legal holder, together with interest thereon from January 1, 1890, and October 30, 1889, respectively, which promissory note and cheque having been presented for payment, were and remain dishonoured. The affidavit of James Parker, the defendant, stated that he resided at Johannesburg from April, 1887, to October, 1892, and was in Johannesburg when the promissory note and the cheque now sued upon became due, and that he informed plaintiff that he was unable to meet the same.

2. That he purchased 1,000 Blue Sky shares and 500 Oriel shares from plaintiff in August, 1899, for £1,375, and gave him a cheque for £164 8s. 9d. and a promissory note for £1,096 4s. 1d. in settlement, and the said shares purchased were attached to the promissory note as collateral security.

3. That according to account rendered by plaintiff, and annexed marked A, it appeared that he sold the shares aforesaid which were held by him as collateral security on January 20, 1891, for £25 without any previous notification to defendant, although defendant was in Johannesburg at the time.

4. That since the due dates of the said promissory note and cheque no demand was ever made by plaintiff for payment thereof until November, 1901, when defendant received a letter of demand annexed, and marked B, and in which the aforesaid account was enclosed. Defendant now denied all liability in respect of the said note and cheque, as they had become prescribed.

Mr. Schreiner, K.C. (for plaintiff): In the Transvaal there was no Prescription Act.

[De Villiers, C.J.: Must not the case be decided by the *lex fori*?]

No. In *Louw v. Skead* (4, Juta, 109) that rule was adopted, but this is not a similar case. My client is now in Natal, and defendant left the Transvaal some years ago. Section 11, Act 6 of 1861, shows that the Act applies only to the people of this colony. In this case both parties were foreigners at the time these notes were made, and we cannot apply the *lex fori* to such cases. *Dicey on Conflict of Laws* (p. 715, sec. 3), who cites *British Linen Co. v. Drummond* (10

B and C., 903). We say that the *lex contractus* of my client affords him protection, and takes the case out of the scope of Act 6 of 1861. *Foots Private International Law* (p. 391).

Mr. Searle, K.C. (for defendant) was not heard.

De Villiers, C.J.: It appears to me that the *lex fori* should be applied to this case. The terms of the second section of the Prescription Act are: "Except as hereinafter is excepted, no suit or action upon any bill of exchange, promissory note, or other liquid document of debt of such nature as to be capable of sustaining a claim for the sort of interlocutory judgment commonly called a 'provisional sentence,' shall be capable of being brought at any time after the expiration of eight years from the time when the cause of action upon such liquid document first accrued." Therefore, unless the present case falls within the exceptions mentioned in the subsequent part of the Act, the action on the note in suit must be deemed to have been prescribed. The case of *Lour v. Skend* is an authority for holding that the present case does not fall within any of the exceptions. The only distinction between the two cases is that in the present case the plaintiff resides outside and not within the jurisdiction, but that circumstance certainly does not strengthen the plaintiff's case. The application must therefore be refused with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Van Zyl and Buissinne; Defendant's Attorney, P. de Villiers.]

CROWDER V. WHALES AND ANOTHER.

Mr. Alexander appeared for the applicant, but asked for a postponement of the case until next provisional day, as they had not yet received proof of service on the defendants, who reside at Mafeking.

Postponement allowed.

PAARL BOARD OF EXECUTORS V. ELIZABETH BARTMAN.

Mr. C. de Villiers moved for provisional sentence upon a mortgage bond for £1,350, together with interest. The bond had become due by reason of the non-payment of interest. Counsel also

asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed and the property declared executable.

DE VILLIERS V. SEIDLER AND ANOTHER.

Mr. C. de Villiers moved for provisional sentence upon a promissory note for £68 13s., with interest due thereon.

Provisional sentence granted as prayed.

HAVENGA AND ANOTHER V. PAGE.

Mr. Upington moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court, dated September 12, 1901, for the sum of £30 5s. 4d., together with £30 15s. 8d. costs. The Sheriff's levy had realised a sum of £7 7s. 8d., and the balance was still owing.

The defendant was in default, and an order was granted as prayed.

SMITH AND CO. V. SOLO- } 1901.
MON. } Feb. 20th.

Accountant—Reference—Costs.

Mr. Benjamin (with whom was Mr. Gardiner) moved that judgment be entered in the above case in terms of the referees' report. This stated that following the directions of the Court the referees had gone into the accounts, and found that £233 17s. 11d. was due by Solomon to Smith and Co.

Mr. Searle, K.C. (with whom was Mr. Close), appeared for the defendant, and said he did not wish to oppose the motion, but he wished to address the Court in regard to the question of costs. Proceeding, Mr. Searle pointed out that, although the defendant had not established, when the matter was previously before the Court, that he was entitled to share in the Bloemfontein contract as a partner, the Court had awarded him the large sum of £180 in regard to that contract, although the plaintiffs, who had not tendered any sum at all, had said in their declaration that defendant was only entitled to £60 from that source. In regard to the salaries' question also, the Court had awarded them £15 out of their claim for £200. He claimed that in re-convention these were the only two points the Court went into. The Court did not adopt the basis of either the defendant or the plaintiffs, but were much nearer the defendant's basis than that of

the plaintiffs. He also read correspondence which had taken place before the trial, to show that these were the only real points in dispute, and that defendant had offered to go to trial upon them alone, but the reply received from the plaintiffs had been to the effect that it was evident that the matter could only be settled by the Court.

Without hearing Mr. Benjamin in argument,

Buchanan, J., who, with Maasdorp, J., heard the principal action, gave judgment, and said: The parties in this suit entered into a joint speculation, and the plaintiffs supplied money to the defendant to buy provisions for the execution of certain military contracts. The plaintiffs demanded a full, true, and correct account from the defendant of his expenditure. The defendant in his answers said he was entitled to certain amounts which he was entitled to set off in account between himself and the plaintiffs, which the plaintiffs disputed. In reconvention defendant claimed that the plaintiffs should render to him an account with regard to a Bloemfontein contract, in which he claimed an interest as a partner. The Court held that the defendant was not entitled to participate as a partner in the Bloemfontein contract, that the defendant must render the account claimed, and that after that account has been debated by accountants, the Court would be able to give judgment on its being ascertained how the account stood. No tender whatever had been made by the defendant of any amount. The accountants, following the directions of the Court, had gone into the accounts, and found that there was a balance of £233 13s. 11d. due by the defendant to the plaintiffs, and in the absence of any tender or anything to take the case out of the usual principle, the judgment must carry costs, including costs of the reference.

REHABILITATIONS.

Mr. Buchanan moved for the rehabilitation of Henning Francois Joubert van der Merwe. Applicant's estate was voluntarily surrendered on August 1, 1895, the schedules showing liabilities amounting to £448 17s. and assets £157 7s. The debts proved amounted

to £518 8s. 4d., and the assets realised £81 9s. 6d., concurrent creditors receiving a dividend of 2s. in the £. There was nothing unfavourable in the trustee's report.

Order granted as prayed.

Mr. M. Bisset moved for the rehabilitation, under section 106 of the Insolvent Ordinance, of Louis Pitt. The usual certificate from the Master was put in.

Order granted as prayed.

Mr. C. de Villiers moved for the rehabilitation of Pieter Wilhelm Wilhelmus Immelman, whose estate was voluntarily surrendered on February 8, 1895. In this estate the concurrent creditors had received dividends amounting to 8s. 1d. in the £. There was nothing unfavourable in the trustee's report.

Order granted as prayed.

MOWBRAY MUNICIPALITY V. { 1902.
COLONIAL GOVERNMENT. { Feb. 20th.

Nuisance—Abatement—Extension of time.

Where the Court had ordered a nuisance to be abated within a month from the date of its judgment, and the defendants subsequently applied for an extension of time, the Court refused the application.

This matter came before the Court on notice that an application would be made for an order extending the time wherein to carry out the Court's order granted on the 11th December last owing to the applicants' inability to obey the said order within the time stipulated.

Samuel Tonkin, Mayor of Mowbray, deposed that immediately after the hearing of the case the Council met and seriously considered the judgment of the Court, and after mature consideration instructed their engineer to draw up a scheme to obviate the complaints of the Railway Department. That after the judgment the Council received from the defendant letters demanding that at various other places where water ran on and along the line this should be stopped. The Council then instructed their engineer to bring up a scheme to cover all the cases. He brought up a most exhaustive report, showing that the cost of that portion adjoining the Observatory-road Station, in-

cluding the roads on both sides, will be about £5,000, and that for the remainder of the line up to the boundary of the Municipality at Rosebank a further sum of £12,500, a large portion of which will be of no use whatever when the proposed underground drainage scheme is carried out, and it will take from eighteen months to two years to carry out the work proposed, and it will only then be of a temporary nature, and in the face of the Council's determination to immediately carry out a comprehensive underground drainage scheme this will be a waste of money. This Council has been approached by the Woodstock Council to join with them in an underground drainage scheme, with a joint main outfall to the sea. That the Mowbray Council have prepared plans showing the main drain to the boundary of the two Municipalities at Eden-road, corner of Station-road, Observatory, and in May last this Council passed a resolution to join with Woodstock in their proposed underground drainage scheme, and have had several conferences with the Councils of Rondebosch and Claremont for the same purpose. This Council instructed Mr. Olive to report on that portion of the Municipality which cannot come into the scheme by gravitation, and find that the whole of the area, except the portion of vlei ground along the Liesbeek and Black Rivers, can come into the scheme, and his report has been before the Council at their last meeting, when the following resolution was passed: Joint Main Drainage—On the motion of Councillor Drake, seconded by Councillor Reid, the following resolution was unanimously passed: "That this Council agrees to join the Woodstock Municipality in the proposed joint sewage outfall in Table Bay, and with a view to expediting matters, this Council agrees to the necessary expense of immediately proceeding with the survey and plans for the main drainage tunnel through the Municipality to Ryan's-road boundary by the engineer appointed by the Woodstock Council for the outfall scheme. That this Council desires to impress upon the Joint Drainage Committee the advisability of at once proceeding to take steps towards the drawing up of a drainage scheme, either jointly or for each Municipality separately, in connection with the joint outfall in which the Muni-

cipalities are about to join the Municipal Councils of Claremont and Rondebosch." The Drainage Committee of the joint Councils of Mowbray, Rondebosch, and Claremont meet this Friday (January 10) evening to consider the above resolution, which has been forwarded to these Councils; and the Mowbray Council will meet to-morrow (Saturday) evening, January 11, to consider and agree upon the terms by which Mr. Olive shall be engaged as consulting engineer, and also as to carrying out the main drain. This Council has also instructed their engineer to engage, and he has done so, two assistants to survey the Municipality for the underground drainage of the Municipality, and will commence the work on Monday (the 13th inst.), under the instruction and supervision of the engineer, and it is confidently believed that in two years' time the main sewer will be so far completed as to allow the water from houses to flow into it. In the meantime, the Mowbray Council will do all that is possible to keep the drains and watercourses clean, and will prosecute all persons found contravening the regulations.

Affidavits were filed by the station-master at Observatory-road and by the District Engineer, which were to the effect that no steps had been taken since the judgment to improve the condition of the drain in Trill-road, but that, on the contrary, the nuisance was being increased.

A further affidavit by Mr. Tonkin was read, stating that since he made his previous affidavit the Councils of Rondebosch, Claremont, and Mowbray had agreed to join with Woodstock in the drainage scheme referred to.

An affidavit by the Municipal Engineer (Mr. Drake) was also read, stating that no breach of the Municipal regulations in allowing water, slopwater, etc., to flow down the gutters in question had been reported, and also denying that there was any increase in the nuisance. In a further affidavit, the engineer stated that plans, etc., had been prepared for making up the road in Church-street, together with provision for a new stormwater sewer, and the execution of the work would be immediately undertaken by the Council; while considerable progress had been made with the survey of the Municipality in connection with the sewage scheme.

Mr. Buchanan (for the Municipality): The Court will never try to enforce an order which it is practically impossible to carry out. We have endeavoured to minimise the nuisance; we have put on a special inspector, and the engineer reports that no complaints have been made since. All these sluits and drains are cleaned out every day and inspected. We only ask for a little time—say two years—to complete a system of underground drainage subject, say, to the condition that after two months we shall be called upon to show that we are going on with the work. In similar English cases time is invariably given; here the Court has given us a month, with leave to apply again; but a month is clearly insufficient. The only alternatives before us are either total prohibition of discharge of this drainage or an underground scheme. The Council are doing their best to carry out the order of the Court. In the case of the *Attorney-General v. Colney Hatch Asylum* (38 L.J. Ch.) three months were given though in that case there was only one establishment to deal with, and only one drain, and yet after giving three months the Court granted leave to apply again. Three months were also given in the *Attorney-General v. The Town Council of Birmingham* (4 Kay, and J. 528).

Mr. Schreiner (for the Government): The drainage still comes down Trill-road and runs between the rails. This nuisance has been going on year after year, nobody has been prosecuted, and the excuse for delay which has always been put forward is that a big scheme is in contemplation. They hold out the threat that if we insist on this nuisance being abated no houses will be let. They boldly say that more than 700 houses drain into Trill-road. In fact, this is only what we have proved. Meanwhile they are sitting still and doing nothing. Much was made of the fact that the stationmaster's house contributed to this nuisance; if it did the contribution must have been infinitesimal, and has been stopped. The Municipality must do the same. All we ask is that the Municipality should be brought face to face with the judgment of the Court and compelled to take action of some kind.

Mr. Buchanan in reply.

De Villiers, C.J.: In an action brought in this court, the Court held there was a nuisance, for

which the Municipality was responsible, and ordered that nuisance to be abated. Now we have an affidavit from the stationmaster at Observatory-road to this effect: "As far as I can judge, there has been no improvement in the condition of the drain in Trill-road since the decree was granted; the quantity and quality of the water coming down on to the railway is just about the same." There is no denial of this statement, but there is a statement on behalf of the Municipality that they intend going in for a larger scheme, in conjunction with other municipalities, and that this larger scheme will take two years; and they ask for further time to obey the order of the Court. Now the time which they apparently ask for would be two years; but there is no guarantee even that in two years the scheme would be completed. In the meantime, before this larger scheme can be completed, the nuisance would go on—that nuisance which the Court has said must be abated. There is no clear proof that it is a matter of impossibility to abate it. Some temporary measure might be adopted while this great scheme is being carried out. That must be done, in terms of the order of Court. The matter was fully discussed in the action, and if there were not a possibility of abating the nuisance, no doubt the Court would not have given the order. Nor is it shown now that there is no possibility of abating it. Under these circumstances, the Court cannot further extend the order, and the application must be refused, with costs.

[Applicants' Attorneys, G. Trollip; Respondents' Attorneys, Reid and Nephew.]

MARTIN V. MARTIN. { 1902.
Feb. 20th.

The applicant in this case was Mrs. Wilhelmina Angelina Martin, who applied to make absolute a rule nisi granted on January 20, calling upon her husband, Jno. Martin, blacksmith, of Mossel Bay, to show cause why an order should not be granted restraining him from dealing with the property of the joint estate of himself and the petitioner, pending the result of an action instituted by the latter for judicial separation. In her affidavit applicant alleged that her husband was a habitual drunkard, and had been guilty of acts of cruelty towards her. He had been three times convicted and fined for drunkenness, and

had once been found guilty of assaulting her. The rule nisi appointed Mr. Lourens as curator.

Mr. Close moved to make the rule absolute.

Mr. Benjamin appeared for respondent, who denied, on affidavit, that he was an habitual drunkard, but admitted convictions, and that he had been drunk on several occasions. He said he was quite able to manage his affairs, but if the Court thought a curator should be appointed, he suggested that Mr. W. C. Gilmore should be appointed.

Buchanan, J., said that there was no allegation that Mr. Lourens was not a fit person.

Mr. Benjamin suggested that Mr. Lourens and Mr. Gilmore should be appointed jointly.

De Villiers, C.J.: The rule must be made absolute. There is no reason shown for not appointing the person mentioned in the rule.

Costs were ordered to be costs in the cause.

THE TOWN COUNCIL OF } 1902.
CAPE TOWN V. TABLE } Feb. 20th.
BAY HARBOUR BOARD.

The Government is not entitled to enter upon land for purposes of railway construction under Sec. 3 of Act 19 of 1874 without previous notice to the proprietor, in terms of the last proviso of Act 9 of 1858.

Such notice should definitely state for what purpose the land is required, and whether and to what extent it is intended to expropriate part thereof.

This was an application for an interdict restraining respondents from trespassing upon or opening up of the Dock-road in Cape Town, or from trespassing on certain land belonging to the applicants, and forming portion of the old Fish Market, and also from laying down any line of railway in the said Dock-road, save and except certain two lines of railway to be constructed in accordance with the permission given to that effect by the applicants, or from running or working any such lines of railway except for the purpose of through traffic to the

Alfred Docks. Notice of this application had been served upon the Table Bay Harbour Board and the General Manager of Railways.

The affidavit of Josiah Robert Finch, Town Clerk of Cape Town, stated, *inter alia*, that by section 110 of Act 26 of 1893 the Dock-road is vested in the Town Council of Cape Town, and has for a considerable time been repaired by the Council at considerable expense. In view of the unsatisfactory condition of the road, deponent acting under instructions received from the Mayor, had entered into a correspondence with the Harbour Board with reference to paving and widening the said road. The Harbour Board agreed to contribute £5,000 towards the cost of doing this, and stated that the Colonial Government had approved of this contribution on certain conditions. The Harbour Board also agreed to grant to the Council the land required for widening the road. At a conference held on June 13 between deponent, the City Engineer, the secretary, and the Acting Engineer of the Harbour Board, the Railway Department was represented as the actual construction of the proposed line along Dock-road would be in their hands. A plan was submitted by the Harbour Board and the Railway Department of the proposed lines in Dock-road on June 15. This plan showed two continuous lines of railway on the Dock-road, and no sidings, and in a letter dated July 11 the General Manager of Railways stated to the Council that these two lines between Adderley-street and Bree-street would be used as through lines, and that measures would be taken to prevent interference with the present Fish Market. On August 28 the Harbour Board wrote to the Council saying that it was proposed to lay two sidings in the Dock-road as a temporary measure, and that it would be necessary to run over a portion of the land upon which the old Fish Market stood. As this was vested in the Town Council, the Council replied that if the Harbour Board wanted to use it they should purchase it. After further correspondence, in a letter dated October 5, 1901, the Harbour Board sent a tracing of the proposed lines to the Town Council. This showed certain "exchange sidings" which the Board proposed to lay down. There was also forwarded a diagram showing the portion of the old Fish Market which the Board proposed to ac-

quire. These plans showed four lines of railway in addition to the two previously proposed. In the meantime the Harbour Board, without any notice to the Council, surreptitiously proceed to construct the lines in question, and in so doing removed a portion of the old Fish Market which had not been expropriated or acquired by them in any way. The result has been to narrow the Dock-road to the loss and detriment of the citizens, to render impracticable the proposed scheme for widening it, and to reduce a considerable portion of it to the condition of a goods yard. Deponent wrote to the Board protesting against these proceedings. A meeting of representatives of the Board and of the Council was held on October 30, at which the Engineer of the Board admitted that their action was a breach of their agreement with the Council, and that if the "exchange sidings" remained there would be no room for the proposed tramway to the Docks. At the aforesaid meeting it was stated by one of the Harbour Board's representatives that the lines in question were being laid down by the Railway Department for, and at the expense of, the Harbour Board, who were responsible for the traffic as far as Adderley-street, where the Railway Department took it over. On November 2 the Board wrote to the Council for their consent to these sidings remaining for four years, the Board to have sole control of the traffic in the Dock-road. To this proposal the Council would not agree, but the work was still continued. Deponent says that the Railway Department has only acted as the agent of the Board in this matter, and has not addressed any communication or given any notice of expropriation to the Town Council. The affidavit of Frank Robb, secretary of the Harbour Board, stated that the grant of the Dock-road to the Council was subject to the approval of the Governor, the Legislative Council and House of Assembly, as provided for in sec. 58 of Act 36 of 1896. That the whole of the land required for the purpose of widening the Dock-road to 120 feet, with the exception of the old Fish Market, is vested in the Harbour Board by Sec. 55 of Act 36 of 1896. One condition subject to which the Government approved of the Board contributing towards the cost of widening the road was that it reserved to itself the right to lay two lines of rails from the Railway Goods Sheds to the Docks, and

in case of necessity to lay sidings in order to clear the traffic. The object of the conference of June 13 was not for the purpose of considering the construction of railway lines to the Docks, but to obtain the consent of the representatives of the Town Council to the position of the tramway lines and railway lines proposed by the Railway Department and the Board. The plan referred to in Mr. Finch's affidavit was merely intended to show the approximate position of the two through lines, and the letter of July 11 cannot affect the reservation by the Board on behalf of the Government in their letter of June 6, of the right to lay necessary sidings. It is not admitted that the agreement in connection with the widening of the Dock-road was finally completed, as the Town Council did not signify its acceptance of the Board's conditions, and the necessary sanction of the Governor and of Parliament to the alienation of the land for widening the Dock-road has not yet been obtained. The General Manager's letter of July 11 to the Town Clerk points out the necessity of other sidings, besides the exchange sidings to be laid down on the Dock-road. The permission of the Council to lay down two lines of rails has never been given, nor has it been asked, as far as deponent is aware, but in negotiations with the Council the Board has always reserved the right to the Government to lay two lines of rails and the necessary sidings. As the Board owns the land on the seaward side of the Dock-road along its whole length, except at the site of the old Fish Market, the permission of the Council to run rails is not necessary. The work undertaken by the Harbour Board was carried out under an agreement entered into by it with the Colonial Government, who have statutory powers, under Act 19 of 1874, to construct and maintain a line of railway from the Castle to the Docks, and the Board, in carrying out the work, is acting as the duly authorised agent of the Government. The Harbour Board gave notice of their intention to the Town Council, as appears from deponent's letter of August 28, to the Acting Town Clerk. Deponent denies that the work done by the Board as to laying down of lines, etc., was done surreptitiously, and says that the value of the portion of the old Fish Market removed was practically

nothing. Deponent denies that the works at present being carried on will affect the width of the Dock-road. He also denies that the present operations carried on by the Board aforesaid, will render it impracticable to carry out the scheme for widening the Dock-road. Deponent did not admit that if the plans of the Harbour Board were carried out there would be no room for tramways. Deponent denies that the work in question was done for, and at the expense of, the Board. Deponent admitted that by letter of November 2, the Board did state that the sidings were only temporary. As to the suspension of the work in the Dock-road, the deputation from the Board stated that they had no authority to discuss the matter. The Board admits that their rails were laid across the site of the old Fish Market, but denies that this was done surreptitiously. Defendants deny that there is any narrowing of the available portion of the Dock-road under their scheme. Deponent was advised and believed the said sidings to be necessary for the purposes of traffic. The Harbour Board does not desire to actually purchase or expropriate the site of the old Fish Market, as it does not contemplate that the sidings will be permanent.

The affidavit of Thomas Smith McEwen, Assistant General Manager of Railways, stated that the sidings in question, in respect of which an interdict was sought by the Town Council, were being constructed by the Harbour Board for the Colonial Government under an agreement, and that the Harbour Board was in regard thereto acting as the duly authorised agent of the Colonial Government. That the Colonial Government was acting under powers conferred by Act 19 of 1874. That exchange sidings were necessary for the working of the traffic and that the space between Adderley-street and the new Fish Market was the most suitable place for the temporary construction of these sidings. That no notice of expropriation was given by the Town Council because it was not intended to keep the sidings permanently, and it was confidently anticipated that within four years these exchange sidings would be removed to another spot.

Mr. Searle, K.C. (for the Town Council): This is now a mere question of costs. This fish market has been entered

upon by the Harbour Board, and the Colonial Government without any notice of expropriation. They even say that they do not intend to expropriate.

Mr. Schreiner, K.C. (with him Mr. Sheil, K.C.) (for the Harbour Board and Colonial Government): The powers of the Colonial Government allow them to take land either for a term of years or for ever. We have now given notice that we mean to take this land for good.

[De Villiers, C.J.: Can you take the land unless you expropriate it?]

Yes. *Town Council v. Commissioner of Crown Lands and others.* (Foord, p. 21.)

Mr. Searle: We had better discuss the legal point first. Act 19, 1874, Sec. 6, sub-section 7 sanctions the construction of the Dock Railway. I must admit that if all provisions of this Act are carried out, the Government can take the land. McEwen's affidavit shows, however, that the Government do not intend to expropriate. Act 9 of 1858 gave no power to expropriate until the Government had determined the compensation to be paid. Section 3 of Act 19 of 1874 deprived the Road Commissioners of this power, and vested it in the Governor, but still the power vested in the Governor was precisely the same as that formerly vested in the Road's Commissioners. Notice to the proprietor is therefore necessary before the Government can come upon his land.

[De Villiers, C.J.: Is not Act 9, 1858, repealed by Act 40, 1889?]

In *Logan v. Colonial Government* (11 Sheil, 114), it was held not to have been repealed. The case of *Town Council v. Colonial Government* (Foord, 21) should be considered in this connection. In that case the Railway Department gave notice of expropriation, whereas in the present case they say they are not going to expropriate; so that case is not on all fours with the present. Nor is this case similar to that of *McDonald v. The District Engineer* (7 Juta, 290). The Court has never held that Government can enter upon land and take it without notice of expropriation.

[Maasdorp, J.: Can they not take it for temporary use?]

Not without notice of expropriation under Sec. 12 of Act 9, 1858. I can find no authority for the position the Government are now trying to take up. *McDonald v. The District Engineer* is

one of the strongest cases against us, but even that does not support the Government in the present case. It only shows that Government are not bound to supply a plan, but in this case they say that eventually they may not want the land at all.

Mr. Schreiner: My learned friend argues as if the Government had taken the fish market without any previous intimation.

[De Villiers, C.J.: Was any formal notice served on the Town Council?]

No formal notice, but they knew what we and the Government were doing. That is shown by the letter of August 21.

[De Villiers, C.J.: That was not from Government.]

It was written on behalf of Government.

[De Villiers, C.J.: How does that appear?]

From Mr. McEwen's affidavit.

[De Villiers, C.J.: A notice from him is no notice from the Government.]

Yes. He was authorised to enter upon the land, Sec. 2 of Act 19 of 1874. It is true that only the Railway Department had power to expropriate, and if they did not give notice of their intention to do this they did give notice of their intention to purchase. The Town Council must have known what work was going on, for the Mayor has a seat on the Board, and yet it was not till October 10 that they wrote demanding that the work should be suspended, and on October 18 for the first time they took up the position that we could not take the land for a temporary purpose. As to costs, this case must be judged as if there had been no subsequent notice of expropriation. There was no agreement between the Town Council and the Board, but surely in view of Sec. 3 of Act 19 of 1874 no interdict can be granted.

[Buchanan, J.: Notice must be given by the Government.]

That was so before the passing of Act 19 of 1874, but Sec. 3 does not require notice.

[De Villiers, C.J.: It is only reasonable that before you go upon a man's land you should tell him what you mean to do.]

The Crown primarily has a right to do what it likes in the public interest. The concessions given to the subject by Act 37 of 1888 are merely *ex gratia*. There is no case of an interdict being granted

against the Government. Originally the application was against the Harbour Board and the Government. Supposing a contractor for the Railway Department wants a load of ballast, surely it will not be said that he cannot take it until Government has expropriated the ground. We say that the Government may take what land it requires, and then it is for anybody who considers himself aggrieved to bring his action for compensation. This case is very similar to that with respect to the foreshore. The so-called agreement between the Government and the Town Council was only a provisional understanding. As both bodies involved are public bodies, I would suggest that each should pay its own costs.

De Villiers, C.J.: This is an application for an interdict restraining the Harbour Board and the General Manager of Railways from further trespassing upon property belonging to the Town Council, but counsel for the applicants does not now press for the interdict, and the only question we have to decide is as to the costs. Now the costs will not be much, and neither for the Town Council nor for the Government would it be a matter of supreme importance which of them paid the paltry costs which have been incurred. The matter has, however, been very strenuously argued, as if very much depended upon the decision of the Court in the case. It appears that the Government claimed the right to go on the land under the 3rd section of Act 19 of 1874, which enacts that all and singular, the powers and authorities which are by the Act No. 9 of 1858 bestowed upon the Commissioner of Roads, are bestowed upon the Governor. In my opinion, however, these powers are subject to the proviso in the 11th section of the Railway Act, which provides that no land shall be taken, or materials raised and carried away, without previous notice to the owner thereof. Now, that question was not raised in the cases which have been cited; in point of fact, in the first case notice had been given by the Government, and although in the second case it is not clear whether notice has been given or not, the point was not raised. In the present case it is clear there was no formal notice given. There was some communication between

the parties, and perhaps it is true that the Town Council knew that the Government was going to construct a railway there, but that was not notice of expropriation. When such large powers are given to the Government, the least that can be expected from the Government is that timely notice will be given to the proprietor of the land before his land is entered upon. No doubt the Government may, after giving notice, go upon the land, but, at least, let it give the notice which is required. The present seems to me to be a strong case against the Government. In his affidavit Mr. McEwen says that "no notice of the expropriation was given the Town Council, because it is not intended to keep the sidings there permanently, and it is confidently expected that within four years from the present time the exchange sidings will be removed to another spot." I am of opinion that the Town Council is now entitled to a definite statement as to what the Government intends doing, and especially whether it intends to expropriate the land. It seems that the Government or the General Manager of Railways does not yet know its own mind, and that no definite decision has yet been come to as to the railway to be constructed on this land. I am of opinion that this is a case where the Town Council is entitled to definite notice of exactly what the Government intends to do upon the land. There is one decision, in which the Court held that it was not necessary to give detailed plans, specifications, and diagrams of the land over which it was resolved that the line should run, but that is a very different thing to being allowed to go on land without any notice whatever. In the opinion of the Court there ought to be a notice stating definitely for what purpose the land is required, and whether and to what extent it is intended to expropriate part thereof. I think that the Town Council was perfectly entitled to come into court, and that such an interdict as that asked for could have been properly obtained against the General Manager. As the interdict is not now asked for we will make no order with regard to it, but as the Council was justified in coming into court, the costs of the application must be paid by the Government.

Their lordships concurred.

[Applicant's Attorneys: Fairbridge, Arderne, and Lawton; Respondents' Attorneys: Reid and Nephew.]

CROSBIE V. RAUTENBACH. } 1902.
{ Feb. 20th.

Costs—Judicial discretion.

The Supreme Court will not, as a rule, interfere with the discretion of a Court of first instance on a question of costs unless there has been a reckless exercise of its discretion.

This was an appeal from a decision of Mr. Justice Hopley, given in the High Court of Griqualand West.

The appeal was not brought with regard to the main action in the court below, but with regard to the question of certain costs of a postponement asked for by the respondent, who was the defendant in the court below. The case was ultimately decided in the defendant's favour, and the appellant (plaintiff in the Court below) did not appeal against this decision, but he appealed against having to pay the costs occasioned by the postponement, he having at the time the case first came on been ready to go to trial, having all his witnesses present.

The reasons of Mr. Justice Hopley for his decision, that appellant should pay these costs, were as follows: This case came on for trial on the 15th of August last, before the Hon. the Judge-President and myself, the plaintiff being represented by counsel and the defendant appearing in person, in custody of a police-constable, he being then, and I believe at present, a convict in the Kimberley Gaol, under a sentence of hard labour imposed upon him by a Military Court at Vryburg for high treason. On that date the defendant was apparently ready to do the best he could in his own defence; but the Court, considering from the opening statement of plaintiff's counsel that important points of law might arise, and that, at all events, the facts might require careful elucidation, suggested to

the defendant that it would be desirable that he should employ an attorney and counsel, and ask for time to enable them to be properly instructed. The case was on that day postponed, partly for that reason, and also because there was no interpreter in Court until the following day. When that arrived, the defendant had been in communication with Attorney Solomon, now a partner in the firm of Coghlan and Coghlan, but that gentleman had had no time to come to any satisfactory arrangement as to the necessary funds to enable him to get up the defence or to instruct counsel. Whereupon, again under some pressure from the Court or at all events upon its suggestion, the defendant applied for a postponement until the following term. The plaintiff's counsel then urged that the application should be granted only on payment of the wasted costs, but the Court, considering that it would be a hardship on the defendant to pay these costs if the whole case should prove to be unfounded, reserved the question of these costs until the hearing. At the hearing of the case, which took place before me alone on the 15th November, I came to the conclusion that the plaintiff's witnesses could not be relied upon, and that, as far as I could judge upon the evidence adduced, the case against the defendant was unfounded. I, therefore, thought that it would be unjust that the defendant should be saddled with the costs in question. Plaintiff's counsel argued that the Court had no discretion in the matter, but was obliged to give the plaintiff these costs. I did not take that view, and I think that if the Court is not bound, as suggested by counsel, this is a very strong case in favour of the defendant. The plaintiff knew perfectly well that the man was a prisoner, unable to get about and attend to his own affairs. He also knew, as appears from a document filed with the record, that the attorneys who had been acting for the defendant had ceased to represent him about a fortnight before the case originally came on for trial and that his then pecuniary circumstances were such that it would not be easy for him to make fresh arrangements. Yet, knowing all these facts, the plaintiff pushed on the case to a hearing, and came into court with what turned out in the end to be an unfounded claim;

and in these circumstances I considered that he, and not the defendant, should pay the costs involved.

Mr. Scarle, K.C. (with him Mr. Gardiner), for the plaintiff, now appellant: This is merely a question of costs. The case was postponed twice in the Court below at the distance of defendant, and I submit that he should be made to pay all reserved costs. The Court below should have granted these postponements only on condition of his paying the costs. It is the ordinary rule that if a man has no real ground for not appearing, he has to pay the costs of the day. It was not plaintiff's fault that defendant was in the custody of the military. See the *Annual Practice* (1902, p. 488), and the case of *Stewart v. Gladstone* (7 Ch. D., 394) there mentioned; *Bradley v. Barr* (6 H.C., 120). Plaintiff had brought his witnesses down from Vryburg, and it is a wrong principle to make wasted costs depend upon the final result of the trial.

De Villiers, C.J.: This is really a most frivolous appeal. The respondent applied for a postponement on the suggestion of the Court, and it was the costs incurred on this postponement which formed the subject of the appeal. It is a well-known practice that discretion must be left to the Court which tried the case to award costs. The Court has frequently said that such discretion must be judicially exercised, and it requires strong evidence that it was an utterly reckless exercise of discretion before this Court will upset it. It is very much to be regretted that the judge has given leave to appeal. He might fairly have refused to do so. The appeal will be dismissed, with costs.

[Appellant's Attorneys:

[Respondent in default.]

JANSON V. JANSON. { 1902.
 { Feb. 20th.

This was an application by defendant for an order on plaintiff to pay her a certain sum of money to enable her to defend the action instituted by him for restitution of conjugal rights, failing which divorce. Applicant asked for £30.

Mr. Gardiner appeared for plaintiff; Mr. Buchanan for defendant.

In her affidavit applicant said she was married to respondent in community of property in August, 1899. There were no children. Respondent had instituted an action against her on the ground of desertion. She had no funds to defend the action. She said her husband was a builder and contractor, and speculator, and had landed property, and she further alleged that he was guilty of adultery.

The respondent denied the allegations that he was a builder and contractor and speculator, and that he had committed misconduct. He said he was a labourer, earning 6s. 8d. a day.

The Court made an order for payment of £15, costs of the application to be costs in the cause.

NIEBURG V. JANDRELL.

Mr. Russell moved for an award of arbitrator to be made a rule of Court.

Granted.

Ex parte EXECUTORS OF THE LATE RETIEF. { 1902.
(Feb. 20th.

This was an application by the Executors of the late Elizabeth Clasina Aletha Retief, of the Paarl, for an order to pass transfer of certain land, being a part of the estate of the deceased, to Gabriel Andries Retief (one of the said executors), who had purchased the property at a public auction at a price far in excess of the Divisional Council valuation. No minors appeared to be interested, and on the motion of Mr. Goch, the Court granted an order, as prayed.

[Applicant's Attorneys: Messrs. Van der Byl and Van der Horst.]

RE ESTATE LATE JEFFREYS. { 1902.
(Feb. 20th.

This was an application for the cancellation of a certain mortgage bond passed by the late George G. Jeffreys on certain property in Uitenhage. It appeared from the affidavit of the applicant, who was executor testamentary in the estate of the deceased, that the amount of the bond had been paid off by deceased, and the bond handed back to him, but that, by an oversight, it had not been cancelled in the office of the Registrar of Deeds.

From the report of the Registrar, it appeared that the property in question had been mortgaged to certain persons as trustees of the Uitenhage Mutual Land and Building Society. The society had subsequently been dissolved, no liquidator having been appointed. Two of the trustees were now dead, but as the books of the society had been destroyed, and it was impossible to trace its financial operations, the Registrar now refused to act on the certificate of the surviving trustee and the secretary, to the effect that the Bond had been paid off.

On the motion of Mr. Buchanan, the Court granted an order as prayed.

[Applicant's Attorneys: Messrs. Fairbridge, Arderne, and Lawton.]

Ex parte BUCHANAN.

Mr. Benjamin moved for the appointment of Mr. W. P. Buchanan as curator to assist the minor in signing articles of clerkship.

The Court granted the appointment.

Ex parte SULLIVAN. { 1902.
(Feb. 20th.

This was an application for leave to mortgage certain property situate in Cape Town, in which certain minors were interested. The petition of Maria Sullivan, married in community to Michael Sullivan, showed that at present there were only two dilapidated rooms on the property, and that she wished to raise £750 for building purposes.

The Master's report was favourable, and he recommended that some responsible person be appointed to see the building contract carried out, to receive the rents, and look after the new property, and after making an allowance of £5 per month to the petitioner to apply the balance to the reduction of the loan until the bond has been cancelled.

On the motion of Mr. Benjamin the Court granted an order in terms of the Master's report.

[Applicant's Attorneys: Messrs. Van Zyl and Buissinne.]

SUPREME COURT

[Before the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Sir JOHN BUCHANAN.]

GLASS V. HANSEN. (1902.
(Feb. 21st.

This was a claim for £50 damages for breach of agreement, and for £15, the cost of an advertising board erected by plaintiff on defendant's property at Salt River.

Mr. Benjamin appeared for the plaintiff. The defendant appeared in person.

Ernest George Glass, the plaintiff, said he hired a hoarding at defendant's premises at Salt River for advertising purposes. The hiring was an annual one, and the last annual payment of £2 10s. covered its hire up to September 12 last. Plaintiff had erected a hoarding 80 feet long and 12 feet high at the rear of defendant's premises at a cost of about £15. No notice to terminate the hiring was ever given, although it was originally understood that reasonable notice should be given. Plaintiff obtained from £50 to £100 a year for the use of the hoarding, and he maintained that he was entitled to a year's notice. He understood that defendant had sold the premises.

Hans Hansen, the defendant, stated that when the hoarding was first erected he told plaintiff that he was trying to sell the property, which he had since done, Government being the purchaser. He asked plaintiff if it was worth troubling to take down the hoarding, and Glass replied no. It was understood that if he sold the property the hoarding should be removed.

De Villiers, C.J., asked Hansen why he had no advocate to defend him. Mr. Steer had originally represented him, but he had withdrawn from the case; why was that?

Defendant replied that Mr. Steer wanted £25 down to go on with the case, but he (the defendant) thought he might just as well speak for himself.

De Villiers, C.J., said this was really one of the most paltry cases that had ever come before the Court; the utmost the Court would have done would have been to

give judgment for 16s. 8d. and Magistrate's Court costs. He did not think the plaintiff had any claim at all. He believed it was quite likely that the defendant's account of the transaction was the correct one when he first gave permission for plaintiff to put up a hoarding it was understood that if at any time defendant sold the property the hoarding should be taken down. His lordship did not think that plaintiff had intentionally stated what was not true, but he had probably forgotten the circumstance, whereas defendant said he remembered very well that it was understood that when he sold the property the agreement should terminate. For these reasons he gave judgment for defendant.

LOTTER V. RHODES. (1902.
(Feb. 21st.

Grass fire—Acts of Servant—Negligence.

Where a shepherd acting for the benefit of his master and in the ordinary course of his employment negligently sets fire to brushwood in order to improve the pasturage, the master was held responsible for damage done to his neighbour's farm by the spreading of the fire.

This was an action in which Johannes Petrus Lotter, of the Paarl, sued Cecil John Rhodes for £300 damages, caused by a fire on defendant's farm.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer residing on, and the registered owner of, the farm Normandy, or Normandyen, in the division of the Paarl; the defendant resides at Rondebosch, in the Cape Division.

2. The defendant is the registered owner of the farm Rhone, in Groot Drakenstein, in the said division of the Paarl. The said farm adjoins the plaintiff's farm Normandy, or Normandyen.

3. On or about the 14th November, 1901, the defendant, by his agents or servants, kindled, or caused to be kindled, a fire on his said farm, close to the plaintiff's farm, and thereafter failed and neglected duly and diligently

to control the course of the said fire, or to exercise due care and caution in respect thereof, and negligently and unlawfully suffered the fire so kindled as aforesaid to spread and come on to the plaintiff's said farm.

4. At the time the said fire was so kindled the grass and undergrowth in and about the locality thereof was dry, and it was dangerous so to kindle such fire.

5. The said fire did damage to the plaintiff on his said farm, and destroyed divers fruit-trees and a part of a vineyard planted thereon, as also certain grass and reeds growing thereon.

6. By reason of the premises the plaintiff has suffered damages in the sum of £300, payment of which the plaintiff is now lawfully entitled to claim at the hands of the defendant, but the latter refuses to pay same or any part thereof.

Wherefore the plaintiff claims: (a) Payment of the sum of £300, as and for damages as aforesaid; (b) alternative relief; and (c) costs of suit.

To this declaration defendant pleaded as follows:

1. Defendant admits paragraphs 1 and 2, save that he is not aware that plaintiff is the registered owner of the farm Normandy, and puts plaintiff to the proof thereof.

2. Defendant denies each and every allegation in paragraph 3. Defendant admits that on or about the day complained of there was a certain fire on his farm, but he denies that it was caused by him or his agents or servants, or by any act or default of his or theirs, or that he or they were guilty of any negligence in respect thereof, or that it spread to plaintiff's farm, which defendant is not aware of, and does not admit, it was through any act, or default, or omission, or negligence on the part of himself or his agents or his servants. The defendant says that said fire could have been stopped and extinguished by the plaintiff if he had exercised due care and caution, and if plaintiff had given the usual and due notice and warning to the defendant, and that the damage, if any, caused by the said fire was caused by the want of such care and caution on the part of plaintiff and by plaintiff failing and neglecting duly and diligently to give the usual notice, and to control, stop, and extinguish the said fire as he should and could have done.

3. Defendant has no knowledge of the allegations in paragraphs 4 and 5, and does not admit them.

4. Defendant denies that plaintiff has suffered loss and damage to the extent of £300; or any loss or damage for which defendant is liable, and he denies paragraph 6.

The replication was general.

Mr. Searle, K.C. (with him Mr. C. de Villiers), for plaintiff; Mr. U'pington (with him Mr. J. E. de Villiers), for defendant.

Johannes Petrus Lotter, the plaintiff, said he was the owner of a farm called Normandie, which adjoined Mr. Rhodes's farm, Rhone. On November 14 there was a fire on his farm. Witness first noticed smoke about 300 yards from the dividing line of his farm, the wind blowing it towards his property. Plaintiff sent his son Carl to ascertain about the fire, which reached his boundary about midday, entering a plantation, afterwards penetrating to the orchard, where it destroyed some young trees. In addition poplar and oak trees were injured, while about 6,000 reeds were destroyed, about half of the whole farm being burnt. The farm was 445 morgen in extent. Witness and his three sons were the only persons on the farm at the time, and it was impossible for them to extinguish the fire. The cook and plaintiff's daughter also aided in the work. Plaintiff said they did whatever they possibly could to stop the fire, which at one time threatened the homestead. On the following day he wrote to Mr. Pickstone, Mr. Rhodes's manager, asking him to inspect the damage and indemnify him. Plaintiff had previously complained about the danger of fires caused by an old coloured man named Apollis, employed on Mr. Rhodes's farm. It was Apollis who had started the fire which damaged the farm. A week before the fire witness had spoken to Apollis about the danger of such fires. Witness estimated that the fire had caused damage to his farm to the extent of £300. Very many of the damaged trees were large ones, including 72 young oaks, some apple trees, young vines, and two poplar plantations. Mr. Pickstone and Mr. Mostert subsequently visited the farm, after receiving a legal demand for £300. Witness showed Mr. Pickstone the major portion of the damaged trees. Afterwards Mr.

Pickstone sent a field cornet and another person to value the damage, but they did not go all over the farm, remaining only about twenty minutes.

Cross-examined: The fire started between ten and eleven in the morning. When he went to put it out, the fire had already crossed his boundary. A portion of the oak trees for which he was now claiming compensation was damaged in a fire four years ago, for which he had received compensation; but they had grown again since then.

There were 72 oak trees and also a number of blue gums burnt, but he did not count the latter.

Re-examined: The fire could have been seen for miles around. A considerable piece of the farm Rhone was burnt, but no effort was made to put the fire out.

Carel Francois van Heerden Lotter, son of the last witness, stated that on the day of the fire, on the 14th November, he was with his father on the stoep of the homestead, and saw the smoke of the fire. He went down to the ridge and found Apollis there. The latter went away and lit a fire in two other places, although his father had told him previously that he was not to set fire to the veld. The fire spread in the direction of the farm Normandy. Witness, with his four brothers, worked hard to put out the fire.

Cross-examined by Mr. Uppington: Witness did not endeavour to get Apollis to say that Mr. Mostert had ordered him to light the fire. He never told Apollis that if he did not say so he would be put on the Breakwater. The place where the fire was lit was in the nature of a vlei.

John de Villiers, residing at Salt River, said he was on Mr. Lotter's farm on the 12th December, and went with the last witness on to the farm Rhone. They met Apollis there, and the latter acknowledged that he had set the veld on fire. Witness was a cousin of the Lotter's, but he had nothing to do with the case.

Cross-examined: He heard no conversation regarding Mr. Mostert, nor did he hear anything said about the Breakwater. He did not hear Carel Lotter tell Apollis that if he said that Mr. Mostert told him to light the fire

he should go free, but if he did not he would be put on the Breakwater.

Daniel Pieter de Villiers, residing in the Paarl district, said that he had been asked by Mr. Lotter to inspect the damage caused by the fire. He estimated the whole of the damage at £150.

Cross-examined: The result of burning the veld would be to improve it for grazing. Several of the oak trees had been burnt in the previous fire.

John Daniel Scholz, a farmer, residing in the vicinity of Mr. Lotter's farm, said that he knew the farm Normandy well. He signed the paper with Mr. De Villiers, and made a careful valuation of the damage.

Gideon G. Lotter, a son of the plaintiff, said he did everything possible to put out the fire. It was impossible to come nearer than 50 yards to the fire. There were no horses on the farm, but everything was done to get assistance.

Cross-examined: All the mules had been commandeered, and when they went to the Paarl they used ox-wagons. He would swear that there was no bicycle on the farm.

This closed the case for the plaintiff.

For the defence,

Harry Ernest Victor Pickstone stated that he was the general manager of the defendant's fruit farm; Mr. Mostert was the manager of the farm Rhone. After the fire witness went over, on receiving a claim through Mr. Shaw, to see the damage on Mr. Lotter's farm. He explained to Mr. Lotter that he had come to see the damage, and they went round together. The damage to the vineyard was not 5s.; it was absolutely paltry. Then they went to see the orchards, and there was a row of apple trees which had been partially scorched on one side; but there again the damage was very small. Witness asked Mr. Lotter how many reeds had been burned, and the latter said about 6,000; but as they had been burnt, there was nothing to be done, and witness was not in a position to dispute the amount of reeds which had been burnt. In regard to the poplar bush, he considered that that was of very small account; he did not go up to them, but he thought that the damage was trivial. There was, as regarded the oak trees, a previous fire three years ago, when, much against witness's judgment, they paid a sum of £50.

By the Court: The fire in the present instance was a much bigger fire than the other. He would not admit that they did not pay far too much in the former case. Subsequently he selected two men to go over to Mr. Lotter's farm and assess the damage. Lotter explained to witness that his son himself saw the fire lighted.

Cross-examined: The fire was a very big blaze, and might possibly have been seen for fifteen miles around.

By the Court: He did not send anyone to assist in putting the fire out. He was very much against the settlement of the former fire, and as soon as he saw the blaze he knew that there would be an action for damages. He came to the conclusion that if he had sent boys to put out the fire, if any claim was made, it would have been held that they were responsible in the matter. If Mr. Lotter had sent down, he would have collected a hundred boys to assist, and would have been glad to have done so.

[De Villiers, C.J.: Seeing that it began on your property, it would have been better to have sent them anyway.]

Witness: I did not know that it started on our property. I am satisfied now that it started on our property.

Cross examination continued: The fire was a veld fire, and there was a very strong wind blowing at the time. They took it that the burning of the veld was an improvement, and it was generally recognised to be a benefit to a farm. He admitted that there was a certain amount of damage done, but at the same time there was also great benefit. Mr. Lotter might have remonstrated with him about the practice of setting the veld on fire.

Andreas Martinus Mostert, manager for Mr. Rhodes, produced a plan of the locality of the fire, approximately showing its extent. On November 14—the day of the fire—witness in the early morning was at the orchard above the Rhone homestead. He did not see Apollis that day. The wind was not blowing very strongly, and not in the direction of plaintiff's farm. Four of witness's boys were working in the orchard. Witness was spraying trees up to a little past ten o'clock, when he left for the Paarl. He returned home about 8 p.m. In cases of farm fires the neighbours usually helped one another to extinguish the out-

break. Witness, with Mr. Pickstone, went to Lotter's farm, but found that the damage was not very much; witness thought about £20 worth. Witness was on the farm when a previous fire occurred, and when Lotter was paid £50 as compensation. Witness was very much against this payment. It was no part of Apollis's duty to light fires. The pathway across the farm Rhone was very much frequented by different people. He was not aware that Lotter had been prevented using it. Witness had examined the ground, and he was of opinion that the fire originated on the ridge near the footpath.

Cross-examined: From time to time the veld was burnt, for the benefit of the goats. Paarl was about nine miles from plaintiff's farm; witness saw the smoke of the fire from Paarl.

Wilhelm Adolf Krige, overseer at the farm Rhone, said that on the morning of the fire he saw Apollis pass about eight o'clock with his goats. About 11.30 witness saw smoke, which appeared to be on plaintiff's ground.

Cross-examined: He did not send any men to see what was the matter. The fire might have been either on Rhone or Normandie farm. Fires were of daily occurrence on the mountains.

Re-examined: Witness had never given any instructions for the veld to be burnt. The fire was in the neighbourhood of the footpath across Rhone.

Apollis Abrahamas, an elderly coloured man, deposed that he was goatherd on the farm Rhone. He did not light the fire in question. He did not smoke, nor did he light fires for the purpose of cocking his food. On the morning of the fire he went out with the goats at sunrise, but did not go near the vlei. Mr. Mostert gave him no instructions to light a fire that day. Witness did not see young Lotter that day.

Cross-examined: He had never burnt the veld. On the day of the fire he was far away from it, on the main road. Neither of the Lotters had warned him against lighting fires.

Goliath, another elderly coloured man, alleged that on the day of the fire he was working with other men on the cultivated lands on Rhone. He saw the smoke, but no fire; a westerly wind was blowing. The fire was far from where they were working, and they could only see the smoke.

Daniel Johannes Joubert, Field-cornet of Groot Drakenstein, stated that he had, at the request of Mr. Pickstone, gone over to Mr. Lotter's farm to assess the damages caused by the fire. He saw a portion of the damage, and subsequently handed to Mr. Pickstone a short note, showing the damage to be assessed at £35.

Cross-examined: He never told Mr. Lotter that he had decided to diminish the estimate of the damage. What he principally had regard to in making the estimate was the vineyards and fruit-trees.

Christian Frederick Beyer, a farmer, residing in the Paarl district, said that he went with the last witness to assess the damage caused to the plaintiff's farm. Independently of the reeds, of which he knew nothing, he should put the damage at £10.

Cross-examined: He considered that the fire was a very good thing for Mr. Lotter. Personally he would have been very glad to have had 200 acres converted into beautiful veld. The oak trees were exceedingly poor. He considered that the improvement to the veld caused by the fire came to more than the damage.

Mr. Upington closed his case.

Mr. Searle, K.C. (for plaintiff): The case of *Van der Byl v. De Smit* (Buch., 1869, p 183), clearly shows that defendant was liable for the acts of his servant. The question, therefore, is merely one of damages. The evidence shows that considerable damage was done to plaintiff's farm, and if he has assessed that damage at a somewhat high figure, I submit that it is much nearer the mark than the absurdly low assessment made by the field-cornet and the other witnesses for the defence.

Mr. Upington (for defendant): In order to render an employer liable the negligent act of his servant must have been done within the scope of that servant's employment. In this case Apollis was not employed to burn the veld; on the contrary he was told not to burn it. In the absence of proof, either of definite instructions given to him to burn, or of proof that it was part of a goat herd's duty to burn, how can his employer be held liable. See *Pollock on Torts* (p. 79, 5th Edition). Even if Apollis was guilty of gross negligence it must be shown that

his act was culpable. *Priestley v. Dumeycr* (15, S.C.R. 393). That was a case of a man acting within the scope of his employment, and it is true that the Court held that not every deviation from the scope of his employment, no matter how slight, would suffice to relieve the employer of responsibility; but this is quite a different case: here the servant was expressly forbidden to light fires. *Beran on Negligence*. (p. 716.)

De Villiers, C.J.—What act makes it criminal to set fire to the veld?

Ordinance 18 of 1859, sec. 3.: But a civil action cannot be maintained against an employer whose servant by setting fire to the veld actually improves the property. Then, again, plaintiff sent his son to the fire when it was just commencing, about 10.30 a.m. It did not come on to his ground before 12 noon. Why, then, did he not go to Mostert and tell him to put out the fire, warning him it was a danger to his (plaintiff's) place. It was clearly plaintiff's duty if the fire was a danger to him to have gone on to defendant's ground and tried to put the fire out; but he does nothing until the fire actually comes across his line. He saw this fire burning at a very dangerous season, and knew that it is the custom of the locality to assist in extinguishing fires on a neighbour's farm. He has been guilty of contributory negligence. Apollis may well be liable, but there is no evidence to show that defendant authorised either him or Marais to burn the veld, or that he was benefited by its being burnt, and that is a very important point. As to the damages, I would refer to Shaw's letter of demand, and to the amended declaration. Nothing was said about these "fine oak trees"; we hear of them now for the first time. The original claim was only for vines and fruit trees, and the fact that neither oaks nor poplars were pointed out to Pickstone when he came to inspect the damage done casts great doubt upon the *bona fides* of this part of the claim.

Mr. Searle (in reply): On December 7 De Villiers and Scholz found that £150 worth of damage had been done to the blue gums and the oaks, so that this part of the claim was perfectly *bona fide*. See *Van der Byl v. De Smit* (Buch., 1869, p. 183). See particularly the judgment of Bell, C. J. There the defendants thought the fire would be beneficial to

them, they warned plaintiff, and they kept a man on the watch, but nevertheless were held liable. Pickstone admits that he thought the fire a very good thing for Rhodes's property, and Mostert quite agrees with him. *Van der Byl v. De Smid* shows that the onus of proving that due care has been taken rests in such a case upon the person who lights the fire, and this onus defendant has not discharged. It is negligence to light a fire among brushwood on a windy day—*Fort* (9-2-19).

De Villiers, C.J.: The defendant's counsel has very properly argued that the defendant himself should not be held liable, unless the fire which had been kindled by Apollis had been kindled by him in the ordinary course of employment. The main question is: Was this fire kindled in such ordinary course? Upon this point the Court can scarcely disregard the custom of setting fire to bushes for the sake of the pasturage. The persons employed to do this are generally the shepherds who are in charge of sheep and cattle. We find that fires had been kindled before on the defendant's farm, apparently for the same purpose of improving the pasturage; but there is no evidence that Apollis who did it was in any way punished. It is true that Mr. Pickstone investigated the matter, and Mr. Mostert says that he directly prohibited the man from firing the veld. But that seems to have been somewhat of an afterthought of Mr. Mostert's, and it is not clear that any such direction was given. In my opinion it is clearly proved that he is the man who set fire to the veld the second time. There is another point, and that is that it seems to me that all those concerned in this farm were rather glad than otherwise of the occurrence. Mr. Pickstone seems to think it has done the plaintiff's place good, and I do not think Mr. Pickstone himself strongly disapproved of this act, or did anything to prevent it. The object of Apollis was not to benefit himself, but to benefit the defendant, his master. If we look at all the circumstances of the case, and consider the custom of the country and the fact that there was no disapproval on the part of his employers, I think we may come to the conclusion that the shepherd acted for the benefit of his master in the ordinary course of husbandry, which requires

that the veld on the defendant's farm should occasionally be burnt. We are justified, therefore, in coming to the conclusion that Apollis was acting in the ordinary course. Under the old English common law a person in whose house a fire originated was liable in an action to his neighbours to whose house the fire spread, even without proof of negligence. By our law proof of negligence is required. In the present case, if once it is established that the fire was lit by the defendant or his servants in the ordinary course of their employment, there is sufficient proof of negligence to render the defendant liable. The wind was blowing in the direction of the plaintiff's farm, and no attempt was made by anyone on the defendant's farm to extinguish the fire. Mr. Pickstone himself says that he saw the fire, and he gives as his reason for not going to put it out the somewhat extraordinary one that, inasmuch as on a previous occasion he had been held liable, it would have been an acknowledgment of liability on his part had he done so. But the duty of the manager of his farm went further. It was his duty, when the fire originated on his farm, to put it out, and to prevent it from going beyond his boundary; and when it was proved that the servant on the one part set fire to the veld, and that the owner of the farm, knowing there was a fire, did nothing to stop it, I think under such circumstances the Court should hold that the owner of the farm on whose place the fire originated is responsible for its spreading. The next question is as to the damages. On this point I think that the plaintiff has somewhat over-estimated the damages; these oak trees were somewhat neglected, and there must have been a considerable amount of brushwood, and they were not of a sufficiently ornamental character that the temporary injury which has been done to them should injure the value of the farm. No doubt, for a time, it will be unsightly to have this black bush about, but in a few months that will have disappeared. The Court is of opinion that the sum of £50 will amply compensate the plaintiff for any injury that has been done, and judgment will be given for £50, with costs.

[Plaintiff's Attorney: J. J. Michau; Defendant's Attorneys: Messrs. Scanlen and Syfret.]

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

MOSSOP V. COOKE. { 1902.
{ Feb. 24th.

Land—Action for Transfer.

This was an action for an order compelling defendant, Wm. Cooke, to give transfer to plaintiff, Joseph Mossop, of certain land.

The plaintiff's declaration was as follows:

1. The parties to this suit reside in Cape Town.

2. On the 22nd of November, 1901, the defendant sold, and plaintiff bought, for £250 sterling, certain land, being portion of plot No. 4, Block E, Tamboer's Kloof, in Cape Town, with certain frontage and a road, upon the terms and conditions set forth in the broker's note duly passed on that day by the brokers, G. and T. Herbert, whereof the following is a true copy, to wit: Bought on account of Mr. J. Mossop, from Mr. W. Cooke,—Certain land, being portion of plot No. 4, Block E, Tamboer's Kloof, with frontage to Burnside-road, and a 50-foot road (opposite to Mr. Mossop's residence), in extent 40 English feet by 100 ditto, for the sum of £250 sterling; buyer to pay all expenses of transfer, and to be liable for all rates and taxes levied after this date. During the ownership of W. Cooke or his daughter of adjoining plot, viz., remainder of No. 4, and Nos. 2 and 3, no house to be erected on land now purchased by Mr. Mossop of less value than £1,000. The buyer agrees to pay the sum of £1 per year (for the plot purchased of 40 feet) for *pro rata* share of road making and drainage if payment enforced by the Town Council (£1 per year for 25 years). Payment cash against transfer. Seller to pay brokerage.—(Signed) G. and T. Herbert.

3. All things have happened, all conditions have been performed, and all times have elapsed and passed necessary to enable the plaintiff upon payment of the price and costs of transfer to demand transfer of the said land subject to the aforesaid terms and conditions, but the defendant has wrongfully and unlawfully repudiated and refuses to be bound by the said contract of sale and purchase.

Wherefore the plaintiff prays for an order compelling the defendant, upon

payment by the plaintiff of the price and costs of transfer, forthwith to give transfer to the plaintiff of the said land in proper form of law subject to the terms and conditions embodied in the said broker's note, or that he may have such further and other relief in the premises as to this Hon. Court may seem meet, together with costs of suit.

The defendant's plea was as follows:

For a plea to the declaration, the defendant says:

1. He admits paragraph 1 thereof.

2. As to paragraph 2 thereof, he admits that there were negotiations as to a sale of the property belonging to him to defendant, but he denies that there was any completed and concluded contract of sale on November 22, 1901, as alleged, or at any time, or that he accepted or became bound by the broker's note, as alleged; on the contrary, he repudiated the same.

3. He admits that he refuses to be bound by the alleged contract of purchase and sale, and repudiates the same; but save as above, he denies all and singular the allegations in paragraphs 2 and 3 of the declaration. Wherefore he prays that plaintiff's claim may be dismissed, with costs.

The replication was general.

Mr. B. Uppington appeared for the plaintiff; Mr. C. de Villiers for the defendant.

The facts appear from the judgment.

Buchanan, J.: The plaintiff in this action sought to enforce the sale of certain property. Defendant denied that there was any completed contract of sale. The declaration stated that the conditions of sale were set forth in a broker's note, which has been put in. This broker's note described the land, fixed the price, and settled the expenses of transfer, and there were two conditions. One was a restriction on the purchaser, by which he was not allowed to erect on the property any house of less value than £1,000, and the second was an agreement with regard to a Municipal lien that the purchaser should pay £1 per year for twenty-five years for road-making and drainage, if payment was enforced by the Town Council. A broker was employed in this transaction, both by plaintiff and by defendant. The defendant had placed the property in the

broker's hands some months before the transaction took place, and when the broker found a likely purchaser, he went to the defendant and obtained from him a written document, in which he stated his price and his conditions, and in which he gave an option until the following Monday at 12 o'clock. The Monday was the 25th November. This document was forthwith sent to the purchaser, and he instructed his broker to close. It was common cause between the parties that the broker saw defendant and declared the purchaser. Here was as complete a transaction as it was possible to conceive. The terms of the contract were set forth in writing. Defendant was told the purchaser, and accepted him. There was nothing more to complete the contract. But defendant said he asked the broker to draw up a broker's note. According to the case cited by Mr. De Villiers, and according to common law, a broker's note was simply evidence of the contract. When the broker's note was drawn up by the broker, he omitted one condition. The option had been accepted, but defendant took the note back to the broker, and insisted on this condition being put in. There were negotiations between the parties as to whether the seller would not reduce the limit of the value of property to be built on the land to £750. There was some conflict of testimony as to when these negotiations took place. The broker and Mossop said it was before the contract was completed, the defendant said it was after. The condition as to the Town Council's lien was not mentioned in the contract, and defendant was perfectly justified in insisting upon this being put into the broker's note. The broker, knowing that this was a condition, and knowing that it was agreed to by the parties, wrote it into the broker's note, and handed it to the seller. The purchaser, Mossop, could not raise objection; he was bound by the option, and it was simply an omission on the part of the broker. If Mossop had refused to ratify this contract, it might then have been open to the seller—Cooke—to say, “I insist upon you carrying out the contract, or, if you do not agree to my conditions, I will cancel it.” But there never was any refusal on the part of Mossop to comply with the conditions. The broker's note is only evidence of what the contract really was. After the contract had been

completed a conversation took place between defendant and plaintiff, which resulted in the defendant getting into a huff, and tearing up his broker's note. The contract was a completed contract on the conditions stated by the seller and accepted by the buyer. The evidence was beyond dispute that there was a contract, and defendant must perform that contract now. The declaration only claims transfer, and judgment must therefore be given for plaintiff with costs.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: Messrs. Fairbridge, Ardenne and Lawton.]

COETZER V. COETZER. 1902.
(Feb. 24th.)

This was an action for judicial separation, and an order in terms of a voluntary deed executed on the 21st July, 1900, in which defendant agreed to a division of the property and to pay £24 quarterly for the support of plaintiff and her three children.

Mr. De Waal for plaintiff; defendant in default.

Francis Henry le Sueur produced the register of the marriage of the parties.

Mary Agnes Coetzer said she was married to defendant on the 23rd April, 1889, at Elliot, in community of property. There were three children, aged 12, 9, and 2. They lived happily for two years, when her husband took to drink, and ill-used her. There was a deed of separation, since the execution of which they had not lived together. After they separated, defendant sold his farm. Witness did not know what had become of the proceeds. The farm was in the Barkly East district. Defendant had not been paying his quarterly contributions regularly, according to the deed.

Buchanan, J., said the Court could not order division, and give alimony to the wife as well.

Mr. De Waal said that plaintiff elected to have alimony, and not the division of the remaining property.

A decree of separation was granted, plaintiff to have custody of the children, and defendant to pay £24 every three months towards the support of the plaintiff and children, with costs.

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

HENDRICKS V. HENDRICKS. } 1902.
Feb. 25th.

This was an action for divorce by the husband on the grounds of his wife's misconduct.

Mr. Buchanan appeared for the petitioner; the respondent was in default.

Francis Henry le Sueur, clerk in the Registry Office, produced the certificate of marriage between the parties.

Samuel Hendricks, harness maker, stated that he was married to respondent on July 21, 1890. They lived in Cape Town for some time, and then went to Rondebosch subsequently removing to 70, Harrington-street, where they took in lodgers. Last Christmas his wife told him that she was going to take in another boarder, and then a man named Gilbert arrived at the house. On January 8 petitioner received an anonymous letter, and two days later he accused his wife of infidelity. He then went to live in Primrose-street, but on going back to Harrington-street on the following Sunday morning he found that Gilbert had been occupying his wife's room. Gilbert informed him that he was going to live with his wife. The pair had since left for Port Elizabeth.

Mrs. Barbara Anna George gave corroborative evidence.

A decree of divorce was granted.

KITE V. JONES. } 1902.
Feb. 25th.

This was an action for a declaration of rights.

Mr. Gardiner (with whom was Mr. De Villiers) appeared for the plaintiff, and Mr. Searle, K.C. (with him Mr. Benjamin), for defendant.

Mr. Benjamin said one of his witnesses was not present, and he suggested that his evidence might be taken on commission, and then the matter might be argued next term. They had three witnesses present. The case was originally in the hands of Sir Henry Juta, and it had only quite recently come into the hands of Mr. Searle and himself. It was an action for ejectment from certain premises occupied by defendant at Claremont.

Mr. Gardiner, while prepared to consent to the case standing over for a few days, pointed out that the matter had stood over since last term, and no application was then made for a commission.

The Court ordered the case to stand over until next term, the question of costs of the day also to stand over, and to be specially applied for.

FLETCHER V. ALIE } 1902.
MAHOMET. } Feb. 25th.

This was an action for damages for breach of contract.

The plaintiff's declaration was as follows:

1. The plaintiff resides in Cape Town; the defendant resides at Salt River, in the Cape Division.

2. On or about the 23rd of October, 1901, the plaintiff purchased, and the defendant sold, a certain property, with houses thereon, situate at the corner of Maitland and Kent roads, Salt River, for the sum of £2,425.

3. It was stipulated in the contract, which was in writing, that a cash payment should be made against transfer to be given on November 13, 1901, while possession of the premises was to be given and taken on November 1, 1901.

4. The plaintiff is, and always has been, ready and willing to carry out his part of the contract, and has tendered, and hereby tenders, to pay the aforesaid purchase price, upon receiving possession and transfer of the property; but the defendant has wholly failed and neglected to perform his portion of the contract, viz., giving possession and transfer of the property, as above stated.

Wherefore plaintiff prays:

(a) That defendant be ordered to give him possession and transfer of the above property, he tendering to pay the purchase price.

(b) Costs of suit.

(c) Or in the alternative, the sum of £500, as and for damages for non-fulfilment of contract.

Mr. Buchanan for plaintiff; defendant in person.

Moses Fletcher said he was a speculator in land. On October 23, 1901, he bought the property at Salt River from defendant, through the latter's agent, Mr. Steer. Witness did not see the defendant personally about the matter. Subsequently witness visited the property, which consisted of eight houses and a

shop, and informed the tenants that he had bought the property, and one woman paid her rent for November in advance. The total rentals were about £32 a month. Subsequently the woman wanted the money refunded, which witness did. Witness had not got transfer or possession of the property; he was ready to take transfer even now. He had suffered damages to the extent of £500, as he could have resold for £3,000. The property was worth about £3,200.

Mahomet, in reply to Mr. Justice Buchanan, stated that he himself had not got transfer of the property from Government. He admitted his signature to the condition of sale, but he could not give transfer, as he had not got it to give.

Arthur Wallace Steer, attorney, said he drew up the conditions of sale. The parties met in his office, and arranged the terms. Witness did not act as agent for defendant. He explained to plaintiff that the original seller, Goveia, had not passed transfer to defendant. The agent for the present owner told him that the sale of the property to defendant had been cancelled.

Defendant stated that he was to have paid £2,425 for the property; he paid £100 on deposit. He knew that the sale was cancelled, but he was told that that did not matter.

Morris Cherry, a land speculator, deposed that he offered the sum of £3,000 for the property to the plaintiff's agent, but as he could not get it, he bought another property.

Judgment was given for plaintiff for transfer to be given within one month from that, or failing that, for £250 damages, with costs.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP]

POWLER V. JOHN.

{ 1902.
Feb. 26th.

Brokerage.

Where a purchaser was introduced by a broker who arranged terms of sale,

Held, that the fact of the vendor having himself completed the transaction and secured better terms for himself than those arranged for by the broker did not deprive the broker of his commission.

Semble: "If a sale is effected through a broker, he is entitled to his commission, however small his trouble in effecting the sale has been; but if it is not effected through his agency he is not entitled to any commission, however much pains he may have taken to bring the sale about."

[Per De Villiers, C. J., in *Machonochie's Executrix v. Bidewell-Edwards* (2 Sheil, 155).]

This was an action brought by Alfred Samuel Fowler, a broker carrying on business in Cape Town, against Benjamin Evans John, a shopkeeper, residing at Wynberg, to recover the sum of £75, alleged to be due for brokerage.

The declaration stated that in September the defendant instructed the plaintiff, as broker, to sell certain landed property belonging to him, and situated at Wynberg; that from time to time thereafter during September, October, and November, the plaintiff took steps in accordance with defendant's instructions, and with defendant's knowledge, to sell the property; that plaintiff procured one Van Oudtshoorn as a purchaser of the property for a sum of £2,900, and introduced him to the defendant on November 21; that the defendant repudiated the sale, but a few days later, in the month of November, in consequence of this introduction, he sold the property to Van Oudtshoorn for £3,000; that thereby the defendant became liable to pay the plaintiff £75, being the usual brokerage at the rate of 2½ per cent. on the purchase price, but that the defendant refused to pay any brokerage.

In his plea, defendant denied all liability for brokerage. He admitted that he employed plaintiff as broker, but said that he gave him due notice ter-

minating the employment on 14th November. He admitted that plaintiff had sold the property to Van Oudtshoorn for £2,900, but said that he had no authority to do so. Defendant admitted that he repudiated that sale, and that subsequently he sold the property to Van Oudtshoorn for £3,000, but denied that plaintiff acted as broker in that transaction.

Mr. Searle, K.C. (with whom was Mr. Alexander), appeared for the plaintiff; Mr. B. Upington appeared for the defendant.

Mr. Searle called

Alfred Samuel Fowler, who said he was a broker. The property belonging to Mr. John was put into his hands to be sold for £2,900. This was in September. Witness subsequently advertised the property extensively, and on November 5 witness's manager gave Mr. Van Oudtshoorn a viewing order. Mr. John was given an advise note. Mr. Van Oudtshoorn made inquiries respecting the bond, and in consequence of that witness on the 7th November wired to Mr. John, "Please come in to-day respecting your property." Mr. John came in, and witness gave Mr. Van Oudtshoorn particulars in writing of the information received from Mr. John. The negotiations with Mr. Van Oudtshoorn continued, and were not concluded until the 21st November, up to which time witness received no communication from Mr. John cancelling the authority to sell. On the 21st witness wrote to Mr. John, saying that Van Oudtshoorn was ready to complete the sale for £2,900. Witness extended the time to Van Oudtshoorn. The time was fixed by witness's manager to bring the sale to a head, and witness extended the time. John never fixed a time. Witness prepared broker's notes. On the 21st John said in Van Oudtshoorn's presence that he would not sell, as he had received no offer of £3,100. Van Oudtshoorn said he had bought the property, and would hold witness responsible. Witness's manager, Keith, said that witness had the power to close. After Van Oudtshoorn had left, John said that if witness could get Van Oudtshoorn to meet him half-way, he would close with him. Afterwards Van Oudtshoorn consented to give the extra money, provided he could get another loan of £100. On the 25th November John's attorneys

wrote stating that John only gave power to sell up to the 14th November, and that witness had exceeded his authority. Witness gave the letter to his solicitors, and sent a letter of demand. He heard that Van Oudtshoorn had bought the property. There was correspondence with Van Oudtshoorn. On the 25th November witness gave Van Oudtshoorn the broker's notes to take to John. They both lived at Wynberg. Van Oudtshoorn told witness he had seen John. On the 25th November witness sent a telegram to John, saying that Van Oudtshoorn was prepared to meet him half-way.

Cross-examined by Mr. Upington: John did not tell witness that he would have to sell by the 7th November, nor that the time was subsequently extended until the 14th. Keith effected the preliminary arrangements. Witness had no recollection of John saying on the 21st that witness had no authority to sell. John imposed no time limit by which witness was to sell the property.

Walter Keith, manager for the plaintiff, said that in September Mr. John saw witness and put the property in the hands of Mr. Fowler to sell at £2,900. Witness entered this in a book, and after that the property was extensively advertised. On November 5 witness gave Van Oudtshoorn a card to view the property. There was some hitch in regard to the mortgage, and on November 7 defendant called upon witness and explained that the purchaser would have to provide all the money except the first bond of £1,800 or £1,900. Defendant never gave them any intimation that after November 14 plaintiff would have nothing further to do with the property. The sale was not fixed by November 14, but on November 21 an intimation was given defendant that Van Oudtshoorn had bought the property for £2,900. Defendant came to the office in the afternoon of November 22. The broker's note had then been made out, but defendant said he had had a larger offer, and could not accept £2,900. He refused to confirm the sale to Van Oudtshoorn for that sum. Defendant had said to witness that plaintiff had authority to sell the property, and witness told him there had been no cancellation of the authority. Defendant said that if Van Oudtshoorn would meet him half-way he would conclude the sale.

Van Oudtshoorn said there had been a sale, and that he would hold plaintiff to it.

Cross-examined: Witness had heard defendant say in September that he was going to England, and wanted the property sold as soon as possible. Witness did not know whether any offer was submitted to defendant during September and October. Defendant never said that plaintiff must find a purchaser for the property by November 7. He saw John on that day, but did not say that Van Oudtshoorn was treating for the property, and he did not ask for an extension to November 14. At the interview on November 22 witness was called in by plaintiff to be a witness. The entry previously referred to was the only one they had in their books in regard to the property. They only made other entries in cases where authority to sell was revoked. In such a case they would draw a blue pencil across the entry, and probably make some remarks. If a man came and said they must sell his property within a fixed time witness would make an entry to that effect in the books. Sellers did not frequently give orders of that kind.

Robert Montgomery, a clerk in the employ of the plaintiff, said that on November 22 he was asked to fetch Mr. Van Oudtshoorn from the Colonial Office. He brought him over to the office, where Mr. John was present. In the latter's presence plaintiff explained to Van Oudtshoorn that Mr. John said he had got an offer for £3,100, and Mr. Van Oudtshoorn said he would hold Mr. Fowler responsible for the sale for £2,900. Mr. Fowler said that if Mr. Van Oudtshoorn did that he would hold Mr. John responsible. Mr. Van Oudtshoorn left first, and then Mr. John, as he was going away, said that if Mr. Van Oudtshoorn would split the difference he would complete the sale. Mr. Fowler said he did not think Mr. Van Oudtshoorn would do so.

Cross-examined: The question of Mr. Fowler's authority was never raised at that interview.

William van Oudtshoorn said he was a clerk in the Colonial Office, and resided at Wynberg. He came to first know of this property being for sale through seeing Mr. Fowler's advertisement in the newspaper. He then went and got a viewing order, and after seeing the pro-

perty he went to Mr. Fowler and said that he liked it, but before deciding definitely he wanted particulars as to the bonds, and so on. Witness got a written document of terms from Fowler. This he had destroyed.

Mr. Searle said he had a copy from Mr. Fowler's letter book.

Continuing, witness said he went and saw the place after receiving the viewing order. He told Mr. Fowler that before deciding definitely he must see if he could make arrangements about the bond. Mr. Fowler said witness could have time. On the 21st witness told Fowler he would buy for £2,900. Fowler wrote a letter to John. At the subsequent interview John said he had had an offer for £3,100. Witness said he would hold Fowler responsible. On the next Sunday witness saw John, who said he could have the property for £3,000. Witness did not then give him an answer. Later in the day witness said he would buy the property. John said that if he bought, he (John) would have nothing more to do with Fowler. Witness next day saw Fowler, and told him of this. The broker's notes were altered to £3,000, and Fowler gave them to witness to take to John. The latter said that he would have nothing more to do with Fowler, and that the sale would have to go through someone else. Witness took the notes back to Fowler. Afterwards Mr. John went to Mr. Arderne to see if he could sell without Fowler, and Mr. Arderne said he would look up some cases. Afterwards the sale was completed through Mr. Holme.

By Mr. Upington: Witness had never told anyone that the reason John had given for repudiating the sale was that Mr. Fowler had not sold in the time given to him.

This concluded the evidence for the plaintiff.

For the defence, Mr. Upington called Benjamin Evans John, the defendant, who said that in September he instructed Fowler to sell the property. He told Fowler that he was going to England, and wanted the property sold as soon as possible. When Mr. Fowler wrote on the 11th November stating that they had given Van Oudtshoorn an extension of time, witness told Mr. Keith that the 14th must be final. Then on the 21st witness was advised by Fowler that the

sale had been made. Witness went to the office, and repudiated the sale on the ground that plaintiff had no authority to sell after the 14th. Witness told Fowler that he had another purchaser for £3,100. There had been negotiations with Holme respecting the purchase of the property for £3,100 after the 14th. Witness did not agree to accept £3,000. Witness did not receive a telegram on the 25th respecting Van Oudtshoorn being prepared to meet him half-way. A sale was afterwards effected through Holme.

By Mr. Searle: Witness first gave Fowler authority until the 7th November, and when he got the letter on the 11th he went and told Mr. Keith that Fowler had exceeded his authority, and that the 14th must be final.

Andrew E. L. Holme said he belonged to the firm of Holme and Co. He was in treaty with the defendant for this property, and made an offer of £3,100 for the property. He was a broker, and wanted to purchase the property as an investment.

Cross-examination: Witness did not get the property for £3,100, because defendant said Van Oudtshoorn had gone to expense in arranging the bond, and he would give him preference. Witness thought defendant considered that he was bound to Van Oudtshoorn.

This concluded the evidence.

Buchanan, J., said that it was admitted that defendant gave plaintiff the property to sell, and that it was through plaintiff that Van Oudtshoorn was introduced to defendant, but it was alleged that the authority to sell had been revoked before that date. Under the circumstances he would like to hear Mr. Upington's argument first.

After hearing Mr. Upington, and without calling on Mr. Searle for argument, the Court gave judgment for the plaintiff as prayed, with costs.

Buchanan, J., in giving judgment, said: The question the Court has to decide in this case is whether the sale of certain property at Wynberg, belonging to the defendant, to one Van Oudtshoorn has been effected through the agency of the broker Fowler, the plaintiff in this case. It is admitted that the parties were introduced through the broker, but Mr. Upington argues that the introduction, though it may have been the *causa proxima*, was not the *causa causans* of the sale. Now it has been

repeatedly laid down that there must be a contractual relationship between the introduction and the sale. Two cases, *Maconochie's Executors v. Bidwell-Edwards* and *Roux v. Brittain*, illustrate this doctrine clearly and distinctly. A broker's commission depends entirely upon his success, as the Chief Justice said in the case of *Maconochie*, "If a sale is effected through a broker, he is entitled to his commission, however small his trouble in effecting the sale has been; but if it is not effected through his agency, he is not entitled to any commission, however much pains he may have taken to bring the sale about." In this case John was anxious to sell his property, as he was going away to England. As far back as September he put it in the hands of the broker. The broker advertised the property for sale, but for some time had no application for it. Early in November, however, in consequence of the broker's advertisement, Van Oudtshoorn called upon the broker, and received from him all particulars. On the 5th November the broker gave Van Oudtshoorn a ticket to view the property. He went and saw the property, seemed pleased with it, and was agreeable to pay the price asked; and coming back, resumed negotiations with the broker. Van Oudtshoorn had not money to pay the whole of the purchase price, and it was therefore necessary to discuss the question of a bond. On the 11th November the broker wrote to the seller, "Mr. Van Oudtshoorn is endeavouring to arrange a bond, and is to have it decided on Thursday. I have therefore extended the time for his decision until then. I have little doubt there will be a sale." If we follow the written documents put in, there is nothing in any document which can justify the defendant in the defence set up in this case—that his authority to sell was terminated. The next communication between the parties is the telegram of November 21, which reads as follows: "Van Oudtshoorn has closed for the property at £2,900; please be here to-morrow morning at ten sharp, with papers, to sign the broker's note." Unfortunately for the parties, a disturbing element was introduced a couple of days before, through a letter written by another broker to defendant on the 19th November, in which he asks John whether he was prepared to accept an

offer of £3,100 for the property, an advance of £200 over Van Oudtshoorn's price. This broker, Mr. Holm, was called, and said he was wishing to purchase the property for himself. Johns, in consequence of a telegram from Fowler, appeared on the 22nd at Fowler's office, and then repudiated to Van Oudtshoorn the sale which Fowler had in the meantime effected, and said he had received this offer of £3,100. Thereupon Van Oudtshoorn very naturally said to Fowler, "Well, you have sold me this property. I have closed with you, and I look to you to see that the transaction is carried out." He then left the office. According to the evidence as to what took place, there was no attempt at repudiation of Fowler's authority by defendant, but after discussion, the defendant said to his broker, "Well, if you can induce Van Oudtshoorn to split the difference, the sale may go through." That is, if Van Oudtshoorn would increase his offer to £3,000, then the broker could complete the sale. The defendant denies this, but the broker is confirmed by the testimony of two other witnesses. Instead of seeing the broker, Van Oudtshoorn went to Johns himself the day after—on Sunday, the 23rd—and after discussing matters with Johns, agreed to raise his offer to £3,000, and the sale was allowed to go through. On the evidence led in this case, I think that if this had been an action brought by Van Oudtshoorn against Johns to compel transfer of the property for £2,800, there is very strong probability that Van Oudtshoorn would have been successful in his action. But perhaps he was well advised, seeing he considered the property was worth £3,000, in preferring to pay £3,000 rather than run the risk of a lawsuit, and so avoided further dispute, and had the matter amicably settled. Now I fail to see upon what principle Johns can now say that the broker is not entitled to his commission. He contends that the broker had extended the time to Van Oudtshoorn beyond the limit which he (Johns) had given him, but he does not put in any correspondence supporting this, and there is the fact that he actually consented to Van Oudtshoorn becoming the purchaser after that date. The purchaser was introduced by the broker, and he took considerable trouble in arranging terms; and the mere fact that

defendant himself completed the transaction is not sufficient to deprive the broker of his commission. I fail to see any ground at all on which the seller can say that this transaction was not brought about by the broker. It was brought about by the broker's advertisements, by the broker's introduction of Van Oudtshoorn, and by the broker's negotiations with the parties. This is one of the clearest cases of a broker being entitled to recover commission. Judgment will be given for plaintiff as prayed, with costs.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorney: D. Tennant; Defendant's Attorneys: Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.) and a Jury.]

SIMS V. ARGUS CO. { 1902.
Feb. 24th.
„ 25th.

Breach of Contract—Damages.

This was an action for breach of contract.

The declaration was as follows:

1. The plaintiff is a photographer, and resides at Cape Town. The defendants are a joint stock company, duly incorporated in this colony, carrying on business therein, and having their head office in Cape Town.

2. In August and September, 1901, the plaintiff incurred much trouble and expense in and about compiling materials, taking and preparing photographs, and obtaining advertisements for a work to be published in book form under the title of "The Royal Tour Souvenir," of which the chief attraction was to consist of photographs of the Duke and Duchess of Cornwall and York, and of the various arches, decorations, and scenes during and connected with the Royal visit to this colony.

3. On or about the 14th September, 1901, the plaintiff and the defendants orally agreed as follows, viz.: That in consideration of the price of £320 (pay-

expenses during the compilation of the work were about £50. Commission to canvassers at 4d. per copy would be £166. Deducting the £50 paid to the Argus Company, witness's damages amounted to £554 5s. 8d. The Argus Company objected to one of the photographs supplied by witness on the ground that it was too dark. Witness made a lighter one, but they eventually used the dark one. Witness considered the photographs good. The defendants had not objected to the other photographs. There was no comparison between the prints executed by the Argus Company and those by the other firm referred to.

Cross-examined by Mr. Searle: Witness would not call a particular photograph a first-class one, but it was good compared to the production in the book. Mr. Hardingham did not mention six weeks as the time in which the books would be supplied, nor did he say they would try to let witness have them in a month. Besides his own efforts, three canvassers were employed to sell the books. He objected to the whole get-up of the book, and contended that the photographs were badly printed. He arranged to pay the canvassers fourpence a copy, and he based the claim for damages on the assumption that he was going to sell 10,000 copies. He had a number of private customers, who had undertaken to take dozens and half-dozens, but when they saw the work they declined to take it.

David M. Smail, manager for W. A. Richards and Sons, said he had had about 20 years' experience of the work in question. He had seen one of the books (produced). He had lately had two photographs supplied to him by Mr. Sims, from which two blocks were made, which were supplied to the plaintiff. The blocks were made by the half-tone process. The prints (produced) were done by witness's firm, and there was no comparison between those and the pictures which appeared in the book. Of course a good deal might depend upon the time taken, but there was faulty workmanship in the book.

[By De Villiers, C.J.: The bad workmanship was chiefly in the machining. He would not say the work was bad, but a good deal depended upon the time taken.)

There you have the book before you; is it good or bad?—It is indifferent.

You won't say it is bad?—Some of them are bad; some are good.

How many are bad, absolutely bad?—No. 9 is very bad, but the photograph may have been bad. The photograph (produced) is not a good one, and a good block could not have been made from it. The picture is a very good impression from the photograph.

[Do you consider the print bad compared with the photograph?—No, not in this case.]

A better print could have been obtained if longer time had been taken. His firm would not have turned out such a book, but they might have refused an order if the work was wanted within a certain time.

Cross-examined: Six weeks was too short a time in which to produce the book. The photograph of the arch at the head of the Avenue could not be expected to make a good block.

Henry da Costa, a printer, said he was engaged in general letterpress printing, and had had twenty-two years' practical experience. From what he had seen of the books that were handed to him, they were very indifferently printed, so far as the machining was concerned. The picture No. 9 was badly made ready, and the block produced in the book was not a fair reproduction of the photograph. The black marks on the picture could have been avoided with a little care. The picture No. 61 he should describe as a smudge. The pages were also not in rotation, as a result, apparently, of a mistake in the folding. In regard to No. 49, the photograph of the Municipal arch, the block had not been made ready, and there was too much ink on it. The job had apparently been left to stand, and the machine-minder had gone away, and had not washed the ink off the block. A better picture should certainly have been produced from the photograph. The block made by Messrs. Richards was a very good picture.

Cross-examined: Witness was a master printer, and his business was that of a letterpress printer, but at the present time he was, unfortunately, a refugee. He carried on business in Johannesburg under the style of Da Costa Bros., and was now managing the Toll-gate Printing Works. He had never made blocks, but he had printed from them. The

photograph No. 22 had been exposed too long. The pictures, generally speaking, were passable, and that was all. If a photograph were bad, the block made for it would be bad too; but, so far as he had seen, the photographs were good. He should, however, have rejected one of the photographs as being too dark.

Re-examined: On seeing all the photographs, he should say that the result should have been a great deal better than it actually was.

Henry Edward Cope, manager of the photographic department of Messrs. Heynes, Mathew and Co., said that the firm gave an advertisement to the plaintiff. On the appearance of the book, however, he rejected it, on account of the pictures being bad. He knew nothing about the original pictures.

Cross-examined: He had refused to pay for the advertisement, and did not intend to do so. He did not order any of the books.

Eli Jenkinson, iron-founder, residing at Salt River, said he gave the plaintiff a full page advertisement for the book, and decided to order 50 copies, on the understanding that the work should be good. He sent about twenty away, and on looking over the remainder he rejected them, and wrote to say he would not have them. He did not examine them before sending them away. He had intended to order 20 or 30 more if the books had been good. His impression was that the book was no use as an advertisement, and was not fit to show to anyone.

Cross-examined: He did not examine the books before he sent them away. He might have looked at his own advertisement, for which he had paid £5.

Charles Dangerfield, assistant manager of the British Hotel, Simon's Town, said that an order was given to the plaintiff for an advertisement, and it was also agreed that copies should be taken for the use of the hotel. On the book being brought down, however, they refused to take it, or to pay for the advertisement, on account of the book being turned out so badly.

Cross-examined: He expected that the blocks would come out as clear as the photographs.

Arthur Walter Townshend, a partner in the firm of Townshend, Taylor and Snashall, said the plaintiff consulted him in September about a quotation for the

book. He had never had a copy of the work submitted to him, and could not express an opinion.

Cross-examined: Witness quoted £110 for five thousand copies of small size and £160 for the same number of a rather larger size. Neither, however, were so large as that produced by the Argus Company.

Thomas James Porter, canvasser for the plaintiff, said he was present when the contract for the work was made with Mr. Hardingham. The plaintiff stipulated for good work, and Mr. Hardingham told him that he could have it. Plaintiff explained that time was an important feature in the matter, and it was arranged that the work should be finished in three weeks, or, to be safe, a month. Witness sold about sixteen or eighteen of the books, but could not sell any more, on account of the bad printing; people would not buy it on account of the bad work. He considered that he could have sold between three or four thousand if the books had been properly printed. He did not think he could have given the books away.

Cross-examined: The most important point about the contract was the time, because as time elapsed the difficulty in selling the books would increase. Witness was to get 4d. a copy for his work, and the plaintiff also said he would subsequently give him a present of £5 or £10.

This closed the case for the plaintiff.

For the defence, Mr. Searle called

Robert John Hardingham, who stated that he was the manager of the works department of the Argus Company. It was agreed that the work should be done for the plaintiff for the sum of £320. Witness told the plaintiff at the time that a number of the photographs were no good for reproduction, and could not be expected to give good results. He (the plaintiff) said witness could have what photographs he liked, and on the understanding that he should get good photographs he told plaintiff he should have first-class work. Sims agreed to bring in other photographs, and on the point of time witness said it would take about six weeks. Plaintiff asked witness to do it in a month, and he promised to do his best; and as soon as the photographs were all in they made a start, but the photographs which the plaintiff brought

were no better than the original ones, and in some cases worse than the first lot, so that they had to adhere to the original ones. The work was done in about five weeks, so far as the blocks were concerned. Plaintiff came up nearly every day and saw copies of the advertisements and of the pictures; he was in a great hurry to get the books, and said he would lose the sale of the books, and consequently everything was done to save time, and, instead of having the sheets off in the proper manner, they had to run over the tapes. Witness did not think plaintiff could have expected to sell many copies, for the excitement in the Royal visit had died out, and the book was merely an advertising medium. He considered that the price charged for the book, 2s., was also too high. Considering the character of the original photographs and the time in which they had to turn it out, the work was as good as could be done. The company actually completed a thousand copies, and had expended about £220 on the job, but they could deliver the remainder in a short space of time. The whole expense would be about £250.

Cross-examined: The faults in certain of the pictures were due to the fact that the job was hurried through. He did not consider the Harbour Board picture was a credit to the firm, but the fault was due to the rollers jumping owing to the work being rushed. Carelessness on the part of the machinemien caused some of the defects. The black marks across the photographs were so caused. If sufficient time had been given, these would not have occurred. On one of the plates the blur was due to a flaw in the plate, of which Mr. Sims was informed. The process man was preparing to make another plate, but Mr. Sims said there was no time, and so the plate was used. Witness did not know that the numbering was incorrect. There was a fault in the arrangement of one of the advertisements, which should have been placed opposite the photographs of the advertising firm's premises. This was because of the work being rushed. Witness thought that in October three or four thousand of the books would have been sold. Witness considered that the photograph supplied to Messrs. Richards and Sons was a better one than that supplied to the Argus Company.

Re-examined by Mr. Searle: With the photographs supplied, and with the time allowed, witness considered the firm did the best work possible.

Francis Ward said he was a process worker in the defendant company's employ. He had been in their service for nine months, and had previously had five years' experience of this class of work in London. He was in charge of the making of blocks for the defendants. When Mr. Sims brought the photographs witness informed him that they were no good for reproduction. He picked out some of the worst, and Sims said he would bring other photographs. He brought other, but they were no better, and witness used the first lot, telling Sims he would do his best with them. The making of one of these blocks should take seven or eight hours. Witness took about five weeks over the work. It could not have been done quicker. The productions were the best he could get out of such photographs. The plaintiff often came up to see witness while the work was being executed, and witness took him into the dark room and showed him the proofs. He told Sims that the book would not pay because the photographs were so bad, and Sims said he was depending on the advertisements, which would cover the cost of the book. Witness considered that better work could not be done under the circumstances from the photographs supplied.

[De Villiers, C.J.: How do you account for Richards doing better?]

Witness: They had a longer time.

[De Villiers, C.J.: Then it is a question of time?]

Witness replied that he believed it had been stated that Richards had different photographs.

Examination continued: Witness would have made the work satisfactory if given a longer time, but he could not make a first-class job from photographs like those supplied.

W. Preston Buchanan publisher and bookseller, said he had been in the trade since 1886. He brought out works from time to time. In witness's opinion, October was too late for a successful sale of these books. Witness himself published a book souvenir of the Royal visit, and sold about 3,000 or 4,000 at 6d. per copy in the streets. There was no

sale for them after the Royal party had gone. Witness's books were on sale while Their Royal Highnesses were here.

Charles Buxtey, manager of the firm of Dennis Edwards and Co., said he had had fifteen years' experience of the photographic reproduction process. He had seen the photographs supplied to the defendants. They were of no use whatever. They were perfectly flat, and there was no detail. He did not think that in the time given better results than those shown in the books could be obtained from such photographs. Witness's firm had published a souvenir, and had found that there was no sale for them a week after the visit.

Richard Joseph McManus, process worker, said he gave the estimate to Messrs. Townshend to do this work. The photographs were under exposed in the original negative. Good results could not be expected from the photographs. There was no tone in the photographs; they were too dark in the shadow, and too bright in the light. On the photograph produced by Messrs. Richards and Sons more time was spent by the artist.

Cross-examined by Mr. Wilkinson: The marks on one of the photographs were caused by want of underlaying.

Edwin Aukett, process worker, employed by Messrs. Van de Sandt and De Villiers, said he would not have done this work. The photographs were bad. There was no detail. One or two in the book were good. The printing might have been better, but witness did not think he could improve on the books.

Ernest T. Notcutt, proprietor of the Electric Printing Works, said he had been in the trade for thirty years. He had seen the photographs supplied to the defendants. They were too faint, and it was impossible to get good work from them. Witness did not think, taking the book as a whole, and all the circumstances, that much better results could have been obtained from the photographs than were shown in the book.

Philip Moore, employed by Mr. Miller, bookseller, Cape Town, said there was apparently no demand for book souvenirs a fortnight after the Royal visit. Witness did not think that any great number of books would have been sold in October.

Cross-examined by Mr. Wilkinson: Witness thought there would probably be

a good sale of book souvenirs in England if they arrived there before the Royal party returned.

Edward M. Ashley said he was representative here of a wholesale photographic firm, and was formerly a professional photographer in Liverpool. He considered the photographs supplied to the Argus Company indifferent. Witness did not think a good job could be made in printing from such photographs. There was no detail. The fault might be in the exposure or development. The negatives, he would presume, were bad.

Mr. Searle closed his case, and counsel then addressed the jury.

In his direction to the jury, the Chief Justice said that the first question to consider was, what was the contract? When the jury had determined what the nature of the contract was, they would have to decide whether there had been any breach of such contract, and if they found that there had been a breach, they would then have to decide as to the amount of damages which the defendant company should pay to the plaintiff. He thought there was very little dispute as to the real nature of the contract. It had been stated that time was to be of the essence of the contract, but to his mind the dispute about the time seemed somewhat irrelevant and somewhat inconsistent with the rest of the plaintiff's case, because plaintiff's claim for damages rested upon this: that at the time when these books ought to have been delivered, and were delivered, they could have been sold. In point of fact, he (the Chief Justice) thought that any objection on the point of time was waived on the part of the plaintiff, who said subsequently to the time when delivery should have been made, that he was quite prepared to take the number if the work were properly executed. The real question, therefore, was: What was the nature of the contract with regard to quality? Now upon this point it was clear that the work had to be first class, but there was no doubt it had to be first class, having due regard to the nature of the photographs delivered by plaintiff to the defendant company. It could not be expected that defendant could make such artistic improvement upon the photographs supplied by plaintiff as to make this book a real work of art. As to the second question,

whether there had been a breach of contract, the jury must not look at one particular feature, but must take the work as a whole; and as ordinary men of the world, as men accustomed to look at these matters, they had to decide whether the books supplied were of such a nature that the plaintiff could reasonably be expected to receive them as an execution of the work entrusted by him to the defendant company. If they decided that the book was not one which satisfied the contract, they would find for the plaintiff on the question of a breach of contract; but if, notwithstanding blemishes here and there, they considered that the book answered the requirements of the contract, then, of course, they would find for the defendant company. As regarded the photographs supplied to the defendant company, there was one important fact that the jury could not disregard, and that was that another firm—Richards and Sons—from two photographs which seemed to be fair representations of the photographs supplied to the defendant company, formed reproductions which certainly were infinitely superior to the reproductions in the book. But it was said that the copies given to Richards differed somewhat from the photographs given to the defendant company. He (the Chief Justice) had compared the two, and he could find no substantial difference. A letter was written on behalf of the plaintiff to the attorneys of the defendant company, requesting permission to take copies from the blocks or a loan of the photographs, in order to get reproductions from Richards, but they refused permission. This was to be regretted, for if permission had been given, there would have been no difficulty in deciding as to whether the work could be done better from the same photographs. The defendant company's reason for the work not being done better was that they were pressed for time, but they should have considered this before they entered into the contract. The jury would look at the pictures, and consider whether the defects in the pictures were such as to render the books unsaleable. If they found they were, they would come to the question of the amount of damages, which seemed to him to be really the most difficult part of the case, because the evidence did not strike him as proving that there would be a very large sale

of the work. A great deal of excitement over the Royal visit had passed away, and much of the interest had passed away. The photographs themselves did not seem to him exceedingly interesting. There seemed to be nothing in them to greatly interest the public. No doubt, while the excitement lasted, there was a great desire to purchase works of this kind, but the jury had evidence that during the visit another work, sold at sixpence, which had been put in, and which, to his mind, was an infinitely superior work, only had a sale of 5,000. Even supposing that the pictures were works of art, it appeared to him that 2s. was a very excessive price, and he was exceedingly doubtful whether plaintiff could have sold such a large number as 5,000 if the work had been properly executed. The other work put in was sold at 6d. a copy, and notwithstanding its cheapness, and the fact that it was on sale at a time of excitement, only 5,000 copies were sold. Was it, therefore, reasonable to suppose that plaintiff would have sold 10,000 copies of this work—an uninteresting work—at a price of 2s. two months afterwards? It was exceedingly difficult now to arrive at any estimate of the number of copies which would have been sold if the work had been properly executed. If the jury found that there was a breach of contract plaintiff would at all events be entitled to recover the £50 paid by him to the defendant company. As to the £140 for advertisements, it was a question for the jury to consider whether there would be any loss to the plaintiff on this transaction. Plaintiff might have failed to sell a sufficient number to have made a profit, and the jury would consider whether the possible loss ought not to be set off against the £140. If the jury considered there would be no such loss they would be justified in adding the £140 to the £50. If they came to the conclusion that the full 10,000 copies would have been sold the amount at which plaintiff stated his damages would be perfectly fair. As to the claim in reconvention, that would only arise in case the jury came to the conclusion that there had been no breach of contract.

The jury retired, and after an absence of 45 minutes the foreman announced that they found for the plaintiff for £50 and costs.

De Villiers, C.J.: The costs you must leave to the Court.

Judgment was entered for £50, with costs, including £3 12s. for expenses of Messrs. Richards and Sons in preparing the blocks.

As his lordship was about to dismiss the jury.

The Foreman mentioned the claim in reconvention and said the jury found for defendants—plaintiffs in reconvention—for £100.

De Villiers, C.J.: If you find for plaintiff for £50, then it means there has been a breach of contract, and if there has been a breach of contract on the part of the defendants, they cannot claim anything. If, his lordship said, the jury found there was a breach of contract, they would award the £50 which, apparently, they had agreed upon, but if they found there had been no breach they must assess the damages to be paid to defendants.

After a brief deliberation, the foreman said the jury found for plaintiff for £50.

De Villiers, C.J.: Then you find there has been a breach of contract?

The Foreman: Yes.

His Lordship said the judgment would accordingly stand.

[Plaintiff's Attorney, J. Brady. Defendant's Attorneys: Van Zyl and Buissonne.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G.) and the Hon. Mr. Justice MAASDORF.]

ADMISSION.

{ 1902
{ Feb. 27th.

Mr. Benjamin moved for the admission of James Key as an advocate.

Order granted and the oath administered.

PROVISIONAL ROLL.

VAN REENAN V. ISAACS.

Mr. Buchanan moved for provisional sentence upon a mortgage bond for £600,

together with interest at the rate of 6 per cent from 1st July, 1901; also for the sum of 18s., being amount of insurance premium due by the defendant and paid by the plaintiff. It was further asked that certain property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed, and the property declared executable.

COLONIAL GOVERNMENT V. } 1902.
GERICKE. } Feb. 27th.

Executable Property—Judgment for Interest.

The Court will not declare mortgaged property executable immediately on giving judgment for interest due in respect thereof.

Mr. Sheil moved for provisional sentence for £190 8s. 5d., being interest reckoned from 13th March, 1896, to the 31st December, 1901, on a capital amount of £820 due on a mortgage bond. Counsel also asked that the property specially hypothecated be declared executable.

The Chief Justice said he thought the Court had previously intimated that it would refuse to make property executable immediately on giving judgment for interest.

Mr. Sheil said that in that case he would ask for provisional sentence only.

The Court then gave provisional sentence for the amount claimed, the Chief Justice pointing out that if that judgment was not satisfied, then the property could be made executable in the ordinary course.

SPILHAUS AND CO. V. SALO IEN.

Mr. Close moved for provisional sentence for £227, due on a promissory note signed by the defendant, with interest and costs of suit.

Provisional sentence granted as prayed.

DE VILLIERS V. HENDRIK VISSER.

Mr. Rowson moved for provisional sentence on two promissory notes, the one for £77 4s. and the other for £55 4s.

Provisional sentence granted as prayed.

TOWN COUNCIL V. C. M. DANTU.

Mr. Rowson moved for provisional sentence for £53 13s. 6d., being rates and water charges due by the defendant.

Provisional sentence granted.

ILLIQUID ROLL.

SPILHAUS AND CO. V. SALKOWODIEN

Mr. Close moved for judgment, under Rule 329d, for the sum of £309 15s. 10d., for goods sold and delivered, with interest and costs.

Judgment granted as prayed.

GENERAL MOTIONS.

WIENER AND OTHERS V. SHAPIRO. { 1902.
Feb. 27th.

Mr. Buchanan moved for an order annulling the provisional order for the sequestration of defendant's estate granted in Chambers.

Order granted as prayed.

WHEELER V. RANKIN. { 1902.
Feb. 27th.
Security—Guarantee.

R. had given to one W. a guaranter that he (R.) would be responsible for any claims one S. might have against him (W.) in respect of the production of a certain play. R., being now about to quit this Colony, was called upon by W. to give security to meet any such claims, and to pay costs of any action in respect of the above matter should judgment be given against W.

Held, that the application must be refused, but that applicant be authorized to pay into Court some £250, moneys due by him to respondent as security for costs in any such action as the above which might be brought against him, costs of the present application to stand over.

Mr. Searle, K.C., appeared for the applicants, and said this was a matter of

some urgency, as the respondent was about to leave the country to-morrow. Notice of the motion had been given to the respondent. The application arose out of proceedings which were taken before that Court a few months by Messrs. Sass, who were theatrical managers here, against Messrs. B. and F. Wheeler. The position was, that Sass moved the Court for an interdict restraining Wheeler from producing the play called "Magda." Wheeler had brought out here a theatrical company, of which McKee Rankin was the manager, and they were to begin their tour with this play "Magda," but before they did so, Sass claimed the sole right to produce the play here. Wheeler knew nothing about this matter personally, but McKee Rankin filed an affidavit and practically defended the action, saying that he had a right to produce the play, as he had got his right in America, while Sass had his from England, and that the American and the English version were really different plays, and so on. The Court then ordered the respondent Wheeler to keep an account of the receipts in connection with the play, and Sass to go to action to establish his claim. There had been negotiations between Sass and Rankin to settle the matter, but no arrangement had been come to. Continuing, counsel said that when the proceedings by Sass were threatened, McKee Rankin gave Wheeler, who really knew nothing about the merits of the dispute, a guarantee that he would be responsible for any claim Sass might have, but now he was going away, and refused to give Wheeler any security at all in the matter.

In his affidavit in support of the application, Mr. Wheeler detailed the circumstances, and said that when the action was threatened Mr. Rankin assured him he had authority to produce the play, and gave him an assurance that he would be responsible for any loss or damage he might be put to. Then, on the following day, September 25, 1901, he sent applicant the following letter: "Adverting to the proceedings instituted, or still to be instituted, by Mr. Sass, or any other person, against you for having produced 'Magda,' I hereby confirm the verbal assurance given to you, viz., that I hold myself personally responsible for whatever loss, cost, or damage you may suffer or be put to by

reason of playing 'Magda.' Acting on behalf of myself and Miss O'Neil, I give an undertaking we each hold ourselves responsible to you." The negotiations for a settlement with Sass having failed, an action was about to be instituted, and as Rankin refused to give the security, the application now made to the Court was to compel him to give security for £1,000, to cover any possible claim and costs of the action. Counsel, however, pointed out that it had now been ascertained that Sass's claim would be for £500, and not for £750, as at first supposed, but the costs of the action, seeing that there would most likely have to be evidence taken on commission in America, Germany, and England, would probably be about £250. The accounts between Messrs. Wheeler and Rankin were now being made up, and it was probable that these would show a balance of £250 in favour of Mr. Rankin. That money Messrs. Wheeler were prepared to pay into court as part of the security in the action. Proceeding, counsel said that if Rankin went away, as intended, to-morrow, Messrs. Wheeler would have no security whatever that he would meet any costs or judgment against him, as he would then be beyond the jurisdiction of the Court, although Rankin was the real defendant, and it was for his benefit that Messrs. Wheeler would have to defend the action.

Mr. McKee Rankin appeared in person to oppose the application, and said that he arrived here on 16th September last with Miss Nance O'Neil and a company to support her. Miss O'Neil had a right to play a version of "Magda," but on arrival here they found that Sass claimed that he had the sole right to produce "Magda" in this country. Sass instituted proceedings against Messrs. Wheeler to interdict the production of the play, and he (Rankin) then gave Wheeler the document produced. The company had played under Messrs. Wheeler's directions for about 21 or 22 weeks, and all the time they had known just what they knew now. Even if the case went against them, he did not see why he should have to tie up a thousand pounds or a thousand pennies beyond the document he had given them.

De Villiers C.J.: But you are about to leave the country?

Mr. E. Rankin: Wheeler knows I am going to London, and will be there until September.

The Chief Justice: But this Court will not have jurisdiction over you then. Can you not give some security?

Mr. Rankin: What security can I give?

The Chief Justice: Do you object to this £250 in the hands of Messrs. Wheeler being paid into court?

Mr. Rankin: I do, seeing I am not a party to the suit at all, and that I have given them this document as security in case they lose. Continuing, he said he did not know why they had left this matter until the last moment. He was to sail by the boat to-morrow for Egypt, as they intended to give performances in Alexandria and Cairo, and if he lost that boat he would have to wait until next month. He had already arranged all his financial matters, and had sent his money on, and could not now lodge the security asked, but even if he could, he did not see that it would be just that he should do so. After they left Egypt the company was to open in the Lyceum Theatre, London, and even if Wheeler did lose they had an agent there, who could recover from him the amount due on the claim and costs. It was not as if he was an obscure individual; on the contrary he was easy to find.

De Villiers, C.J.: Mr. Searle, when this document was taken Mr. Wheeler must have known that it was possible, in fact probable, that Mr. Rankin would be leaving the country soon, and therefore ought he not to be satisfied with the document now? Can you quote any case where an attachment has been granted upon a contingent case of this kind?

Mr. Searle said it was hardly a contingent claim, because Rankin was standing between Sass and Wheeler. Rankin was really the person for whose benefit the action would be defended. The action had not been brought because there were negotiations proceeding between Rankin and Sass. He did not think Mr. Rankin would deny that.

Mr. Rankin: I do deny that.

The Chief Justice again asked if Mr. Searle had any precedent for such an application as that now made.

Mr. Searle said he could not remember one, and he had not had time to look

into the authorities, as the papers had only been put in his hands that morning, but he submitted that it was a similar case to an endorsement on a promissory note.

The Chief Justice: But can you make an application like this upon an endorsement on a promissory note?

Mr. Searle submitted that there were certain circumstances the Court would look at, especially if it appeared that the matter originated entirely for the benefit of the respondent.

The Chief Justice: There is no application for his attachment or for any restraint upon his leaving.

Mr. Searle said the application was for an order compelling him to pay into the Court forthwith the sum of £1,000. If he was going away without complying with such an order they could attach him for contempt of Court. His clients did not desire to proceed to extremes, and the order they would ask for would be that he must give some security before to-morrow morning, failing that, that he should be attached. Messrs. Wheeler said that they had no knowledge whatever as to his financial position.

De Villiers, C.J.: The document relied upon in support of this application is as follows: "Adverting to the proceedings instituted, or still to be instituted, by Mr. Sass, or any other person, against you for having produced 'Magda,' I hereby confirm the verbal assurance given to you, viz., that I hold myself personally responsible to you for whatever loss, cost, or damage you may suffer or be put to." This personal assurance was accepted by the applicants at a time when they knew that the respondent might leave the country, and it is not an assurance given in regard to the past only, but an assurance in regard to the future; and further, the applicants continued to share with the respondent the responsibility for having the play produced. Some precedent ought now to be produced to justify the Court in practically preventing the respondent from leaving the country, and I don't think the Court should now call upon him to give any security as proposed, but I think it is only fair that any amount due to the respondent which the applicants may now have in their hands should be retained by them, and paid into the Court. That, at all

events, would be security for the costs in an action, and if any damages should be given, I think there is no reason to suppose that the respondent will not pay them, or even if he did refuse to pay, there is no reason to suppose that he would not be amenable to the courts in England. The Court will therefore grant the order, so far as concerns the money in the applicants' hands. They will be allowed to retain that money, and pay it into the hands of the Registrar, as security in the action which is to be instituted, but the Court is not prepared to go beyond this. The question of costs had better stand over.

Maasdorp, J., concurred.

[Applicant's Attorneys, Van Zyl and Buissinne; Respondent, in person.]

GROBBELAAR V. GROBBE- { 1902.
LAAR. { Feb. 2:th.

This was an action brought by Mrs. Grobbelaar against her husband, formerly a doctor practising at Cradock, for divorce on the ground of his adultery.

The declaration set forth that the parties were married at Carlisle, England, in January, 1884, the defendant being at that time a medical student at Edinburgh, but his domicile was in Cape Colony. They afterwards came to the Colony together, and lived at Cradock until they separated by mutual agreement. It was alleged that between the 7th and 10th February of this year the defendant, who was passing under the name of Van der Byl, and living at the Royal Hotel, Cape Town, had committed adultery with a person unknown to the plaintiff. She therefore claimed a decree of divorce, and half of the joint estate.

Mr. Searle, K.C., for plaintiff. Defendant in default.

Mr. Searle called

Elizabeth Grobbelaar, the plaintiff, who deposed as to her marriage to defendant at Carlisle in 1884. She had resided in Edinburgh, but for three weeks previous to the marriage had lived at Carlisle. Defendant was at that time a medical student, and in 1888, immediately he had completed his course and taken his degree, they came out together to Cradock. It was their intention to do so when they married. At that time neither of them had property, and defendant was dependent upon his father, who resided at Cradock. She

lived with defendant at Cradock until 1897, when she became aware of certain conduct on his part which led to a separation being arranged, he agreeing to pay her £20 a month, which payments had been made regularly. At that time she taxed him with misconduct, and he admitted several of the charges. Afterwards she went to England, intending to take proceedings against him there, but she was informed by a solicitor in London that she would have to take proceedings in this country, as he was domiciled here. Continuing, witness gave evidence as to defendant, in answer to a letter from her, coming to see her at the International Hotel, Cape Town, where she was staying. He then sent in his name as Mr. Van der Byl, and she met him in the garden of the hotel. He told her he was going to Johannesburg. He was then staying at the Royal Hotel. He did not seem to want her to walk as far as the gate with him. The following day she engaged Mr. Peek to take her to the Royal Hotel, where she waited in the hall for her husband. He came in about 6.30 p.m. He recognised her, and came up and spoke to her. She told him she had come to make sure that he was staying at the Royal, and asked him if he was the Mr. Van der Byl staying there. He replied "Yes." She asked him "Who is the Mrs. Van der Byl staying here?" He replied that there was no such person. She said "That is a lie." He then said she had found him out. The gentleman she spoke to was her husband, Mr. Grobbelaar. She did not see him again. She subsequently received the letter handed in from her husband. He had certain property in Cradock, and she claimed a share of the estate, and applied that a receiver be appointed by the Court.

By the Court: In the letter handed in her husband wrote saying he would call and see her. She refused to see him again.

Mark G. Cameron, bedroom steward at the Royal Hotel, deposed that he remembered a Mr. and Mrs. Van der Byl staying in room 91 a few days in February, arriving on the 10th. He had not seen them since they left the hotel. They were the only Mr. and Mrs. Van der Byl staying at the hotel at that time.

Arthur Walter Peek, a detective, deposed that he took a letter from Mrs.

Grobbelaar to a Mr. Van der Byl at the Royal Hotel on February 11. Mr. Van der Byl was staying in room 91, a lady being with him. He subsequently arrested the same man at St. James's as Dr. Grobbelaar.

A decree of divorce was granted, the Court ordering the plaintiff to receive one-half of the joint estate, and appointing Mr. Alfred Metcalf, Cradock, as receiver. Defendant was ordered to pay the costs.

ADRIAANSE V. ADRIAANSE.

This was an undefended action for divorce. Mr. Uppington appeared for the plaintiff, and applied for a postponement.

The Court fixed the hearing for Tuesday next.

MESSINA BROS. AND MASTER
OF THE "POLITICIAN" } 1902.
V. MASTER OF THE } Feb. 27th.
"CROMARTYSHIRE." } Mar. 5th.

Salvage—Award.

The C., a vessel worth about £5,500, laden with a cargo of coal, had been abandoned about 100 miles from Algoa Bay in consequence of her cargo having caught fire. She was found in a burning state by the S.S. Politician, a vessel worth (with her cargo of horses) about £146,000. Some of the Politician's crew were, at great risk, placed on board the derelict, and she was towed into Algoa Bay. Two tugs, the property of the first plaintiffs, and worth £9,000 and £6,000 respectively, rendered assistance in extinguishing the fire, and were so engaged during in all 14 days, their owners meanwhile incurring out of pocket expenses to the extent of £627.

Held, that each of the salvors must be awarded $\frac{1}{4}$ of the value of the ship saved.

Seemle: It is impossible to lay down any hard and fast rule as to the awards in salvage

cases, but the peril of the property saved and the value of the ship rendering the salvage services must always be among the elements to be considered by the Court.

These were consolidated actions in respect of salvage services performed by the plaintiffs.

The facts as disclosed by the pleadings were as follows: The Cromartyshire, a sailing ship of 1,401 tons, and classed A1 at Lloyds, was on a voyage from Leith to Algoa Bay with a cargo of coal. On August 31, about 100 miles from Algoa Bay, fire broke out amongst the coal, and in consequence the vessel was abandoned by the master and crew. On September 1 the S.S. Politician, 7,228 tons, with a cargo of horses for the Imperial Government, and valued at £146,000, sighted the vessel, which was still on fire and a derelict, and deviated from her course in order to render assistance. The master, at great labour and peril, boarded the ship, and left an officer and nine men on board. He put a hawser on board, and towed the vessel into Algoa Bay, where she arrived about noon on September 2. The plaintiffs claimed £7,500 for the salvage services rendered, which they said were of an exceptional nature and of great value, and they said that by these means the ship and cargo were saved from total loss. The defendants, in their plea, admitted that the Politician rendered salvage services, but said that the cargo was still on fire when the vessel was brought into port, and the fire was extinguished by the aid of two tugs, the Talana and the Ulundi, belonging to Messina Brothers. The defendants tendered to the owners of the Politician £1,000 for their services. This tender was refused as insufficient. On behalf of Messina Brothers, a declaration was filed to the effect that when the Cromartyshire was towed into Algoa Bay, the fire was so great that the men of the Politician who were on board were about to abandon her. They said that at great labour and peril they succeeded in extinguishing the fire, and for these services they claimed £3,000. In reply to this the defendants tendered £1,000, and this was refused by Messina Brothers as insufficient.

Mr. Upington (with him Mr. C. W. de Villiers) for the "Politician"; Mr. Benjamin (with him Mr. Buchanan) for Messina Bros.; Mr. Searle, K.C. (with him Mr. Gardiner) for defendant.

Mr. Benjamin said it was admitted that the value of the Cromartyshire on the 2nd September in Algoa Bay was £3,000; the balance of the freight when the vessel was abandoned, £1,750; and the cargo damaged realised £3,697 gross subject to deduction of expenses. The parties now joined issue on that valuation.

Evidence was then called by Mr. Benjamin.

William Messina deposed that he was one of the plaintiffs in this action. His firm owned the tugs Talana and Ulundi. Before he saw the Cromartyshire coming into Port Elizabeth he received certain information, and prepared two tugs to go and render assistance, if required. The Talana was the first sent out on September 2. He was on board. The Cromartyshire was ablaze, the flames springing as high as the lower yards. The sails were not seriously in danger at that time. He went to the Politician first, and asked the captain of that vessel if any assistance was required. The captain of the Politician replied: "Yes, what will you do the job for?" He (witness) said he could not answer at once, but said no time must be lost, or they would lose the vessel. The captain of the Politician invited him on board, and he went on board and joined the captain on the bridge, saying, "If you do not hurry up, you will lose the ship." The captain of the Politician again said: "What will you do the job for?" He (witness) said he could not make an arrangement then, and then the captain of the Politician said, "For God's sake, then, go ahead!" The Talana then went to the assistance of the Cromartyshire. There were no other tugs at Port Elizabeth which could have rendered assistance. The tugs Ulundi and Talana were fitted with special pumps for extinguishing fire at sea, which cost £600 each vessel. The annual upkeep was about £150 a year each tug. The deck of the Cromartyshire was in a bad condition when they went on board, a lot of it being already burnt away. The crew of the Politician did nothing to assist while he was there to extinguish the fire. The captain of the Politician

handed the vessel entirely over to him, and rendered no assistance. There was great danger in getting on board the Cromartyshire, owing to flames of 15 to 20 feet high. All the braces were adrift and the yards swinging aft. The ship rolled, and the braces might have caught the Talana's funnel or mast as she came alongside. The state of the weather was moderate, with a westerly wind. He subsequently assisted the Politician to take the Cromartyshire in. They towed the Cromartyshire to the northward, and anchored in five fathoms of water. They took her to the northward in case it should have been found necessary to beach her. The mate of the Politician, with whom he was in conversation, told him he could not think what the old man (that was the captain of the Cromartyshire) was about in leaving the Cromartyshire. As the Talana arrived the captain of the Politician was about to abandon the Cromartyshire. He rendered services from the 2nd September to the 9th September in extinguishing the flames, and then again from the 23rd September to 1st October in extinguishing the flames, which again broke out. In connection with those services he hired a pump from the Harbour Board, which he took out to the Cromartyshire. Witness had framed an account (put in) of his actual expenses in connection with the services rendered. This showed a total out-of-pocket expenditure of £627 5s. This did not include the appliances. It was for labour, hire of harbour pump, and shipping and landing thereof, coal consumed by the two launches, wages of special engineer, special fenders, and up-keep of them, and three coils of rope. The gross earnings of the Talana would be from £200 to £300 a week. The net earnings would be about £200. The earnings of the Ulundi would be about the same. They paid £9,230 for the Talana in April last; £6,000 for the Ulundi. Witness estimated the value of the Cromartyshire in her damaged condition at from £4,500 to £5,000. The sails were in good condition; one sail only was slightly burned. This estimate included the stores and everything. The stores, which were worth about £300, were all intact. When witness left Port Elizabeth the Cromartyshire was partly repaired. He would value her then at about £9,000. For 30 years witness had been in frequent con-

tact with ships' captains, and he derived his knowledge of the value of vessels from information he had received from them. There was danger from the fire. Witness himself lay on deck partly suffocated from the fumes. Several times the natives refused to work on account of the fumes. Witness could see the whole extent of the damage except that to the skin of the lower hold, which he saw subsequently, and which, he would say, was damaged to the amount of about £50.

Cross - examined by Mr. Searle: Witness would not pit his opinion as to the value of the ship against Mr. Gowan. Messrs. Gowan, Palmer and Beck had surveyed the ship, and valued it at £3,000 in its damaged condition. At first Captain Palmer valued it at £5,000. When he came up witness would not call the weather rough. The ship was never beached. In a short time the flames were under control, but they were not wholly extinguished, as the fire kept breaking out from time to time. The sails were in danger until witness got there. There was no risk to the men of the Politician while they were on board the Cromartyshire. If witness had been 10 or 15 minutes later there would have been no chance of saving the Cromartyshire.

Cross - examined by Mr. U'pington: All the towage was done by the Politician. If the Politician had not towed the Cromartyshire the ship would have gone. The Politician could not have saved the ship.

Re-examined by Mr. Benjamin: Captain Palmer first valued the damage at £5,000. Since then he had estimated the damage at £3,000. When he first valued the damage, Captain Palmer could see the whole extent of the damage, with the exception of that to the stem of the lower hold.

John McRae, second hand on board the Talana, said there was a slight breeze and a swell when the Talana went out. The weather was moderate. The making fast to the Cromartyshire was a difficult operation. The crew of the Politician would not help. Witness had to jump on board. It was difficult to clear the place for working the pumps. At first they could not stand on the deck. Witness twice went through. Two Europeans belonging to the Politician told witness they

were on the point of leaving the ship on account of an explosion in the main hatch. There were about six Lascars on board with the two Europeans. The flames from the main hatch were about 15 feet above the hatch. There was danger from smoke and fire. Witness saw Mr. Messina carried up and witness was himself carried up. Several of the men had to come up, and the Kafirs refused to go down. There was danger to the tug while alongside the vessel. They had no assistance from the men of the Politician. In fact on the Tuesday night they were an hindrance, because they were partly intoxicated, and were interfering with the work.

Cross-examined by Mr. Searle: The ordinary thing when pumping a burning vessel was that the men could not remain down long, but were coming up and down frequently.

Olaus Skaugen, partner in the firm of Mercer and Skaugen, sailmakers and shipchandlers, said that two sets of sails would cost about £1,800 new. Witness was told that the Cromartyshire was a full-rigged ship. He did not know anything about this particular vessel.

Edward Dowds, engineer in Messina Brothers' employ, said he was on board the Ulundi when the salvage services were rendered. He made a scrap-log at the time, and afterwards wrote the usual log (produced) up from this. When witness went on board there was considerable danger from fumes and smoke. It was impossible to pass from one end of the ship to the other. The deck was very thin in parts, and there was danger of falling through. There was very considerable danger to the tugs lying alongside. They made a temporary deck and hatches to prevent the sea washing over in the event of there being rough weather. They once had to leave on account of rough weather. When the surveyors came on board they could see all the damage except that to the floor of the vessel, to which, witness estimated, damage was done to the amount of £40 or £50. The stores were not damaged. There was a spare set of sails in good condition.

Cross-examined by Mr. Searle: There would have been danger to the tugs if

rough weather cropped up. Only on one occasion was there rough weather.

Mr. Benjamin said that this was all the evidence, excepting certain evidence taken on commission.

The Chief Justice said this could be read later.

Mr. Searle called

Wm. Govan, Lloyds' surveyor at Port Elizabeth, who said that at the request of the ship's agents he made several surveys. Witness made the first survey on the 16th September. It was not then possible to see the full amount of the damage. On the 19th October he made another survey, and estimated the value at £3,000. He made a full report (produced). The repairs witness estimated at £4,000. These were being executed.

[By the Court: Witness estimated the value of the vessel, repaired, at £9,000. She could only be permanently repaired in England. The temporary repairs here would cost about £5,000, and the value of the ship after these had been completed would be about £8,000.]

By Mr. Searle: There was no great risk in the towage of the vessel by the Politician. There would be danger to the men of the Politician on board the Cromartyshire. There was a certain amount of risk in connecting the Politician with the Cromartyshire.

Cross-examined by Mr. Benjamin: There would be risk—the ordinary risk in salvage—in the Talana running alongside the Cromartyshire. To go to England direct, repairs would be necessary here to the amount of £2,500, and in England it would cost about half as much to complete the repairs.

Re-examined by Mr. Searle: There was no exceptional risk; the weather was fine.

August Reiners, merchant, Port Elizabeth, said his firm were the consignees of this cargo of coal. Witness's firm gave notice of abandonment of the cargo immediately they heard of what had happened. Part of the freight was paid at Home; the balance (£1,750) had not been paid. Two thousand two hundred and one English tons of the coal had been sold. After deducting charges, the balance would be £829 18s. 2d. The freight per English ton was 23s. The invoices showed that the part of the freight payable here was two-thirds—£1,750. The rest was paid in advance.

Charges to the amount of £2,867 were incurred. Witness had prepared a list showing these charges. Witness's firm were acting as agents for the ship. About £4,200 had already been spent in repairs, which were not wholly permanent. Most likely there would be further repairs while the vessel was in Algoa Bay.

John A. Chabaud, attorney for the ship's agents, deposed as to correspondence and documents put in.

Mr. Upington put in certain affidavits, reports of the Court of Inquiry from the "Eastern Province Herald," and other documents.

The affidavits of Captain Chandler and Mr. Naude, chief officer of the Politician, were read. Deponents said that the Politician towed the Cromartyshire for a distance of about 120 miles. On several occasions the ropes broke, and there was difficulty in making connection.

The newspaper report of the proceedings at the Court of Inquiry was also read. The Court held that the abandonment of the ship was justified, as the ship was in a very dangerous condition.

Evidence taken on commission for Messrs. Messina Brothers was then read. The captain of the Talana considered that that tug saved the Cromartyshire, to which vessel the danger was great. The Talana's mate gave similar evidence. They had to stand on the rail as the deck was too hot to stand upon. There was great danger and difficulty. One of the Politician's men on the Cromartyshire said they were about to abandon the vessel. The work of extinguishing was dangerous. There were explosions of gas. There were two rough days during the Talana's operations. The log was put in at the commission.

De Villiers, C.J., said that as the matter struck the Court at present, £6,000 might be taken as a fair valuation. There was an abandonment of the ship, and on the evidence, the Court thought, subject, of course, to what counsel would say, that one-half of the £6,000 would be a fair amount to divide between the two salvors, and that this amount should be equally divided between them.

Mr. Upington intimated that he was prepared to accept judgment for £1,500, with costs.

Mr. Benjamin said he was willing to take judgment for the amount mentioned.

Mr. Searle, K.C. (with him Mr. Gardiner), for the Cromartyshire. The

Court never awards half of the value of the ship, freight, and cargo in cases of salvage. *Leake on Contracts* (p. 42). The high water mark in salvage cases was reached in the case of *the Andes* (Sheil). Her value was £6,200. She was derelict, and it was rough weather. The Midge towed her some distance, and then a large tug came up and towed her into East London. £1,250 was awarded to the Midge and £1,000 to the large tug. That is something over 1-3 was awarded as salvage, and yet the vessel was derelict.

De Villiers, C.J. In the present case there was great danger to the crew.

Counsel read the judgment of Buchanan, A.C.J., in the *Andes* case, and continued:

This judgment gave 1-3 of the full value of the ship saved to the salvors, and this, I believe, was the largest proportion ever awarded by any of our Courts. There is also the case of *The Associated Boating Companies v. Baardsen* (12 S.C.R., 330), in which 1-6 was awarded. The value of ship, freight, and cargo was a little over £6,000. The English case of the "Fortuna" was quoted in this case. We made a larger tender in this case than than has ever been made in any previous case. Then, as to the two claims against us, the Politician found us about 200 miles from Port Elizabeth; the weather was not very rough. Very few similar cases of salvage ever come into Court but see the *Jason*. *Pritchard Admin. Digest*. (V. 2, p. 1,963, case 244.) It is true that in the present case the vessel was abandoned, but the mere fact of abandonment ought not to weigh so much as the services rendered.

Maasdorp, J.: What have you to say about the case of the *Glengyle*. (Prob. D. 1898, p. 97.)

In that case there was no special risk to the salvors, and only about one-quarter of the value of the ship, etc., was saved. Then, again, the Politician was not specially maintained for salvage. She incurred no special risk; the fire was only burning at the main hatch, and Messina said there was no risk. The case could not have been so very bad when only 146 tons of coal out of 2,300 tons were missing. The services of the Politician would be amply compensated by our tender of £1,000. The weather was not bad, and no trouble was experienced in towing. She towed only from 3 p.m. to 11 a.m.

ing the deck he was insensible owing to the gases. "We kept signals of distress flying all the day previous to leaving the ship; we were unanimous, officers and crew, in deciding to leave the ship." Then the Court of Inquiry, in giving its judgment, after going into the facts of the case, came to this decision: it appeared that the Politician, seeing the derelict, took her in tow, and she was anchored in Algoa Bay with her cargo still burning, and an explosion had actually taken place in the hold, as is instanced by the displacement of the hatches. The Court found that the captain was justified in abandoning the vessel, that she was in a very dangerous condition, so that in all probability, if the maste and crew of the Politician had not come to her aid, she would have been totally destroyed, and the owners would have saved nothing. Then the Politician, at considerable risk, went out of the way to rescue her. There was a considerable risk at all events to the crew, especially to those of the crew who were put on board the Cromartyslure, and even to the Politician herself there was some risk, although not so great a risk as that of the crew which were left on board the Cromartyslure. Anyhow it is admitted that it was a valuable service, and, in my opinion, it was a very meritorious service, and a service of this kind should always be liberally remunerated as an encouragement to others when they see vessels in this condition to come to their assistance. Certain cases have been quoted as showing the principle of rewarding salvage services, but it is impossible to lay down any hard and fast rule. After all, the circumstances in each case must be carefully considered before the Court can fix the proportion of the reward to the value of the property saved. In the present case we are of opinion that if we take the valuation at a low one, the Politician should have one-quarter of the value of the ship. As I said just now, the services rendered were very meritorious, and a quarter share of the value of the ship would be a fair remuneration to the owners of the Politician. Coming now to the other plaintiffs, Messina Bros., we think they were not justified in leaving the ship. Coming to Messina Bros. we think

to urge that they ought to receive more than the Politician. I confess, if I had any doubt on the matter, the doubt is whether they should not receive somewhat less, because after all the Court cannot lose sight of the great value of the Politician herself, which was £146,000 with her cargo, and she went out of her way, and then, further, the nature of the cargo should be considered. There were horses on board which would require to be brought to Algoa Bay at the greatest speed possible, and there was considerable risk in any way deviating from her course, and therefore this ingredient of the value of the salving ship is very much in favour of the Politician. Of course it must be, on the other hand, borne in mind that the services of the plaintiffs, Messina Bros., were much longer continued, and that the expense to which they were put was very much greater, and, taking all these circumstances into consideration, I think that Messina Bros. should receive also one-quarter of the value of the ship. The only other question is what may be considered the value of the ship. This proportion of one-half is, we are aware, a very large proportion. In recent times it has been seldom awarded, and as a general rule one-half is regarded as a very large proportion, and no doubt it is a very high proportion, and, having awarded a very high proportion to both the plaintiffs, the Court would not be inclined to increase the valuation of the ship in any way. The Court is inclined to consider that the admission made by counsel that the property is worth £5,500 may be taken as a fair one. There is considerable discrepancy in the evidence as to the value, and possibly, if we went minutely into it, we might find that the value was nearer £2,000. The Court, however, will take the value of £5,500, and one-quarter is awarded to each of the plaintiffs. Judgment will be in each case for the plaintiffs for £1,375, with costs. I think the plaintiff, Messina, would be entitled to his witnesses' expenses.

MASSON, J., concurred. He remarked that the case was a very unusual one in its circumstances, and that the salvage services should be liberally rewarded. The two great features of the case were the great peril to which the vessel was exposed and the

all, and these services scarcely fall under those set forth in the declaration. As to the danger incurred by them, it could not have been very great. All their men, save three natives, were willing to go on board and to work on the ship, and nobody was injured.

Mr. B. Upington (with him Mr. C. W. de Villiers) for the Politician: There is no reason why the basis on which salvage is computed should be only half of the value of the ship, cargo, and freight. In the case of the *Errato* (13 Prob. D. 163) the ship and cargo were worth £3,750, a tender of £1,500 was made, and £2,000 was awarded. See also the *Rush* (Mew's Dig. Art. "Shipping," p. 642). In case No. 69 in Pritchard (p. 1,935) the value of the ship saved was £4,000, and £3,500 were awarded. Also No. 5 in Pritchard (p. 1,924) on a ship worth £14,000, £11,300 were awarded. There are many other cases in which the Court has gone beyond half the value of the ship. Now in this case the circumstances were very extraordinary. The ship was a derelict, and was on fire. I have only been able to find one case at all similar to the present. There a ship was on fire in a river. She had not been finally abandoned, for her master and her crew were still looking after her. In the present case, a Court of Inquiry found that the master was fully justified in abandoning his ship. A very dangerous cargo (coal) was on fire; the hold was full of gas, and one of the hatches had been blown off. Then, too, a heavy cross sea was running. The hawser broke and then the "hits" gave way. The master, mates, and crew of the *Cromartyshire* all speak of the great danger to the salvors. The barometer was falling at the time, and there was every prospect of bad weather. Then, again, the Politician was a large vessel, with a valuable cargo, and worth in all about £146,000. See *City of Chester*. (9 Prob. D. 202). judgment of Lindley, L.J. In public interest salvors ought to be encouraged. I would refer also to the *Janet Court* (Prob. D. 1897, p. 59). There the value of the ship was £7,050, and £3,000 were awarded. In the case of the *Andes*, the services rendered will not bear comparison with those rendered in this case. I submit that considering the risk run by the Politician, and by her crew, the value of her cargo and the imminent risk of the ship saved, the Court should not be bound by any hard and

fast rule as to never allowing their award to exceed a bare moiety.

Mr. Benjamin (for Messina Brothers): Messina Brothers are not bound by admissions made by the Politician. The vessel was worth between £4,000 and £5,000. The valuations of Beck and of Palmer are not binding on us, but it must be remembered that on October 10, 1801, they valued the ship at between £4,000 and £5,000. The lower estimate was made after the vessel had been repaired. It was then difficult to judge of the value of the damages to the vessel prior to such repairs being executed. Probably in this latter valuation the two sets of sails, worth £1,800, and the stores (£200) were not taken into account. The sails were in good condition. Then again there is the cargo and freight, in all £6,000. I would submit that Messina Bros. are entitled to at least £1,500. The Court often awards more than half the value of the vessel saved as salvage, and has a discretion little short of absolute. *Abbot on Shipping* (p. 725). Again, the enterprise shown by the salvors must be taken into account. Messina Bros. keep vessels specially adapted and equipped to render these services. Again the crew of the salvor incurred great risk, much work has been done, and expenses to the extent of £627 have been incurred in doing this work. The award in the case of Messina Bros. should be higher than in that of the Politician. *Kennedy on Civil Salvage* (p. 162).

De Villiers, (C.J. : In this case it has been admitted that the services performed by both the plaintiffs were really salvage services, and a tender has been made upon that basis. If the Court could possibly support that tender it would have done so. If the amount awarded had been substantially near the amount tendered the Court would have supported the tender. But, on the whole, looking at all the circumstances of the case, the Court is of opinion that the tender is not sufficient. The chief ingredient in all these cases is the peril of the property saved, and upon that point the peril of this ship, the *Cromartyshire*, was very great indeed. Upon that point we have the evidence of one of the crew of the ship, who says that he went down into the hold of the ship himself before the ship was abandoned, and examined the cargo. Upon reach-

ing the deck he was insensible owing to the gases. "We kept signals of distress flying all the day previous to leaving the ship; we were unanimous, officers and crew, in deciding to leave the ship." Then the Court of Inquiry, in giving its judgment, after going into the facts of the case, came to this decision: it appeared that the Politician, seeing the derelict, took her in tow, and she was anchored in Algoa Bay with her cargo still burning, and an explosion had actually taken place in the hold, as is instanced by the displacement of the hatches. The Court found that the captain was justified in abandoning the vessel, that she was in a very dangerous condition, so that in all probability, if the master and crew of the Politician had not come to her aid, she would have been totally destroyed, and the owners would have saved nothing. Then the Politician, at considerable risk, went out of the way to rescue her. There was a considerable risk at all events to the crew, especially to those of the crew who were put on board the Cromartyshire, and even to the Politician herself there was some risk, although not so great a risk as that of the crew which were left on board the Cromartyshire. Anyhow it is admitted that it was a valuable service, and, in my opinion, it was a very meritorious service, and a service of this kind should always be liberally remunerated as an encouragement to others when they see vessels in this condition to come to their assistance. Certain cases have been quoted as showing the principle of rewarding salvage services, but it is impossible to lay down any hard and fast rule. After all, the circumstances in each case must be carefully considered before the Court can fix the proportion of the reward to the value of the property saved. In the present case we are of opinion that if we take the valuation at a low one, the Politician should have one-quarter of the value of the ship. As I said just now, the services rendered were very meritorious, and a quarter share of the value of the ship would be a fair remuneration to the owners of the Politician. Coming now to the other plaintiffs, Messina Bros., no doubt they were not instrumental in first rescuing the ship. Counsel for Messina Bros. go so far as

to urge that they ought to receive more than the Politician. I confess, if I had any doubt on the matter, the doubt is whether they should not receive somewhat less, because after all the Court cannot lose sight of the great value of the Politician herself, which was £146,000 with her cargo, and she went out of her way, and then, further, the nature of the cargo should be considered. There were horses on board which would require to be brought to Algoa Bay at the greatest speed possible, and there was considerable risk in in any way deviating from her course, and therefore this ingredient of the value of the salving ship is very much in favour of the Politician. Of course it must be, on the other hand, borne in mind that the services of the plaintiffs, Messina Bros., were much longer continued, and that the expense to which they were put was very much greater, and, taking all these circumstances into consideration, I think that Messina Bros. should receive also one-quarter of the value of the ship. The only other question is what may be considered the value of the ship. This proportion of one-half is, we are aware, a very large proportion. In recent times it has been seldom awarded, and as a general rule one-half is regarded as a very large proportion, and no doubt it is a very high proportion, and, having awarded a very high proportion to both the plaintiffs, the Court would not be inclined to increase the valuation of the ship in any way. The Court is inclined to consider that the admission made by counsel that the property is worth £5,500 may be taken as a fair one. There is considerable discrepancy in the evidence as to the value, and possibly, if we went minutely into it, we might find that the value was nearer £6,000. The Court, however, will take the value of £5,500, and one-quarter is awarded to each of the plaintiffs. Judgment will be in each case for the plaintiffs for £1,375, with costs. I think the plaintiff, Messina, would be entitled to his witnesses' expenses.

Maasdorp, J., concurred. He remarked that the case was a very unusual one in all its circumstances, and one in which salvage services should be liberally rewarded. The two great features of the case were the great peril to which the vessel was exposed and the

immense services rendered by the master and crew of the Politician. The services rendered were very different from most of the cases which had been cited. It might almost be said that in this case the loss of the owners of the ship was almost certain, taking into consideration that the ship was a derelict, and had actually been abandoned. It seemed to him that the rarity of these cases arose from the fact that when ships were found in that condition those who saw them saw so small a prospect of saving them that they left them. Under the circumstances of this case, he thought the enterprise shown by the master of the Politician was very great indeed. He undertook to save a ship which might have been lost after being taken in tow, and if it had not been for the assistance rendered by the two tugs his labour would have been entirely thrown away. There was a prospect of incurring great danger both to his vessel and to his crew, and also of performing great labour, the value of which might ultimately have been completely lost. Under the circumstances, he thought the services rendered by him should be liberally rewarded, and that his services were more valuable than those rendered by Messina subsequently.

De Villiers, C.J., replying to Mr. Searle, said that the taxing master would have to decide the point of the costs of attaching the ship.

[Attorneys: For the Politician, Scanlen and Syfret; for Messina Bros., Mr. G. Trollip. For Defendant: Van Zyl and Buissonne.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

ARDENE V. SALESIAN { 1902.
INSTITUTE. { Feb. 28th.

Mr. Buchanan said he appeared for plaintiff to apply that a provisional order for sequestration should be set aside.

Granted.

EATON, ROBINS AND CO. V. DANEMAN.

Mr. Gardiner, for plaintiffs, moved to set aside a provisional order for sequestration of defendant's estate.

Granted.

ESTATE OF MARSH V. VAN HEERDEN.

Mr. Russell moved for provisional sentence for £1,600, interest and costs, and for specially hypothecated property to be declared executable.

Granted.

ILLIQUID ROLL.

PAARL BERG WINE CO. V. LEONARD.

Mr. Close moved for judgment, under Rule 329d, for £39 13s. 9d., interest and costs.

Granted.

DE VILLIERS V. SCHRODER.

Mr. C. de Villiers moved, under Rule 329d, for payment for £41 5s., rent due, with interest and costs.

Granted.

COLONIAL GOVERNMENT V. { 1902.
JOHN FOX SMITH. { Feb. 28th.

This was an action to recover the sum of £1,418 3s. 8d., being the carriage of certain mealie meal from Port Elizabeth to Bulawayo, consigned during August, September, and October, 1898. The meal was declared to be Colonial produce, and was consequently carried by the Railway Department at the lower rate, whereas, as a fact, the meal had been manufactured from imported mealies by Peachey Bros., of Natal, and consigned by that firm to the defendant as Colonial produce, and the action was to recover the difference between the two rates.

Mr. Sheil, K.C., appeared for the Government, and moved for judgment in terms of a consent paper which had been filed for £1,418 3s. 8d., with interest thereon from the 27th July, 1901, and costs.

The Court granted judgment in terms of the consent paper.

PALM V. PALM.

This was an action for divorce, the plaintiff, Mr. John Palm, of Beaconsfield, alleging that the respondent, Cornelia Palm, had committed adultery

with one Gabriel Butler, with whom it was stated she was at present living. Plaintiff applied for a decree of divorce, division of the estate, forfeiture of benefits by the respondent, and custody of the two minor children.

Mr. Buchanan appeared for the plaintiff; defendant had been barred.

Francis Henry le Sueur, clerk in charge of the marriage register at the Colonial Office, produced the duplicate register of the marriage.

William John Palm, the plaintiff, said he was married to defendant on the 7th February, 1888, at Beaconsfield. They lived together until November, 1893, when witness gave defendant leave to go to her aunt at Kroonstad. He found she had gone to Johannesburg. Witness had previously prohibited a man named Gabriel Butler from coming to the house. After his wife left, Butler went to Johannesburg. Witness went to Johannesburg, gave his wife money, and made arrangements to go home with her. At dinner one evening, before going, his wife left, and witness did not see her for two years. She sent the children to him. She was now living at Sea Point. Witness wanted the custody of the children.

Daniel Storkey, gardener, Sea Point, deposed that Butler and a woman he called Nellie lived in one room in one of witness's houses.

Mr. Buchanan said that "Nellie" was the defendant's name.

John Edward Palm, plaintiff's son, said that Butler told him he was living with defendant at Sea Point.

Raymond Syter said that from 1893 to 1896 Butler and defendant lived in one house at Johannesburg. They were known as Mr. and Mrs. Butler.

The Chief Justice said it should be easy to identify the woman with whom Butler was living. The case would stand over until Tuesday for proof of adultery.

Postea, March 4.

Daniel Storkey having given evidence of identification, the Court granted a decree, as prayed.

MILLER V. MILLER

This was an action instituted by Frances Laura Miller against her husband, George Frederick Miller,

for restitution of conjugal rights, failing which, for divorce, on the ground of desertion. The parties were married at Birmingham on the 2nd September, 1883. Defendant came out to the Colony in 1892, and plaintiff joined him the following year. In or about the month of November, 1899, he deserted her, having for some months previous to that neglected to support her.

Mr. Buchanan for plaintiff; defendant in default.

Frances Laura Miller gave evidence confirming counsel's statements. Her husband was a compositor. There were no children living; four had died. After coming out defendant worked three or four years at Richards and Sons, and then went to Johannesburg. He returned to Cape Town, where he remained for a time, afterwards going to King William's Town as foreman compositor on the "Watchman." On the 31st May, 1899, he made the last payment towards her support. Defendant had been to England, and witness had also been there, but could find no traces of him. She had received a letter saying that he had returned to South Africa.

A decree of restitution was granted, defendant to return to or receive plaintiff by the 15th May, failing which an order would be issued calling on him to show cause on the 31st May why a decree of divorce should not be granted, the rule to be served in the same manner as was ordered in regard to the citation.

ANNEAR V. ANNEAR.

This was an application for leave to the wife to sue her husband *in forma pauperis* for restitution of conjugal rights or divorce on the ground of desertion.

Mr. J. de Villiers appeared for the applicant.

Applicant was called, and said she was a dressmaker at the Paarl. She had three children, and could hardly earn enough to maintain them.

A rule was granted calling on defendant to show cause on the 12th April, the rule to be served personally; if defendant could not be found, further application to be made to the Court for substituted service.

ALIWE V. HADJIE.

Mr. Searle, K.C. (with whom was Mr. Benjamin), appeared for defendant, and applied to fix a day for trial by jury.

Mr. J. de Villiers appeared for plaintiff.

The Court fixed Tuesday, the 6th May.

REHABILITATIONS.

Mr. Close appeared for the rehabilitation of Alfred Selby.

Granted.

On the motion of Mr. Buchanan, Harry George Burgess was rehabilitated.

Mr. Gardiner moved for the rehabilitation of Lewis Michael Myers.

Granted.

GENERAL MOTIONS.

Ex parte LOURENS AND (1902.
OTHERS.) Feb. 12th.

Divisional Councils' Act—Voters'

Roll — Court for hearing claims and objections — Fraud — Mistake.

In the absence of fraud, a person whose name appeared on the voters' roll, but was struck off by a Court held under the 21st and 22nd sections of Act 40 of 1889, although no objection had been made, held entitled to have his name restored.

This was an application upon notice calling on the Chairman of the Court appointed to revise the Divisional Council voters' list for the district of Bredasdorp, and one Councillor Taljaard, to show cause why the names of the petitioners should not be replaced on the voters' list as occupiers. Petitioners, it was alleged, were all occupiers of farms assessed above the required value, and their names were placed on the voters' list by the secretary of the Divisional Council. On the 30th July last a Court, consisting of the two respondents and Councillor Albertyn, sat to hear objections. No objections were made respecting the petitioners, whose names were, however, removed. Petitioners said they were duly qualified, and

contended that under section 22 of Act 40 of 1889, the Court had no power to remove their names in the absence of any objections.

On affidavit it was stated that Councillor Albertyn dissented to the proposal to remove the names. A Mr. Fletcher deposed that some of the petitioners occupied land belonging to him, and had the rights of gardening and of grazing thereon. The value of the properties occupied by the petitioners were stated to be above the necessary value.

For the respondents, Wm. Thomas Clarke, chairman of the Court and Civil Commissioner, deposed that he was guided to a considerable extent by the knowledge of the properties possessed by Councillor J. J. J. Taljaard, and by the provisions of sub-section 6, section 22, of Act 40 of 1889. Councillor Taljaard deposed that to the best of his knowledge the petitioners were not qualified to be put on the roll. Four were servants of Mr. Fletcher, and were paid salaries. One of the rest was a hired servant; another lived with his mother. He denied that Councillor Albertyn dissented.

Mr. Upton for the applicants; Mr. Searle, K.C., for the respondents.

Mr. Upton, after dealing with the point that the names of the petitioners being upon the list, the Court had no power to strike them off, seeing that no objection had been raised to them, proceeded to argue that the petitioners were entitled to have their names on the list, they being the occupiers of separate farms or dwellings, although they were in Mr. Fletcher's employ. Therefore it was different to the case of *O'Brien v. Christian and Others* (15 Supreme Court Reports, p. 282), where it was held that the houses in which the applicants resided not being separately valued, according to the assessment roll in force in the division, they were not entitled to be placed on the voters' roll.

Mr. Searle, in argument, said that it was perfectly clear that if these persons had been placed upon the list in the ordinary way under section 19, and the provisions of that section had been properly carried out, then sub-section 6 would not apply, but although the course followed seemed to have been done perfectly *bona fide*, and in accordance with past practice, the names seemed to have been

placed on the list in a somewhat irregular manner. It was unfortunate there was not more evidence to show whether these persons were placed on the list in the proper manner, under section 19, but what was on record showed that these persons were servants in Mr. Fletcher's employ, and that it was Mr. Fletcher who brought in the list of their names.

The Chief Justice pointed out that the names were placed upon the list in perfect *bona fides*.

Mr. Searle admitted that he could not say there was any *mala fides*.

The Chief Justice said he did not see how they could get over the second sub-section of section 22.

Mr. Searle said that if the Court held that that preliminary objection was fatal to his case he could not take the matter further. As to costs, however, he submitted that the Court would not give them against the Civil Commissioner, seeing that it was a Court acting *bona fide*, had decided that the names should be struck off. It was therefore not a case where the Court would give costs at all.

Mr. Upington admitted that in view of the previous decisions of the Court in such matters, he could hardly contend that the respondent should pay costs, but still it seemed hard that in a case of that nature the applicant should have to stand all the expense.

The Chief Justice, in giving judgment said: It is quite clear in the present case that the names of the applicants appeared on the list which had been duly prepared by the secretary of the Council in terms of the 19th section of the Act, and it is clear also that no objection was made at the time the Court sat, but the Court considered that it had the power to correct a mistake under the 6th sub-section, and struck out the names. Now, we are of opinion that the Court acted wholly beyond its powers. I am not prepared to say whether, where there is a clear case of *mala fides*—where there is a clear case of fraudulent placing of names on the list—the Court would not have had the power to strike off names. It is not suggested that Mr. Fletcher committed any fraud in placing the names of these people upon the list. Their claim seems to be a reasonable one, and I am not prepared to say without further consideration whether

or not it is a good one. That question, however, has not to be decided now, and what I will say upon it is only this: that it was a *bona fide* claim to have the names placed upon the list, and that the placing of the names on the list was not apparently a fraudulent act, such as to justify the Court in striking them off. That being so, the second sub-section of section 22 seems to apply, and this enacts that the chairman and Councillors who are revising the roll shall retain on the list the names of persons to whom no objection has been made. These persons claim to appear upon the list, and no objection has been made, and therefore the duty of the Court was to retain on the list these names. It is true that the sixth sub-section gives the Court power to correct a mistake or an omission, but it is clear that the mistake or omission does not apply to a case coming under the second sub-section, and consequently the mistake or omission which they must correct meant some mistake or some omission not provided for by any other section or sub-section. For instance, a clerical mistake, by which a man's christian name might be wrongly given, or a mistake in the spelling of a man's name, might be a mistake which it was the duty and within the power of the Court to correct, but it had certainly no power to act in opposition to sub-section 2, which directs specially that they shall retain on the list the names of all persons to whom no objection has been made. For this reason I am of opinion that this application should be granted. As to costs, the Magistrate or Civil Commissioner and the Councillors seemed to me to have acted perfectly *bona fide*. They had an opinion by which they were guided, and which opinion they seem to me to have somewhat misread—but that is a point which need not now be decided—but they acted perfectly *bona fide*, and therefore the Court will not make them pay costs. The application will therefore be granted, but no order will be made as to costs.

[Applicants' Attorney: C. W. Herold.
Respondents' Attorneys: Dempers and Van Ryneveld.]

BROPHY V. BROPHY. } 1902.
 } Feb. 28th.
 Contempt of Court — Personal
 Attachment.

This was an application for an order for the attachment of the person of the respondent for contempt of Court, he having failed to comply with the terms of a judgment of the Court. It appeared that in November, 1900, the applicant, Mrs. Brophy, obtained a decree of divorce against her husband, the respondent, and the latter was also ordered to pay to the applicant £1 per month for the maintenance of each of the two minor children of the marriage. The respondent, however, had not paid anything towards the maintenance of such children.

Mr. Benjamin moved.

The defendant appeared in person, and said he was only earning 5s. 8d. a day as a railway labourer. After the judgment of the Court, he arranged with the plaintiff's attorney to pay £2 a month towards the payment off the costs of the action, which amounted to £28 10s. 8d. He had now paid the whole amount of the costs, with the exception of 10s. 8d. His living cost him £1 a week, and owing to having to pay the costs, he had been unable to comply with the judgment of the Court to pay the monthly instalments for the maintenance of the children. He, however, was prepared to pay the instalments as soon as had finished the costs.

Cross-examined by Mr. Benjamin, respondent said he was living with a woman to whom he was not married, but she was earning her own living.

The Chief Justice said it would just make it worse for the applicant if they committed the defendant to prison, as there would then be no chance of her getting anything, and she would probably have to keep him.

Mr. Benjamin submitted that he ought to be able to pay more than £2 per month.

In reply to the Court, respondent said he would pay off the balance of the costs this week.

The Court decided that no order would be made on this application, but the Chief Justice warned the respondent that if he did not pay to the applicant the £2 a month ordered by the Court after he had paid off the costs, he would be sent to prison.

STANFORD V. WILLIAMS AND OTHERS.

This was an application by defendants for the postponement of a jury trial, which had been set down for hearing on March 10.

The following affidavit on behalf of the applicants was read:

I, Gideon B. van Zyl, make oath and say:

1. I am a member of the firm of Van Zyl and Buissinne, attorneys for the defendants, and have conducted all this case on their behalf.

2. I attach hereto letters and telegrams from the different defendants, or their commanding officers, all of which show that they cannot obtain leave, and that therefore it is impossible for any of them to attend the trial on March 10, and, further, that it is uncertain when they will be permitted to leave their columns to attend the trial.

3. It is not safe therefore to go to trial without the presence of the defendants, all of whom are required to give evidence for the defence.

In the correspondence referred to, Lieutenant-Colonel Aspinall wrote as follows to defendants' attorneys: "With regard to your letter of the 17th inst., I regret that I am unable to allow Captains Williams and Hayes, of the regiment under my command, away at present; cannot the trial be postponed?" Lieutenant Cecil Fane wrote enclosing a telegram from his column commander, Colonel Capper, in which the latter said he could not possibly spare the writer and Lieutenant Truman (two of the defendants). Colonel Capper also said that it was highly improbable that either of them would get leave from the field for a long time. With regard to another defendant, Hermon Hodge, a telegram from Colonel Crabbe, at Victoria West, stated that he regretted that it would probably be impossible for Lieutenant Hermon Hodges to attend at the trial. Lieutenant Prior, of the 17th Lancers, another defendant, telegraphed from Rhenoster Kop that, owing to his military duties, he could not attend the trial. Lieutenant Judkins, also one of the defendants, telegraphed from Porterville that his column commander could not allow him to come to Cape Town for the 10th March, and he asked that the trial might be put off until May. Captain Hayes wrote from Quaggasfontein that, owing to opera-

tions in the Orange River Colony, for the present all leave had been refused, and there was therefore no prospect of his being able to attend and defend the action on March 10.

The answering affidavit of Hardwicke Foster Stanford, the above-named plaintiff, was as follows:

1. That I have read the affidavit of Mr. G. B. van Zyl, together with the annexures thereto.

2. That all the defendants in this case have, to my knowledge, during the past six or nine months been in Cape Town on leave, and for their own pleasure, and only now find it difficult to get leave.

3. That no proper effort has been made by the defendants to come to Cape Town and defend the present action.

4. That there is nothing in the affidavit of the defendants' attorney or on the annexures to show that all the facts of the case have been represented to the Commander-in-Chief, with a request to allow the defendants to come to Cape Town to defend the present action.

5. That the defendant Williams, just after the incident which forms the subject matter of my claim, said: "I will not stop at anything; I have made up my mind to finish you off to-night; I have now made it impossible for any lady ever to speak to you again, and I shall make it my business to spread what has been done to you to-night from one end of the service to the other, so that you will be cut by everyone." He has apparently put his threat into force, judging from the behaviour of all the officers who have since come down from the front.

6. That several of the defendants, and particularly the defendant Judkins, have stated openly in Cape Town that they intended to do all in their power to prevent the case being tried, and that, owing to martial law, the Court, meaning this Hon. Court, was powerless, as far as they were concerned, and that I know and verily believe that the present application for a postponement is merely made with the object of defeating the cause of justice.

7. That I will be greatly prejudiced should the case not be heard on the 10th, or on an early date, as I intend to leave Cape Town very shortly, and in addition, several of my witnesses will most likely be leaving the Colony, and it will be impossible, without very great expense,

to obtain their evidence should the case be postponed to an indefinite date.

8. That the defendants have spread reports of what occurred, and in doing so have misrepresented the facts in such a way as to cast a slur on my fair name and character.

9. That until the action is tried, and the true facts of the case are known, it will be impossible for me to remove the slur which has been cast upon me, and to clear my name and character, and further than this, it will be practically impossible for me to return to Johannesburg.

Mr. Searle, K.C., for the applicants.
Mr. Uppington for the respondent.

Mr. Searle contended that there was sufficient before the Court to show that the application was *bona fide*. The commanding officers had written that it was impossible for these persons to come down.

De Villiers, C.J., asked how it was that the defendants were wanted personally. In their plea the defendants denied that the plaintiff had sustained damages, but they admitted that they committed a legal tort, and they tendered £25.

Mr. Searle said the amount claimed was £3,000. It was most important that the defendants should show the circumstances under which these things complained of were done. There was a great conflict of evidence as to what took place on the evening in question.

[De Villiers, C.J.: Have they taken all steps to have represented to the Commander-in-Chief the urgency of the case?]

Mr. Searle said it was most difficult to communicate with the defendants, some of whom were actually engaged in operations. He submitted that the Court would recognise the circumstances of the country, that there was war going on, and these persons were engaged in this war. The defendants had had no opportunity to reply to the statements made by Stanford in the affidavit just read.

De Villiers, C.J., said that if the statements in the declaration were true it was the most scandalous case he had ever heard.

Mr. Searle said the declaration showed how aggravated a case it was, and how impossible it was to go to trial without the defendants' evidence.

In reply to a question by the Court as to whether he would be ready to go to trial in May, Mr. Searle said that a post-

ponement until then was the most he could ask, and what evidence they could not then bring down they must have taken on commission before the trial.

Mr. Upington said the plaintiff was being very seriously injured as a consequence of these proceedings, which took place at a hotel in Cape Town. He had been deprived of a great many friends, and he had had no opportunity of putting his side of the case forward. The plaintiff alleged that the report of this thing had been spread far and wide.

De Villiers, C. J.: It is quite clear that should the case go to trial on the day fixed by the Court, the defendants will not be able to appear and give their evidence, and I think it would be a pity if a case like this was tried without their having an opportunity of doing so. Their evidence could be given on commission if they so wished, but I think that under the existing circumstances, the Court has no option but to postpone the trial. The case will therefore be postponed until the 7th of May next, with the clear understanding that it must come on on that day. If the defendants find they cannot come to Cape Town at that time they should make timeous application to this Court for a commission. The applicants must pay the costs of this application for postponement.

[Applicant's Attorneys, Fairbridge, Arderne and Lawton. Respondent's, Van Zyl and Buissinne.]

KIMBERLEY WATERWORKS CO., LTD., V. KIMBERLEY TOWN COUNCIL. 1902. Feb. 28th.

Appeal to Privy Council—Interlocutory judgment.

Where the High Court of Griqualand West had granted a perpetual interdict against the Town Council in favour of the company, which had only asked for a temporary interdict, and the Supreme Court had on appeal reversed the decision of the High Court,

Held, that as this was not a final judgment leave could not

be granted to appeal to the Privy Council.

This was an application by the Kimberley Waterworks Company for leave to appeal to the Privy Council against a decision of the Supreme Court given on February 7 in the matter of the appeal by the present respondents (the Kimberley Town Council) against a decision of the High Court of Griqualand. The High Court had granted the present applicants an interdict restraining the Town Council from proceeding with certain works for bringing into Kimberley a supply of water from the Vaal River, until the termination of a certain agreement between the Waterworks Company and the Town Council. Against this decision the Town Council appealed to the Supreme Court, which allowed the appeal.

Mr. Searle, K.C. (with whom was Mr. Upington), appeared for the applicants, and Mr. Buchanan appeared for the respondents.

Mr. Buchanan said he opposed the granting of leave to appeal to the Privy Council, on the ground that it was only an interlocutory, and not a final, judgment, and under the Charter of Justice it was only in a case of final judgment for a sum over £500 that leave would be given to make such an appeal.

Mr. Searle contended that the Court could grant leave, as the construction put upon the agreement in question was practically a final judgment. However he pointed out that all his clients wanted was a decision on this point, so that when they went to trial they could not be estopped on the ground that they ought to have appealed to the Privy Council.

Without calling upon Mr. Buchanan, the Court dismissed the application.

De Villiers, C.J.: I confess it is with considerable regret that I come to the conclusion that the decision is not final, and therefore cannot be appealed against. I say with regret, because it would have saved expense if there could have been an appeal on the judgment as it stands, but the Privy Council might look upon it as only interlocutory, and not give final judgment upon the case, but only upon the provisional question which was raised. I think, upon

the whole, this application should be refused. We must look at the nature of the suit before the High Court. There it was an application, not for a final interdict, but for an interdict pending an action; but the High Court went very much further than the parties asked for, and made it a practically final judgment. In order to decide this application, we must look at the application as it was made, and inasmuch as it was an application for an interdict pending an action, the parties had better institute an action, so as to have judgment in such a form that it may be appealable.

[Applicant's Attorneys, Van Zyl and Buissinne. Respondent's Attorneys, Scanlan and Syfret.]

BERRY V. BARRON. { 1902.
{ Feb. 28th.

**Ownership—Theft—*Rei vindictio*
—Damages.**

During the plaintiff's absence from the Colony, his cart, which he had entrusted to a livery stable keeper for safe custody, was stolen and given by the thief to an auctioneer for sale by public auction.

Held, that in the absence of negligent conduct on the plaintiff's part tending to mislead the public, the plaintiff was entitled to recover the cart or its value.

Held further, that the plaintiff was entitled to damages for the detention of the cart after the defendant knew that the plaintiff claimed it as the owner.

This was an action for the return of a certain cart or payment of its value, £70, and for the sum of £50 for damages and costs. The declaration stated that the plaintiff resided at Cape Town, and the defendant at Claremont; that in the month of June the plaintiff was the owner of a cart; that in the same month he left for England; that on returning in December he found that the cart had been appropriated, and removed from his possession; and that he found the cart in the possession of the defendant, who re-

fused to deliver it up, and wrongfully claimed the same. The defendant pleaded that in July he purchased the cart from one Hamilton, who had purchased the same at a public auction held by Messrs. G. C. Behr and Co.

Mr. Benjamin (with him Mr. Wilford) for plaintiff. Mr. Close for defendant.

Mr. Benjamin called

Michael Berry, who said that in June last year he left the Colony and went to England. Before he left he sold a business in Long-street to Messrs. Mills. The dogcart was stored in Messrs. Kannemeyer's stable. Witness left the key for unlocking the cap of the wheel with a man named Branskoff, who had been in his employ, and whom witness asked to keep an eye on the dogcart. In September witness returned, and found the vehicle gone. Witness had a man named Douglas in his employ before leaving. He never authorised Douglas to sell the cart. Witness had caused a warrant to be issued for the arrest of Douglas. The cart was now knocked about. Defendant was using the cart every day. It would cost about £20 or £25 to put the cart in the same condition as it was in when witness left.

Cross-examined by Mr. Close: Witness did not put a notice in the paper to the effect that his business had been taken over by Douglas.

George Branskoff said he was given the key by plaintiff. Douglas afterwards asked witness to give him the key, but witness refused. Afterwards he sent a messenger for the cart from the shop. Witness asked Douglas where the cart was, and the latter replied that it was none of his business. Witness afterwards found the cart in defendant's possession. He looked about for the cart a good deal before finding it.

Cross-examined by Mr. Close: Witness saw Douglas take the cart away. He did not inform the police.

Mr. Benjamin closed his case.

Mr. Close called

Alexander Barron, who said he bought the cart in July last year from Mr. Hamilton, who bought it at a sale held by Messrs. G. C. Behr and Co., at which witness was present. The cart, together with a horse and harness, was sold for £53. Witness bought vans with Mr. Berry's name on at this same sale. Witness gave Hamilton £20 and an old cart, for which he paid £12, in exchange for

the dogcart. The cart was not damaged. Witness had used the cart once or twice a week.

George Conrad Behr, auctioneer, gave evidence as to the sale of the cart. Witness was instructed to sell this and other carts bearing Berry's name. The cart was sold with a horse and harness for £53. That was a very fair price. The horse and harness were worth £25. Witness had seen the cart recently. It had not deteriorated beyond the ordinary wear and tear. It only wanted varnishing, and would cost about £3 or £4 to touch up. Douglas instructed witness's son to advertise these carts. He sold them as his (Douglas's).

Charles Percival Behr said he was instructed by Douglas to advertise the vehicles and horse and harness. Some of the vehicles had Berry's name on them. Witness thought £53 a good price.

Counsel were heard on the facts.

De Villiers, C.J. : There is no question in this case as to the *bona fides* of the defendant. He bought in perfect fairness, and there is no imputation upon him. Nor is there any allegation of negligence on the part of the plaintiff tending to mislead the defendant, and under these circumstances the law is clear that the true owner is entitled to follow up his property. The fact that the property was sold by public auction does not deprive the owner of the ownership unless he authorised the auctioneer to sell for him. There is no proof that there was any such authority in this case, or that Douglas was in any way authorised by the plaintiff to dispose of the cart. I should not have given any damages in this case at all if defendant had not detained the cart after he knew plaintiff was the owner. I think that for the use of the cart after he knew this he ought to pay some amount of damages, though not much. Now the cart is proved at the time of the sale to have been worth about £32, and the Court will therefore order the defendant to deliver the cart to the plaintiff, or to pay the plaintiff the sum of £32. The Court will further order the defendant to pay £5 for the use and occupation of the cart.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Silberbauer. Defendant's Attorneys, Scanlen, Syfret and Co.]

DE KOCK AND OTHERS V. } 1902.
FINCHAM. } Mar. 3rd.

Sale—Risk and Profits before transfer—Rents—Agent.

Where land is sold for cash on transfer and the purchaser is prepared from the date of the sale to pay cash, he is entitled, as against the vendor, to any rents received in respect of the intervening period between the date of sale and the date of transfer.

At the time of the sale of certain land, the purchaser appointed an agent to collect rents generally for him. The agent, who was also agent for the vendor, received rents from tenants of the property sold and, knowing that the rents for the period intervening between sale and transfer were claimed by the purchaser, paid the same to the vendor as being, in his opinion, entitled to the rents.

Held, affirming the judgment of the High Court of Griqualand West, that such payment was no defence to an action brought by the purchaser against the agent for the amount of rent received by him.

This was an appeal from a judgment of the High Court of Griqualand in an action in which the present respondent, plaintiff in the Court below, claimed:

1. The sum of £25 9s. 4d., being the amount due by defendants to plaintiff for rents collected by them as his agents, in respect of Erf No. 69, situate in Mafeking, the property of the plaintiff, from the 6th May to the 14th June, 1901, inclusive; or, alternatively,

A true and full account of such rents collected by them as the agents of the plaintiff, and payment of such amount as may be found due.

2. General relief, and

3. Costs of suit.

Plaintiff's declaration was as follows:

1. The plaintiff is a merchant residing at Vryburg, and the defendants are attorneys, practising in co-partnership under the style or firm of De Kock and Bolus, at Mafeking, in the Cape Colony.

2. On or about the 6th day of May, 1901, the plaintiff purchased a certain Erf No. 69, with the buildings and erections thereon, situate in the town of Mafeking aforesaid, from the defendants, who were then acting as agents for one Francis, the vendor of the said erf, one of the terms of the said sale being that the purchase price should be paid in cash by the plaintiff on delivery to him of the deed of transfer of the said erf.

3. The said buildings on the said erf were at the time of purchase let to the Salvation Army, one Elliston and one Cohen respectively.

4. On the 6th day of May, 1901, the plaintiff gave to the defendants his general power of attorney, under and by virtue of which they collected the rents of the said buildings from the said date.

5. Transfer of the said erf was registered at the Deeds Registry, Vryburg, on the 14th day of June, 1901, and on the 22nd day of June, 1901, the deed of transfer was delivered to plaintiff's agent at Mafeking aforesaid, and the purchase price was paid.

6. The defendants have accounted for the rents of the said buildings from the 14th day of June, 1901, whereas the plaintiff is entitled to the rents aforesaid from the 6th day of May, 1901, to the 14th day of June, 1901, amounting to £25 9s. 4d., which sum has been collected by the defendants for and on behalf of the plaintiff, but which they refuse to hand over to the plaintiff.

7. About the beginning of the month of July, 1901, the plaintiff cancelled his said power of attorney in favour of the defendants.

Wherefore the plaintiff claims:

(a) The sum of £25 9s. 4d., being rent from the 6th May to 14th June, 1901.

(b) Or, alternatively, a true and full account of such rents collected by the defendants as the agents of the plaintiff, and payment of such amount as may be found due.

(c) General relief.

(d) Costs of suit.

Defendants' plea was as follows:

1. The defendants disclaim all interest in the subject matter of this action, and deny all liability in respect thereof, and say that the said rents claimed by the plaintiff were collected for and paid to their disclosed principal, the said C. W. Francis, and that if the plaintiff has any right thereto (which the defendants do not admit), he should claim the said rents from the said C. W. Francis.

2. The defendants admit the allegations contained in paragraphs 1, 3, 5, and 7 of plaintiff's declaration.

3. As to paragraph 2 of the said declaration, the defendants do not admit that the terms of the said contract of sale are therein correctly or sufficiently set forth, and crave leave to refer to the same at the trial.

4. The defendants say that the plaintiff gave a limited general power of attorney to the defendants to collect rents due to the plaintiff in Mafeking. Save in so far as the above contains an admission, the defendants deny paragraph 4 of the said declaration.

5. As to paragraph 6 of the said declaration, the defendants deny that the plaintiff is entitled to the said rents arising between the said 6th day of May and the said 14th day of June, 1901, or that such rents were collected by them on behalf of the plaintiff.

6. The defendants further say that they were the duly appointed agents for the purpose of collecting rents in Mafeking, both of the plaintiff and of the said C. W. Francis, and that, having regard to the fact that it was one of the terms of the contract between the plaintiff and the said C. W. Francis that the purchase money should only be paid on transfer of the erf, the said defendants considered that the rents issuing from the said premises sold up to the date of payment of the purchase money belonged by law and right to the said C. W. Francis, for whom they accordingly collected the said rents, and to whom they have been handed over.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

In the Court below the following exception was taken to the plea: The plaintiff excepts to the defendants' plea on the ground that it is vague, embarrassing, and bad in law.

PLAINTIFF'S REPLICATION.

In case this Honourable Court shall not uphold the above exception, the plaintiff replies as follows:

The plaintiff joins issue with the defendants on their plea, except in so far as the said plea admits the allegations in plaintiff's declaration contained.

The exception was not pressed, and the following evidence was led:

Arthur William Fincham, sworn, states: I am the plaintiff, and am merchant at Vryburg. In April or May last I wished to acquire properties, and corresponded with my brother in Mafeking, and personally went to Mafeking, arriving there 4th May, and on 6th May I saw defendant, J. W. de Kock, in his office, and we had a conversation, in which I told him I was satisfied with what my brother had done, and that I would leave a cheque with my brother to pay him for the property (viz., the property of Francis). On the same day I gave J. W. de Kock a power of attorney (produced, No. 1). I also gave De Kock verbal instructions to collect and receive all my rents in Mafeking, and to allow him commission therefor. I owned other properties there besides the property I was then acquiring from Francis. I was aware from my brother that it was part of the contract that I was to pay for certain building alterations which were being done under contract between Francis and certain building contractors. I then returned to Cape Town, and in July wrote to De Kock for statement of rents to 30th June. De Kock allowed me no rent from my newly-acquired property before 14th June, but he accounted for the other rents from May 1. The amount of rent due from 6th May to 14th June for the newly-acquired property would be £25 9s. 4d., according to account put in, No. 4. I wrote 13th July, No. 5. Subsequently I put the matter in the hands of Minchin and Sonnenberg, and on 23rd July, 1901, they wrote to defendants, No. 6, put in. Later Minchin and Sonnenberg would not act in the matter, and through Rosenblatt I instructed Haarhoff and Hertog as my attorneys, and they on 9th August wrote No. 7. On 24th August Haarhoff and Hertog, received from Duncan and Brown, No. 8, and reply same date, No. 9, was sent.

Cross-examined: As far as I know, no money was paid on behalf of the contract

to the builders who were working on the property before 14th June, when I got transfer.

Alfred Ernest Fincham, sworn, states: I am brother of plaintiff, and carry on business as a merchant at Mafeking. About the end of April I was looking out for property for plaintiff, and saw Mr. J. W. de Kock, who told me he had Erf 69 (Francis's property) for sale. After some bargaining offers on my part, which I knew defendant De Kock submitted to his principal, Francis, in Graham's Town, and which were refused by the latter, I eventually offered on behalf of plaintiff £1,500, and to take over the building contract of £200, those being the terms which I knew Francis had insisted on, as I had seen his instructions to De Kock on the matter, and De Kock on behalf of Francis accepted. De Kock had told me that the property was bringing in £20 a month rent. This was while we were bargaining about the price. When De Kock closed with my offer, he said, "I will go on paying the contractors so as not to complicate matters, and you can settle with me afterwards in a lump sum," and I agreed to that course being pursued. On 5th May I accompanied my brother to De Kock's office. I have heard his evidence, and agree that it is correct. A day or two later plaintiff left for Cape Town. On his behalf I made a declaration of purchaser, and produce a certified copy, No. 10. On one occasion De Kock asked me to inspect the building work, to see if I was satisfied, and I did so. That was in July, I think, after I had given the cheque. On 22nd of June De Kock handed me the title deeds of the property duly transferred to plaintiff, and I handed him the cheque for the purchase price. I had had the cheque signed, but with the amount not filled in. Ever since 6th May; I was ready to pay on delivery of transfer. In July I received a communication from plaintiff about the rents, and I went to see De Kock. This was about 16th July. I then asked him about the rents between 6th May and 14th June. De Kock said he would not hand those over to plaintiff, as in justice to Francis he should have either the rents or bank rate of interest on the £1,500, which he agreed to accept in lieu of the rent, which he would then hand over to plaintiff. This offer I communicated to plaintiff, who declined to pay the interest,

and insisted on having the rents as well. Next day, acting on plaintiff's instructions, I went to De Kock and demanded the plaintiff's papers, and De Kock handed them over to me, including the power of attorney cancelled.

Cross-examined: I knew Francis was De Kock's principal, and he showed me the telegrams to and from Francis. Telegrams Nos. 11 and 12 put in. These I saw. When plaintiff was instructing De Kock to collect his rents, no special mention was made about rents of No. 69 Erf.

I did express my own opinion, when De Kock offered to pay over rents if I paid bank rates of interest on the £1,500, that his proposal seemed reasonable, and that it seemed to me that Francis should have one or the other.

FOR THE DEFENCE.

John William de Kock, sworn, states: I am an attorney at Mafeking, and a member of defendant firm. I have held power of attorney from Francis since 29th March, 1898. It is still in force. During all that time and until 14th June last, when it was transferred to plaintiff, Francis has been the registered owner of Erf 69, which is a freehold property, and I have collected his rents and accounted to him for them. The rents accrued from buildings upon the erf, which were let to various tenants. At the time of the contract nothing was said about the rents or who was entitled to them. Fincham paid nothing on Crause's building contract before 14th June. I advanced the money in dribblets on architect's certificates, and if the purchase had not been completed I should have charged these against Francis. As it was completed, I charged and was paid by Fincham, according to the terms of the contract.

On 6th May, when plaintiff gave me his power of attorney, I understood I was to be his general agent, and he gave me instructions as to two of his properties, but he did not mention Erf 69, but I assume that was only because I knew all about it. I continued to receive the rents on Erf 69 after May 6, and until the power of attorney was cancelled by plaintiff in July.

Cross-examined: When I was expending the moneys on the contract I expected to be repaid eventually by Fincham, and charged the amounts against him in my

books. I made up Francis's account on about 2nd July, and, as he then came up to Mafeking, he did not draw the money till 1st August. On 2nd or 3rd June I did receive some rents, which I credited to plaintiff at first in my books, as I did not know the exact date when transfer would be passed. I always looked upon the matter as one for adjustment between plaintiff and Francis when the exact date of transfer was known. The greater portion of the rents in question I received after registration, and I then apportioned the whole between the parties.

Case closed.

Hopley, J.: In April last the plaintiff, who was then in Cape Town, instructed his brother, Mr. Alfred Fincham, of Mafeking, to try and purchase immovable property in that town for him. At that time Mr. J. W. de Kock, a member of the defendant firm, was managing certain property, to wit, the freehold Erf No. 69, in Mafeking, for Mr. Francis, a resident of Graham's Town, by virtue of a general power of attorney given to him in 1898 by Francis, and which is still of full force. That property was then being repaired under a contract with a builder named Crause, who had contracted to repair the buildings on the said erf for £200. Those buildings were in the occupation of certain tenants, who were paying rent to De Kock for Francis, and Francis was willing to dispose of the property. Negotiations were entered into between Alfred Fincham and De Kock, on behalf of their respective principals, with the result that they came to terms about the beginning of May, and the plaintiff was informed that he might purchase the property if he wished for £1,500, provided he took over as well the building contract with Crause. Thereupon the plaintiff proceeded to Mafeking, and, after an interview with his brother, saw De Kock, with whom, on the 6th of May, he closed the transaction. There is no dispute as to the terms of the bargain, which were that plaintiff bought the said erf for the sum of £1,500, which he was to pay in cash upon getting transfer, and he also took over Francis's liabilities in regard to the contract with Crause. Nothing was said as to the date by which transfer was to be given, but there is no doubt that it was understood that it should be done forthwith, because plain-

tiff left his cheque signed (but blank as to the amount) with his brother to effect payment on transfer, and of this fact he informed De Kock. On the 6th May De Kock informed Francis by telegram that he had sold the property in question, and on the same day plaintiff gave a general power of attorney to the defendant firm, under which they were to manage his affairs, and, *inter alia*, to collect and receive all rents due to him, at Mafeking, where he already owned other house property. The plaintiff then returned to Cape Town, and Mr. J. W. de Kock collected his rents on the other properties, and also the rents accruing from Erf No. 69. There seems to have been some delay in getting the transfer passed, but that formality was duly effected on the 14th of June, and on the 22nd of June the deeds of transfer were handed to Mr. Alfred Fincham, who thereupon filled in the plaintiff's cheque and handed it in payment to Mr. De Kock on behalf of Francis. The points in dispute between the parties are whether or no plaintiff is entitled to the rents paid to De Kock by the tenants of the said buildings on Erf 69 for the period between the 6th of May and the 14th of June, and, secondly, if he should be entitled to them, whether the Defendants, who have paid the amounts over to Francis, are the proper persons to be sued in the matter. It is clear that Mr. J. W. De Kock acted as the plaintiff's agent under the power of attorney given to his firm from the 6th of May until about the 14th July, when he handed back the said power, cancelled, to Mr. Alfred Fincham who on that date had an interview with him on behalf of the plaintiff—a difference of opinion having arisen between the plaintiff and the defendants as regards the said rents, which Mr. De Kock in his capacity as the general agent for Francis had apportioned to the latter. Mr. De Kock no doubt acted perfectly *bona fide*, and he defends his action on the ground that as the property was not transferred to the plaintiff until the 14th of June, Francis, and not the plaintiff, was entitled to the rents until that date. Now the contract of sale was concluded on the 6th of May and the effect of that was to pass all the risks and benefits attending the ownership of the property from the seller to the buyer. Voet (18.1.3) says "when a definite understanding has been arrived at with respect to the thing to

be sold, and the price, nothing more is requisite to the completeness of the contract neither words nor delivery nor writing" At 18.6.1 he lays down "as a general rule all risk concerns the purchaser as soon as the contract has been completed by mutual consent, even if the property has not yet been delivered or the price paid: for the price would have to be paid by the purchaser even after the destruction of the property. For though in general the maxim holds that the owner bears the loss (*res perit domino*) and the ownership does not pass out of the vendor before delivery, yet none the less on that account does the risk concern the purchaser before delivery; first, because to him accrues also all the advantages derivable from the property; secondly, because immediately from the completion of the contract the vendor becomes the debtor of a specific thing and it has been held that such debtor is discharged by the destruction of the thing. . . . [See also *Grotius, Int. to Dutch Jurisprudence*, 3.14.34; *Van Leeuwen's Roman Dutch Law*, ch. 17, secs. 1 and 2, with Mr. Justice Kotzé's notes (b) and (d), and *Van der Keessel*, Th. 639.] It was however contended in argument in this case that as there had been no transfer *coram lege loci* in the Deeds Registry at Vryburg before the 14th of June the property remained vested in the seller, together with all the risks and benefits arising therefrom, and the leading case of *Harris v. Trustees of Buissonne* was cited as bearing on the point. It seems to me that Voet (18.6.6) disposes of this contention. Referring to the following passage from *Groenewegen*—"De immobilium autem alienatione hodie dubium est ex Caroli Quinti Constitutione irritante omnem immobilium alienationem quorum traditio rite facta non est. Verum enimvero cum ex proœmio ejusdem constitutionis manifestum sit, hoc ita non in universum, sed tantummodo in creditorum gratiam cautum esse: scilicet ne hi clandestina aliqua traditione hypothecæ vel alio jure frustrentur: ita ut in re duobus vendita et uni privatim alteri publice tradita, is præferri debet cui coram lege loci rite tradita est, ideo non obstante Carolina Constitutione jus civile in universum illorum mansisse, adeoque et hodie rei immobilis venditæ periculum etiam ante traditionem ad emptorem pertinere censeo, atque ita in

Hollandie Curia judicatum intellexi" (Inst. 3.24, sec. 3) he approves of his reasoning, and adds—"For though under the constitution of Charles V. the sale of immovable property is not held to be valid unless there has been a formal conveyance in accordance with the local law, yet no change has been made with respect to the risk. For by the Civil Law also no right of ownership passed to the purchaser otherwise than by delivery following a completed contract of sale yet, none the less on that account, was the risk considered to have passed to the purchaser immediately upon the signification of the mutual consent. Since, therefore, the only change introduced by the modern practice relates to the mode of delivery, that is to the transfer of the ownership of the immovable property, and the transfer of the risk does not depend upon the transfer of the ownership, there is no reason why a change in the form of the one should involve a change in the other, especially if it be remembered that the formal transfer according to the local law was not invented for the sake of the actual contracting parties, the buyer and the seller to wit, but rather for the benefit and security of the creditors of the seller . . . ; and moreover, that as regards the buyer and the seller there is nothing to prevent the seller even now from divesting himself of his right of ownership previous to that formal transfer by virtue of a *constitutum possessorium* or by some other method." Two interesting decisions on the point are cited from *Neostodius* by these authors and other writers on the point. Decision 32 of the Court of Holland, Zeeland and Friesland, after setting forth the ordinary rule of law that the risk passes on completion of the contract to the purchaser, and quoting the terms of Charles V.'s *Placaat*, which declared all sales, burdens and alienations and mortgages of immovable property to be worthless, null and void unless made *coram lege loci*, proceeds to state the case that arose, viz., that A. sold certain lands and houses to B., who received the use thereof and fruits but did not get transfer *coram lege loci*. Before this was obtained the house was burnt and the lands flooded, and the question arose which of the two was to bear the loss. *Schorer*, in his note 366 on *Grotius* 3.14.34, says that the Court decided that

the risk was the seller's (see *Maasdorp's Translation of Grotius* with *Schorer's* notes), but, on looking at the decision itself, I cannot find that any conclusion was come to. The report sets forth the two contending views and concludes "*sed opinioniones variae, neque aliquid decisum*," and in a note the author adds: "Bij den Hoogen Raadt is verscheijden malen verstaan dat dit Placaat alleen plaatze heeft, ten regarde van derde personen, die andersints soudén mogen bedrogen ende verkort werden, ende niet ten opsigte van de contrahanten selve." . . . The other decision, No. 70, of the Supreme Court of Holland, Zeeland and Friesland, was given in a case in which the seller, after divesting himself by deed of sale of possession which he ceded and gave over to the purchaser, and after ordering his tenant for the future to pay rent to the purchaser, and giving an irrevocable power of attorney to an agent to pass formal transfer changed his mind before formal transfer had been effected, withdrew his mandate and ordered his tenant to pay rent only to himself; whereupon the purchaser sought relief from the Court and claimed an interdict. The seller relied upon the *Placaat of Charles V.*, and denied that the plaintiff was in legal occupation or possession of the property. But the Court gave judgment for purchaser on the ground that the seller had divested himself of possession and so had not title at all against the purchaser. The Court held that the seller could not protect himself by the terms of the Edict, as it was made only for the protection of his creditors, but that it did not otherwise prevent him from divesting himself of his rights either by means of a *Constitutum Possessorium* or of any other kind of transfer. In the present case Mr. Stratford, for the defendants, relied upon the latter portion of *Voet* (18.6.6) which deals with special customs in certain Belgian towns to the effect that, if a sale of immovable property, especially house property, took place in mid-winter and the sale were subject to the customary condition that formal transfer should not be given until the following May, the better opinion was that until such transfer the risk remained with the seller since it was on his account and for his benefit that transfer was postponed. It seems in those sales to have been specially

understood that all emoluments, fruits, rents, etc., should, until formal transfer in the summer, accrue for the benefit of the seller, and consequently, as *Fest* shows, it was equitable that he should in the meantime bear risks and losses. He then goes on to state that the seller, being responsible for delay, would on general principles be liable only for such accidents and damages as would not have happened to the property if it had been transferred to the purchaser forthwith, but that, this having been found an inconvenient principle as applied to immovable property a more simple rule has been established in the sale of houses, viz., that the purchaser ran no risks at all and that the seller took every kind of risk until the day fixed by the clear agreement for the formal transfer. Mr. Stratford argued that that was the general rule, and that consequently in the present case the contract having been "cash against transfer," no risks passed to, and no benefits could be claimed by, the plaintiff until the day when transfer was effected, and the cash became due. I am, however, convinced that *Fest* is in that portion of the section dealing only with the case of this special custom which carried with it the special rule as to the risks. That seems to be quite clear from the terms of the section of the same *Title of Fest*, in which he is discussing the general law, and where he says: "But forasmuch as it is in accordance with natural equity that the advantages derivable from any thing should accrue to him who has to bear the disadvantages thereof, therefore any benefit arising from a thing sold, after the completion of the sale belongs to the purchaser even if it should fall in before transfer." He instances fruits ungathered at the moment of the completion of the sale and he adds "and as for *fructus civiles*, i.e., payment due from persons who have hired the property sold from the vendor; if they are in respect of property the use of which is being enjoyed at every moment such as house property, or beasts of burden, it seems that they should be divided between the seller and the purchaser according to the time when they became due, passing to the purchaser so far as they became due after the completion of the contract."

As regards immovable property the point of time when the risk and benefits

pass from the seller to the purchaser seems never to have been decided in this colony between the immediate contracting parties, though as regards movables there have been several cases, of which the case of *Terrington v. Simpson*, 2 *Mens.*, 110, is instructive. In that case a ship had been bought by the defendant and was wrecked before the bills of exchange drawn by the defendant in consideration of the purchase in favour of the vendor, the plaintiff, fell due and before any registration of the ship in the name of the purchaser had been effected as required by law. When sued on the bills at maturity the defendant set up the plea that the property in the ship had not passed to him owing to the non-registration thereof in his name and that consequently the risk remained with the seller, and that he consequently had received no consideration for the bill sued upon, but the Court held that the risk had passed to the defendant upon completion of the contract. It appears, then, that, in the present case, the risks and benefits arising from the ownership of the erf in question passed from Francis to the plaintiff upon the conclusion of the contract of sale on the 6th of May and that he was entitled to all rents from the property in question from that date. But, even admitting this the defendants contend that they were merely agents for Francis, and that he and not they should be sued, the fact of their being merely agents having been disclosed. Now, in the first place, the defendant firm did not hold Francis's power of attorney, but only one of the members of that firm; and in the next place the plaintiff is not suing the defendants as agents for Francis, but as his own agents, who received moneys which they should have paid to him and which they have taken upon themselves to pay away to a third party. It is clear that, after the 6th May, plaintiff was entitled to demand and receive from De Kock, acting for Francis, cession of the right of action for the rent if any of the tenants had refused to pay. The tenants however paid willingly, and when the money came into De Kock's hands he should have held it for the plaintiff and paid it over to no one else. It appears to me, therefore, that there must be judgment for the plaintiff for the rents accruing between 6th May and 14th June, received by De Kock as a member of the defendant firm. The amount it is ad-

mitted is £25 9s. 4d., for which sum there must be judgment for the plaintiff with costs.

From this judgment the defendant now appealed.

Mr. H. Jones (with him Mr. Benjamin) for the appellants: The question is, "was plaintiff entitled to rent from May 6th to the 14th June. I submit that in this case risk and profits are the same as in case of sale (*Voet*, 18.6.1 and 18.6.9), *Loenius* (*Decis* 34). As regards Roman Dutch Law, *Voet*, *Grotius* and *Van Leeuwen* all lay down that on a contract of sale being completed the risk falls to the purchaser. *Voet* says that this is the general rule, but that there are exceptions. No case has ever been decided in this Court as to immovable property. *Taylor v. Mackie, Dunn and Co.* (*Buch.*, 1879, 166) *Taylor and Poppe, Schunoff and Guttery* (*Buch.*, 1879, 191), and other cases, which I need not now refer to, all refer to moveables. It is true that the Roman Dutch authorities say that the same rule applies to both movable and immovable property, but our own customs have changed since this law was established.

[De Villiers, C.J.: I suppose you admit that after the purchase, the purchaser and not the seller has to insure the goods?]

[Buchanan, J.: If the risk falls to the purchaser, then surely the profits must do so?]

But let us suppose that the buildings were burnt down after the sale but before the transfer?

[De Villiers, C.J.: The purchaser might, of course, make a special contract that the vendor should be responsible.]

See reasons of *Hopley, J.*, *supra*; also *Loenius* (*Decis* 34). On the completion of the sale, the risk passes to the purchaser. He, however, draws the distinction that if a written document is required in order to complete transfer, the property does not pass until such written document is completed. Thus no sale of immovable property is complete without transfer.

[De Villiers, C.J.: Surely a sale is complete without transfer?]

The authorities are not agreed as to immovable property (*Voet*, 18.6.6).

[De Villiers, C.J.: Is it not clear that the seller was to have his cheque on transfer?]

No, the seller was entitled to keep the property in his own name till he passed transfer. This sale was under the usual agreement, viz., that the seller should pass transfer against payment by buyer. Surely, then, the buyer ought to account to the seller for *ad interim* profits?

[Maasdorp, J.: Would not the purchaser have the right to profits before transfer was passed? It is a very common practice for people to get possession of property before transfer is passed.]

The interest on £1,500 should be set off against the rents. It is both legal and equitable that this should be done. There can be no doubt as to the equity of the matter. He who pays interest should receive rents.

Mr. Searle, K.C. (for respondent): As to the first point raised for the appellants, the question of agency has not been raised on the pleadings. Messrs. De Kock and Bolus knew perfectly well the position that plaintiffs were taking up as to the rents.

[De Villiers, C.J.: If an agent receives money, is he not bound to account for such money received?]

This firm was the agent for plaintiff and one of the partners was agent for the defendant. An agent is bound by the acts of his principal if he knows the whole circumstances of the case.

[De Villiers, C.J.: The agent of defendant was justified in paying over money to his principal even though his firm were agents for plaintiff?]

I cannot admit that.

[Buchanan, J.: Your strong point is that De Kock was your agent and received rents in your name?]

If an agent receives rent for both parties he does so at his own risk, and cannot escape from the position in which he has placed himself by offering to pay money into Court. (See *Fincham's* evidence in the Court below.) Then, again, the only circumstance which could disentitle the purchaser to receive the rents would be the fact that he was *in mora*.

[De Villiers, C.J.: The only point is, who is *in mora*, as it takes time to get transfer passed in the Deeds Office.]

The vendor takes the first step in the making of the transfer, hence any delay in the whole transaction is his *mora*. I fully admit that.

Mr. H. Jones (in reply): The original summons shows that this case is not one

of agency. As to the time of transfer, it must be remembered that the one party was at Mafeking and the other at Vryburg. As to the delay, the sale legally took place when it was registered in the Deeds Office. With regard to the amount in dispute, appellants are willing to set off rent received against debts due to them.

De Villiers, C.J.: I fully concur with the judgment of Mr. Justice Hopley, and with the reasons upon which it is founded. Under the Roman law it was clearly established that the risk, as well as the benefit, of a thing sold and not delivered passes to the purchaser. The Dutch law adopted the same rule in regard, at all events, to movable property; but for some time there was doubt as to immovable property. The better opinion, however, was that the same rule applied to immovable property, that the rents produced by immovable property are in the same position as other profits, and that such profits pass to the purchaser, notwithstanding that by the law of Holland, which differs in this respect from the Roman law, registration of property was necessary before the property passed. So that, if this were a case between the plaintiff and Francis, the vendor of the property, no doubt plaintiff would be entitled to recover rents from the time that this property was sold until the time when transfer was passed. Francis might possibly have had a counter-claim for interest—possibly; but this is a point not now to be decided—for the time which necessarily passed before transfer could be given; but unfortunately this point was not raised, and no evidence was given as to the practice relating to registration at Vryburg, and as to what time would have elapsed before transfer could be passed. Probably not more than a week or two would be necessary in which to pass transfer, and if Francis had claimed, the amount would most likely be not more than £2 or £3. That question, however, does not arise. The only point upon which I have had any doubt is as to the liability of the defendants, who were employed as agents by the plaintiff, one of the partners being also agent to Francis. It seems that the matter of the collection of the rents had been left in the hands of De Kock, who was acting both for plaintiff and for Francis, and if it was known to De Kock that the amount was claimed

by plaintiff, I think he was wrong in paying this amount to Francis. On this point, I think that a paragraph in the evidence of Fincham, the plaintiff's brother, fairly establishes knowledge on the part of the defendants before the money was paid. "In July," says this witness, "I received a communication from plaintiff about the rents, and I went to see De Kock. This was about 16th July. I then asked him about the rents between 6th May and 14th June. De Kock said he would not hand these over to plaintiff, as in justice to Francis he should have either the rents or the bank rate of interest on the £1,500, which he agreed to accept in lieu of the rent, which he would then hand over to plaintiff. This offer I communicated to plaintiff, who declined to pay the interest, and insisted on having the rents as well." From this I think it may fairly be held that the money had not been paid to Francis. Then defendant, in the concluding portion of his evidence, says: "On the 2nd or 3rd of June I did receive some rents, which I credited to plaintiff at first in my books, as I did not know the exact date when transfer would be passed. I always looked upon the matter as one for adjustment between plaintiff and Francis when the exact date of transfer was known. The greater portion of the rents in question I received after registration, and I then apportioned the whole between the parties." Now, De Kock might have protected himself by offering to deposit the money with the Registrar of the Court or with a bank, pending the decision as to who was entitled to it, but he took it upon himself to protect the one principal in preference to the other principal, and when it was determined by the Court that the plaintiff is the man entitled to receive the money, I think the agent is not freed from his liability to pay the money to the plaintiff on the ground that he has paid the money to Francis. For these reasons I am of opinion that the appeal should be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys: Messrs. Finlay and Tait; Respondent's Attorneys: Messrs. Fairbridge, Arderne and Lawton.]

GAY V. GAY.

{ 1902.
Mar. 3rd.

This was an action instituted by Thomas Gay, of Port Elizabeth, against his wife for restitution of conjugal rights, failing which for divorce, with custody of the minor child of the marriage, and forfeiture of benefits.

Mr. Benjamin appeared for the applicant.

Thomas Gay said he was married in London on the 8th June, 1896, to the defendant. They lived in London for 18 months, and witness then came out to Cape Town as a chef. He sent money to his wife to enable her to come out, and she came out with a friend. There were quarrels, witness objecting to his wife being absent from home when he came home from work. One day witness went home, and found a letter on the table, in which defendant stated that he was going away, and he would not see her again. She also stated that she was going to get employment up-country, and intended, when she had enough money, to return to England. That was over three years ago. He had not been able to discover her whereabouts.

An order for restitution was granted, defendant to return to or receive plaintiff on or before May 15, failing which to show cause why a decree of divorce should not be granted as prayed, the rule to be published in the same manner as ordered with regard to the citation, and plaintiff to write to defendant's father by registered letter offering to pay defendant the sum of £20 for expenses of the voyage to the Cape.

NAUDE'S EXECUTOR V. MARITZ AND OTHERS. { 1902.
Mar. 3rd.
" 8th.

Insolvency—Proof of Debt—
Prescription—Judicial Interpellation.

A debt barred by prescription cannot be proved against an insolvent estate.

The sequestration of a debtor's estate does not prevent prescription from running in respect of debts which have not been proved.

Proof of debt by a creditor has the full effect of a judicial interpellation.

This was an application to have certain proofs of debt filed by D. P. Maritz, of Johannesburg, and W. A. Hall, trading as Hall and Co., of Worcester, disallowed on the ground that the debt sought to be proved by the first creditor was prescribed by law, being over eight years old, and also the promissory note itself should have been produced in respect of which the debt was alleged to be due. The claim of the second creditor was also objected to by the trustee on similar grounds.

The affidavit of Daniel Philippus Maritz, of Laingsburg, a sheep and cattle farmer, stated that the late Naude was a farmer and sheepbuyer, residing near Worcester. About the middle of 1883, deponent had sold to the said Naude certain sheep and goats for £62, for which Naude gave a promissory note payable on demand. Deponent demanded payment but Naude failed to respond to his demand, and thereafter surrendered his estate as insolvent. Deponent having been informed that there were not sufficient assets in the said insolvent estate to cover expenses of sequestration, did not prove his claim. Deponent further stated that he had lost or mislaid the aforesaid promissory note.

The affidavit of William Asworth Hall, of Worcester, general dealer, stated that previous to 1881 he had carried on business in partnership with his father, who died in the said year. The father's estate, however, remained in the partnership until 1899, when the said partnership was dissolved, and deponent took over the entire business of the firm, including all outstanding debts and liabilities. In 1881, the late J. S. Naude had purchased goods from the firm to the value of £85 5s. Deponent took over this debt, but did not prove his claim on the insolvent estate of the late J. S. Naude, as he was informed that there were not sufficient assets in the estate to cover the legal expenses of surrender. Deponent had lost, or mislaid, the late Naude's promissory note for £85 5s.

From the affidavit of Frederick Lindenberg, executor dative of the estate of the late Naude, it appeared that certain landed property of the deceased had not been

brought up in his schedules, and it being thus left undisposed of, the said executor applied to the Supreme Court on October 12, 1900, for the rehabilitation of the estate. The Court refused this application, but made an order authorising the Master of the Court to assist deponent, in his capacity as executor, in passing transfer of the landed property. This was done. The property was realised, and a distribution account was lodged in due course. The Master, however, refused to pass this account pending the result of certain legal proceedings. On October 12, 1901, the Court was moved on behalf of certain of the respondents for an order authorising the Master to convene meetings of creditors in the insolvent estate of the late J. S. Naude, and a special meeting was held before the Resident Magistrate of Worcester on November 12, 1901. At that meeting the two first-named respondents filed proofs of debt to which the above-mentioned exceptions were taken, viz.:

(a) The insufficiency of the evidence and vouchers produced.

(b) Their being barred by prescription.

Applicants now asked the Court to disallow these proofs of debt on the aforesaid grounds.

Mr. Searle, K.C. (for applicant): The respondents are the only creditors who came forward. We say that the evidence as to these debts was unsatisfactory, and that the said debts had been prescribed. The executors filed their account and made distribution in accordance therewith. These accounts the Master refused to pass, notwithstanding the fact that he considered the debt had been prescribed. Still, the insolvent brought up this debt in his schedule. On November 14, 1883, Naude surrendered his estate. No creditors claimed, and no meeting was held. During the year 1900, Lindenberg was appointed trustee and the piece of ground said to belong to Naude's estate was found to be in a derelict condition. The whole question is, "Have the creditors any claim on this ground?" If the creditors had proved, they would have had a claim. *Re Estate Parker* (9 Sheil, 564) where see judgment of De Villiers, C.J. In this case the claims were not proved, and this fact raises quite a new point which has never (as far as I know) been decided in this colony. There are many English cases founded on the Statute of

James I., and we must also consider whether a proof of debt is not a "suit or action" within the meaning of Act 6 of 1861 of our own Statute Law. If we interpret that enactment by English cases the answer must be in the affirmative (*Robertson on Bankers' Law*, 243). All authorities say that if a debt is not barred at the date of insolvency it cannot thereafter be prescribed. The fact of insolvency keeps the debt alive. *Ex parte Durdney* (15 Veysey, 479) is a leading case on this point. See particularly the judgment of Eldon, L.C. (495).

[Maasdorp, J.: Do I understand you to say that these debts were prescribed?]

The note had not been prescribed up to the date of insolvency. I admit that I was wrong in saying that it had run to the date of insolvency.

[De Villiers, C.J.: In the case you cited had prescription run before insolvency?]

Yes, it must have done so.

[De Villiers, C.J.: In Roman Dutch law, prescription ceases during the time that a party cannot be sued.]

Yes, there is *Executors Meyer v. Gericke* (Foord, 14) in support of this view. *Roffey ex parte* (2 Rose, 245).

[De Villiers, C.J.: That is all against you.]

Yes, but I cite these cases because the question has been introduced. Looking to the wording of our own Statute Law the respondents are barred. The fact of insolvency cannot put a creditor in a better position than he would otherwise occupy.

[Maasdorp, J.: In case of insolvency the estate vests in the trustee for the benefit of the creditors.]

For the benefit of such creditors as have proved in the estate. We cannot go behind the Insolvent Ordinance. See *Re Estate Parker* (9 Sheil, 564). I submit it is against public policy that an applicant should be allowed to come in and prefer his claim at any time.

Mr. Currey (for respondents): Our claim is based on sec. 37 of the Insolvent Ordinance. Under this section two meetings had been called, and at neither of these did the holders of the promissory notes prove their claims. Now, applicants wish to contend that sec. 37 of the Insolvency Ordinance is over-ridden by Act 6 of 1861. See judgment of Malins, V.C., in *Eccles Com. v. N.E. Rail Co.* (4

"I, Arthur Joseph Annison, do will as follows: To my affiance (*sic*) Alice Gertrude Baker, of Humansdorp, £500. To my mother, Mrs. Annison, 126, South Birkbeck-road, Leytonstone, Essex, England, my life assurance in the City of Glasgow Company, and £200. After paying all debts, the balance to be divided between my two brothers, James, Bert, and my sister Alice.

(Signed)

A. J. ANNISON.

Touw's River, Sept. 5, 1901.

ENDORSEMENT.

Cash with A. Baldie, of Port

Elizabeth, about	...	...	£900	0	0
Braybrooke and Co., about	...	...	200	0	0
Insurance policy	...	...	300	0	0

The Master of the Supreme Court had granted letters of administration in petitioner's favour, being of opinion that the will was valid, but on December 13, 1901, had written to petitioner's Attorney to the effect that it would be the duty of the executor—when appointed—in the interests of those concerned to apply to the Supreme Court to have the will declared.

Petitioner now prayed that the document above set forth might be declared to be the last will and testament of the said Annison, and that the costs of the application might be borne by the estate.

The affidavit of I. A. B. Downing, of Port Elizabeth, at present serving in the P.A.G. Mounted Infantry, testified to the making of the above document in pencil by Annison, and to having found it, in the same envelope after Annison's death, in the flap of Annison's despatch-book, in which he (deponent) has seen Annison place it.

Mr. H. Jones (for applicants): The Courts both in England and in this country have upheld military wills of this character. There was a case not very long ago—*Van Zyl and Buissinne*, ex parte. (11 Sheil, 765.)

The Court granted the application in terms of the petition.

THE EDISON-BELL PHONO-
GRAPH CO., LTD., V. W. } 1902.
F. BRITAIN AND CO. } Mar. 4th.

Patent Rights—Phonographs.

*Where an interdict was prayed
restraining the respondents*

from selling or dealing in certain phonographs and their accessories.

Held, that as the affidavit of applicant did not disclose in what way the instruments sold by respondents infringed his patent rights, and as no specimens of the phonographs in dispute had been submitted to the Court, the evidence in applicant's favour was too weak to justify the Court in granting the interdict aforesaid. The Court, however, directed that respondents should keep an account of all sales of the goods in question effected by them.

This was an application for an interdict to restrain respondents from infringing certain patent rights in respect of phonographs.

The matter had previously been before the Court on December 5, 1901, when it was ordered to stand over to January 13, 1902, respondent undertaking meanwhile not to sell any machines objected to. From January 13, the hearing of the application had been postponed to the present date.

The affidavit of the applicant (Denis Doyle), sole agent of the Edison Bell Phonograph Co., Ltd., in South Africa, stated that respondent had been selling and dealing in instruments which infringed on the Colonial Patents assigned by due registration to the Edison Bell Company, and originally taken out in this colony by Thomas Alva Bell.

The affidavit proceeded to enter into a minute description of the various parts of these instruments from which it appeared that the violation of patent rights complained of consisted in the use by respondent in his instruments of "a recorder or reproducer (of sound), consisting of a diaphragm composed of glass, or porcelain, and the manufacture of a phonogram blank, or surface to receive the record, composed of an insoluble soap, or of a mixture in which soap was the principal ingredient.

Respondents' defence was that they were acting as agents for the Columbia

Phonograph Company, of Broadway, New York, and that they had sold the articles in question under a written guarantee from the said Columbia Company, that they were not thereby infringing any patent. Respondent undertook by letter, dated July 10, 1901, to desist from dealing in such articles pending advices from the Phonograph Company.

Mr. Upington, for applicants; Mr. Searle, K.C., for respondents.

Mr. Upington: These patents which we have taken out stand to-day, and there is strong evidence to show the patent of the Edison-Bell Company has been infringed, and on the other side they only produce the evidence of an expert to prove that our patent had not sufficient originality. They admit our patent, but deny that our invention was patentable. We have three separate patents, all of which affect the most essential parts of the machine. As to the glass diaphragm, there are many patents of good diaphragms for transmitting sound. The respondent does not deny having infringed certain patents.

[De Villiers, C.J.: They say that these inventions patented were really matters of common knowledge.]

But they bring no evidence to prove that allegation, save the evidence of one expert.

[De Villiers, C.J.: We cannot decide this case without seeing the instruments in question.]

That is what I feel. I submit that the Court cannot decide a question affecting the validity of several patents, on the evidence of one expert. But even if the Court does not think fit to go into the whole question of the rival machines and of patents, Mr. Brittain has not put in any affidavit to show that any patent rights of his firm have been infringed by us. If the Court will not grant a perpetual interdict, I would ask for a temporary interdict to stand until we have time to institute an action. We say that our patents are good, and nothing has been shown to the contrary. The object of a patent is the protection of the rights of inventors, and this protection is all we ask.

Mr. Searle, K.C. (for respondents): This application should not have been made on motion. There is no example in this Court of any similar application on such meagre affidavits. All the respondents say is that certain features of

our invention are not patentable. In a matter of this kind where only a few machines have been imported into this country the Court will not interfere. Applicant should produce some technical evidence to show that his patent has been infringed.

Mr. Doyle does not profess to be an expert. I submit applicants should be put on terms to go to trial. The whole affair is only a very paltry matter. There is only a very small stock in the country, and I submit that if applicants are really serious in seeking a remedy at law they must go to action. It is certainly no case for an interdict. There is no clear right, for the onus of proving an infringement of their patent lies with the applicants, and this onus, I submit, they have not discharged. As to the question of keeping an account of sales, that is a very small matter, and we have no objection to do so, pending an action.

[De Villiers, C.J.: In what exact point, Mr. Upington, has your patent been infringed?]

Mr. Upington: With respect to the use of a glass diaphragm, a tapering cylinder, and the use of soap in the manufacture of the "blank." I submit that Mr. Doyle is an expert, as was very clearly shown in *Edison-Bell v. Doyle* (9 Sheil, 600).

De Villiers, C.J.: The affidavit upon which the application was founded stated the points in respect of which protection was claimed for the phonograph which was then in question. If the affidavit had stated in what respects the instruments sold by the defendants infringed any of the patents, the Court would have had something more tangible to go upon. The Court should have had before them specimens of each kind of phonograph, and there ought to have been somebody present to explain to the Court the point in respect of which there had been an infringement of patents by the respondent company. Upon the affidavits the evidence is certainly too weak to justify the Court in granting an interdict. There is nothing upon the records of the previous case to show that the respondents were selling phonographs similar to the one in question, so that that case can not be taken as a precedent. It is quite clear that the applicants are not likely to suffer much damage from the action of the respondents in the pre-

sent case, because it appears that the defendants have only a few of the machines left. The utmost the Court can do will be to order the respondents to keep an account of all sales of phonographs, such as those described in the affidavit, and the Court will not grant the interdict, but leave it to the applicants to bring their action. Full particulars will be required, and certainly more particulars than have been furnished in the present case. The respondents will keep an account of all sales effected by them, and as to the costs of the application, the Court is not in a position to judge as to who should pay the costs. The Court will therefore refuse to grant the interdict, and let the question of costs stand over.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorneys: Findlay and Tait.]

MIRRAINE V. THE CONTROLLER OF CUSTOMS. } 1902.
} Mar. 4th.

Import Duty—Concealment of goods—Security for costs in action against Comptroller of Customs—Act 10 of 1872, sec. 51 and 67.

M. was a passenger from England to Cape Town, and on his arrival there found that a trunk containing a certain quantity of jewellery had been seized by the Customs' authorities. On the authorities aforesaid refusing to give up the trunk and instituting an action in the Supreme Court for the forfeiture of the said jewellery, applicant attempted to enter appearance to defend the said action. The Registrar of the Court, however, refused to accept such appearance unless applicant furnished security in the sum of £100, in terms of Sec. 67, Act 10 of 1872. Petitioner applied for leave to enter appearance, and defend the action without compliance with this condition.

Held, that the Court had no discretion as to the demand for security, but only as to the amount, and that under the circumstances the security demanded was not excessive.

This was an application on notice calling upon the defendant to show cause why the applicant should not be allowed to enter appearance and defend the action instituted by the respondent against him for the forfeiture of certain jewellery.

The applicant alleged that he arrived from England on 21st January last by the Gaika, accompanied by his wife and children; that he brought with him a quantity of valuable jewellery, which was packed in a trunk among his luggage; that when he arrived at the Custom House to check his luggage, he found that this trunk was missing, and his wife and son at once made complaint to the Customs official in charge of the warehouse, informing him that the trunk, which contained jewellery, clothing, etc., was missing; that they were subsequently referred to the Union-Castle Company's claim office in Cape Town, and from there back to the Docks again, ultimately finding the trunk in possession of the Customs authorities at the latter place; that for some reason unknown to him this trunk with the jewellery therein was seized by the Collector of Customs, who refused to give up possession of it, and he has instituted an action against the appellant for the forfeiture of the jewellery in terms of section 51 of Act 10 of 1872. The applicant denied that the jewellery was in any way concealed among his luggage, or that there was any attempt on his part to obtain the passing of the jewellery through the Customs without paying duty, this being borne out by the fact that he disclosed the contents of the trunk, not only to the Customs authorities, but to the Union-Castle Company, and at the police office, at which latter place he had also made complaint. That he was desirous of defending the action instituted by the Controller of Customs, and signed a warrant authorising his attorneys to enter appearance on his behalf. The Registrar of the Court, however, refused

to accept such appearance unless respondent furnished security in the sum of £100 in terms of section 67 of Act 10 of 1872. That this he was wholly unable to do, as he was not in possession of any means or property beyond personal effects and the jewellery referred to above; that he was a stranger in the Colony, and had no friends who would bind themselves on his behalf. He was living with a friend at the present time, who provided him with board and lodging, but he was not in a position to provide the necessary security. That if, therefore, he was debarred from defending the action unless he found security, his property would be condemned without being heard in his defence.

Benjamin Martin Wiggett, Customs examining officer, deposed that he had received instructions to take special precautions with the applicant, should he arrive by the *Gaika*, as information had been received to the effect that he intended to attempt to smuggle some jewellery through the Customs. Nineteen (19) packages or cases belonging to the applicant were brought up to the Customs Baggage Warehouse by the officials of the Harbour Board on the 23rd January, in accordance with the usual custom. Shortly after, the applicant, accompanied by his family, arrived at the warehouse, for the purpose of clearing his baggage. Deponent asked the applicant whether he had anything dutiable to declare, and that he replied that he had not. He asked him whether his baggage contained any jewellery, and he replied, "No." Deponent pointed out that, as he was a jeweller, there might be some jewellery. He insisted that there was not. Deponent carefully searched the 19 cases in the presence of the applicant, and found a fair quantity of silver and plated ware concealed in them among articles of wearing apparel, and in old pots, kettles, and boxes. If a cursory search had been made, the deponent would not have found them. After the search had been finished, the applicant said that a *Saratoga* trunk belonging to him was missing. He appeared to be particularly anxious about it, as he said that it contained all the spare wearing apparel of his daughter. No trace of it could, however, be found in the warehouse. The applicant did not appear to be aware of the fact that the trunk was missing

when the search began. The applicant and his family appeared at the warehouse again on the following morning to inquire about the missing trunk, and on being informed that it had not been found, the applicant's son-in-law stated that it contained the major portion of the jewellery, and that a mistake had been made. During the course of the day the missing trunk was brought up to the warehouse by the officials of the Harbour Board, and was at once sealed by the deponent. It appeared that it had been lying on the quay at which the *Gaika* discharged. On Monday, the 27th January, 1902, the applicant, accompanied by his son-in-law, came into the warehouse and handed over the key of the trunk. It was opened and searched in his presence, and after a diligent search, nothing but clothing could be found. The applicant was asked to point out, in order to save time, where the jewellery was secreted, and he then showed two secret panels in the tray of the trunk, in which were found 63 rings and 46 chains, all made of gold of a superior quality.

Mr. Benjamin (for the applicant): This application is made under section 67 of Act 10 of 1872. I admit that we cannot ask leave to enter appearance without giving some security, but the Government are already in possession of the jewellery, which, of course, is some security, and indeed, is the only security applicant can give. He is only a poor man, dependent upon the hospitality of his friends, and, if required to find the security which has been demanded, the maximum security exigible, applicant's property may be forfeited without his having had any opportunity of being heard in his defence. This would be most inequitable.

[De Villiers, C. J.: Of course the Government have some security, in the shape of the rings and chains.]

Mr. Sheil, K.C. (for respondent) relied upon *Graham v. Leri* (Buch., 1873-98, and 1874 p. 8).

[Maasdorp, J.: What security do you require for costs?]

Not less than £100.

De Villiers, C.J.: The language of the section is imperative, and the Court has no discretion in the matter; the only question is as to the amount of security which the applicant should find. Under the circumstances, we are of opinion that security for the sum of £100 is not too

much. The application must be refused, with costs.

[Applicant's Attorneys: Silberbauer, Wahl, and Fuller. Respondent's Attorneys: Reid and Nephew.]

GINSBURG V. CHURCH. { 1902.
Mar. 4th.

This was an application to have a rule *nisi* calling upon respondent to show cause on the 27th February why attachment of certain moneys lying to the credit of defendant, in the hands of the Civil Commissioner of Barkly East, should not be made absolute. The rule *nisi* was granted on February 6, 1902, in consequence of the Sheriff having made a return of *nulla bona* to a writ issued against the goods and chattels of defendant for the satisfaction of a judgment debt. On the motion of Mr. C. W. de Villiers the rule was made absolute.

[Applicant's Attorneys: Van der Byl and Van der Horst. Respondent in default.]

LYON V. BLACK.—PEABODY V. BLACK.

Mr. Gardiner applied for a postponement of the trial in the above cases. Mr. Benjamin appeared on behalf of the respondents.

The Court decided to set the cases down for hearing in the August term. The application was granted accordingly, the costs of the application to be costs in the cause.

SEBBA V. HIGHMAN. { 1902.
Mar. 4th.

This was an application for an order restraining respondent from collecting certain rents.

From applicant's affidavit it appeared that on February 4, 1901, he and respondent entered into a joint agreement to acquire certain property known as "Inverry Place," Cape Town, respondent to acquire two-thirds of the said property and applicant one-third. Respondent was to keep all accounts and to receive and disburse moneys, and neither party was to dispose of his share without the consent of the other party. Applicant being dissatisfied with respondent's method of keeping the accounts, it was agreed to refer the whole matter of accounts to

Mr. Maynard Nash. Meanwhile respondent had sold the property to one Drake, had given him possession, and Drake was now drawing the rent. Applicant had protested against these proceedings, and now asked for an interdict to restrain respondent from collecting any further rents, and an order upon him to hand over all rents already collected to Mr. Kempton Jones, that he might hand over the same to Mr. Maynard Nash, and that the future collection of rents should be entrusted to Mr. K. Jones until such time as Mr. Nash should have given his award.

The affidavit of respondent stated that he (respondent) had had to raise money on the property aforesaid, and also on some of his own private property by way of mortgage in order to erect certain 12 cottages on the aforesaid property. That respondent personally purchased the property in question, raised the necessary funds, superintended the erection of the cottages, without any assistance whatever from applicant, save £253 by him contributed towards the purchase of the property and the building of the cottages.

Respondent offered to submit his accounts to Mr. Nash, and should he (Mr. Nash) find any inaccuracy therein to pay to applicant any sum that might be found due to him. The only rents due and unpaid were those accruing for the current month (£53), which probably would not be paid before March 15th prox., by which time Mr. Nash would be able to give his award. Respondent denied that he sold the property to Drake without applicant's consent and authority.

In an answering affidavit, applicant merely repeated in substance the chief allegations made in his original affidavit.

Mr. Benjamin moved, and Mr. Wilford appeared for respondent. The Court refused the application, with costs.

[Applicant's Attorney: D. Tennant, jun. Respondent's: Fairbridge, Arderne, and Lawton.]

IN THE MATTER OF THE { 1902.
MINORS BOSMAN. Mar. 5th.

Mr. Jones applied for leave to sell certain land in the village of Lady Grey for the sum of £105, which offer had been made.

The Master reported favourably, and the Court granted the application, in terms of the Master's report.

IN THE MATTER OF THE PETITION OF
ELIZABETH RAWSTORNE.

Mr. Buchanan applied for leave for the Master to pay out certain moneys.

The application was granted.

IN THE ESTATE OF THE LATE DANIEL
G. DE VILLIERS.

Mr. Uington applied for leave to draw certain moneys for the benefit of the minor children, in order to provide for their maintenance.

The Master recommended that the application should be granted, and the Court granted the application, in terms of the Master's report.

IN THE MATTER OF THE MINORS
WADDELL.

Mr. Searle, K.C., applied for leave to have a clause in a certain lease set aside, respecting land at Kenilworth and Wynberg.

The Court referred the matter to the Master for report.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

DA COSTA V. DA COSTA. { 1902.
Mar. 6th.

This was an application for a commission *de bene esse* to take evidence in London of one Nancy Garwood and other witnesses in an action for divorce brought by applicant against his wife, on the ground of misconduct. Defendant went to London in 1899, and it was alleged that she had committed adultery there. The Court originally ordered that personal service should be made on defendant, but there was considerable difficulty in doing this, there being strong evidence that she was trying to evade service, so the Court ordered that a registered letter be sent her. Applicant was not certain that he could make service in the present instance, but he could send a registered letter to the same address as before—41, Russell-terrace, Bush Hill, Enfield, Middlesex.

F 2

Mr. Searle, K.C., for applicant; defendant barréd.

The application was granted, notice to be sent by registered letter to defendant notifying her where the evidence was to be taken.

SAALFELD V. SAALFELD.

This was an application for leave for substituted service.

Personal service had been found impossible. The plaintiff was the wife, and she sued her husband, Maurice Felix Saalfeld, for an order for restitution of conjugal rights, failing which, for divorce, on the ground of his desertion. When the case was previously before the Court an order for restitution of conjugal rights before February 13 was made, and the Court directed that personal service should be effected on the defendant. The notice was forwarded to London, but the defendant's address could not be ascertained. The plaintiff's attorneys communicated with the defendant's brother, but he stated that he had not heard from his brother, and the attorneys stated that he did not seem inclined to give information as to the whereabouts of the defendant.

Mr. Buchanan, for applicant. Respondent in default.

The Court ordered that the rule should be served on the defendant's brother, and amended the previous order by directing that the defendant should return to or receive the plaintiff on or before May 15, failing which, to show cause on May 15 why a decree of divorce should not be granted.

IN THE MATTER OF THE PETITION OF
B. J. VAN DE SANDT VAN NOORDEN.

Mr. C. de Villiers moved for an order authorising the petitioner to sign a power of attorney to enable him to pass a bond to take transfer of certain property.

The order was granted.

RE ESTATE STRYDOM. { 1902.
Mar. 6th.

Will—Interpretation.

This was an application by the executor of the estate in question for an order declaring that his reading of a certain clause of the testator's will was correct. The petition of Gerhardus Philipus

Kemp, in his capacity as the executor of the estate of the late Wessel Marthinus Lourens Strydom—showed:

1. That the late W. M. L. Strydom is registered owner of (1) certain 1-30th share of the farm Krakeel River, (2) 1-30th share of the farm Stoiekloof, (3) 1-13th share of the farm Vryheid, all situate in the division of Uniondale, by deeds of transfer, dated January 11, 1842, and August 7, 1854.

2. The late W. M. L. Strydom was married twice, first to Johanna Magdalena Strydom, and secondly to Assiana Jacomina Strydom. Both these marriages were in community of property.

3. Johanna Magdalena Strydom, the first wife of the said W. M. L. Strydom, died intestate on November 28, 1858, leaving four sons and two daughters surviving her. Of these children, one Johannes Petrus died on June 12, 1898, leaving no issue. And one Wessel Marthinus Strydom died on October 4, 1889, leaving issue. Adriana J. Strydom died in June, 1900, leaving two sons and two daughters surviving her. She made a will, a copy of which is hereto annexed, marked B.

4. The late W. M. L. Strydom died on January 3, 1890, leaving a will made by him with his second wife, marked A.

Some time after the death of his first wife, the late W. M. L. Strydom handed over to his children by his first marriage the half share of the above landed property, and the house on the property in which he resided. He built another house, in which he resided with his second wife.

No transfer of the landed property was ever passed to the children, and no account dealing with such land was ever filed with the Master. The only account ever filed by the said Strydom is hereto annexed, marked C.

Your petitioner has now to pass transfer of the landed property to the heirs. He is advised that he should pass these transfers as follows, viz.,

(1) To the children of the marriage of W. M. L. Strydom, and J. M. Strydom, one-sixtieth share of the farm Krakeel River, one-sixtieth share of the farm Stoiekloof, one-twenty-sixth share of the farm De Vryheid.

(2) To the four sons of the marriage of W. M. L. Strydom and J. M. Strydom 1-120th share of the farm Krakeel River, 1-120th share of the farm Stoiekloof, 1-52nd share of the farm De Vryheid.

(3) To the two sons of the marriage of W. M. L. Strydom and A. J. Strydom 1-120th share of the farm Krakeel River, 1-120th share of the farm Stoiekloof, 1-52nd share of the farm De Vryheid.

Your petitioner is desirous of carrying out this advice, and has had deeds of transfer drawn as above tendered to the Registrar of Deeds, but these deeds have been rejected, as your petitioner understands that the Registrar is not satisfied that the transfers as drawn are correct. In addition to this, your petitioner has learned that some of the heirs, children of the 2nd marriage, are dissatisfied with his action, and claim that they are entitled to a larger share of the landed property.

Your petitioner has caused notice of his intention to apply to the Court to be served on all the children of the late W. M. L. Strydom, with the exception of one who is in the Orange River Colony, and whose whereabouts are doubtful; and on the executor of the second wife's estate.

Wherefore your petitioner prays for an order:

(a) Declaring that your petitioner is correct in passing transfer to the heirs in manner set forth above.

(b) Authorising the Registrar of Deeds to pass such transfers.

(c) Allowing the costs of this application to be charged against the estate, and for alternative relief

THE WILL B.

I, the undersigned Adriana Jacomina Rademeyer, surviving spouse of the late W. M. L. Strydom, of Krakeel Rivier district, Uniondale, giving full force and effect to our joint will, dated May 14, 1869, whereby half of the immovable property is bequeathed to the sons born of the first marriage, which comes to them as their mother's portion, and the other or remaining half is bequeathed to the sons born of this our marriage, subject to my life interest and usufruct. I hereby declare this to be my testament and last will.

I hereby nominate and appoint my two daughters, Rosina Elizabeth, married in community of property to Johan Andries Kretzinger, and Margareta Aletta as my sole and universal heirs of all my goods, movable as well as immovable legacies and credits, nothing excepted, and to be

possessed by them after my death as free property without the interference of any one.

As executor of this my will and administrator of my estate and effects, I nominate and appoint Johan Andries Kretzinger, my son-in-law, with power of assumption.

This signed, etc.

THE WILL A.

We, the undersigned W. M. L. Strydom and Adriana Jacomina Rademeyer, lawful spouses, living on the farm named Krakeel Rivier, District George, have on this May 14, 1869, agreed to dispose of the goods to be left by us at our death, and do so this day of our own free will, without the advice whatever of any one.

We appoint each other reciprocally, the first of us dying, the survivor as universal executor, or executor of the goods to be left at our death. And now as to the appointing of heirs; the survivor shall have the full and undisturbed possession of our immovable goods, whereby we mean the half of that portion of the farm Krakeel Rivier, whereof we are at present the owners, while the remaining half shall go to our sons, or male children born of our first marriage. The last mentioned shall also be the heirs to the dwelling-house, with the exception of one room, which shall be the undisturbed property of the survivor. Further, it is our last wish that the above-mentioned immovable goods shall never be alienated, but shall, on the death of the survivor, go to our son, or sons, born of our second marriage, and in case these should die and leave no male heirs, the above-mentioned immovable goods shall go to the above-mentioned sons of our first marriage, or their lawful heirs.

Further, we shall dispose of our movable goods, under which we wish included a certain erf, or plot of land situate in the village Haarlem, as further described in the transfer to be found amongst our papers.

We wish the survivor after the death of the first dying to be obliged and bound, to hold within the period of three months a public sale of all our movable goods, but from this shall be excluded: (1) The above-named erf, or plot of ground aforesaid; (2) 100 sheep-ewes, and failing this £50 sterling, which money shall come out of the proceeds of the said public sale;

(3) the silver table service. These three said things shall be given as a legacy to the survivor.

After the deduction thereof, all the movable goods as above-mentioned shall be sold, and the proceeds—in money—thereof shall be divided in two equal shares: the half thereof shall be the portion of the survivor, and the other half shall be distributed in equal shares amongst our children born of the first and second marriage.

It is further our will and desire that no one shall interfere with our estate, minor child or children, except the above-mentioned executor or executrix.

We further reserve to ourselves the right to so add to alter this above-mentioned last will as we may deem fit.

May 14th, 1869.

(Sgd.) W. A. L. STRYDOM.

A. J. RADEMEYER.

The report of the Registrar of Deeds was as follows:

The late W. M. L. Strydom was twice married in community of property, and left issue by both marriages. His first wife died intestate, but the second wife, who survived him, executed two wills; the first jointly with her husband, and the later one individually.

The executor proposes to transfer to the children of the first marriage—daughters as well as sons—one half-share of all the land belonging to the joint estate of their parents, and as the mother died intestate, I am of opinion that that is his proper course. But he desires also to transfer to the sons of the first marriage half of the landed property belonging to the joint estate of their father and step-mother, his contention being that they are entitled thereto under the joint will. In my opinion, however, the sons of the second marriage were by the will instituted sole heirs of all the immovable property belonging to such joint estate, and I am therefore opposed to transfer of any shares to the sons of the first marriage being effected, so far as that estate is concerned.

I should add that the landed estate consists of shares in the farms Stoiekloof and Vryheid, besides a share in the farm Krakeel Rivier, but apparently in applying the latter name, testators intended to include all their property.

The Master's report was as follows:

The first wife, J. M. Strydom died intestate, leaving four sons and two daughters. Therefore the father, W. M. L. Strydom, became entitled to half of the immovable property, and the other half devolved on the six children. But one of the sons, Johannes Petrus, died on June 12, 1898, and left no children: the whole of his property therefore reverted to the two brothers and two sisters, for one of his brothers, W. M. L. Strydom, jun., died before his brother on October 4, 1889, and therefore no vestment took place from the estate of the brother. W. M. L. Strydom left four children, all of whom are minors.

Now, as regards the disposition of the other half of the properties with the testator's second wife:

The testator could not dispose of the half of the property of his first wife, who died intestate: that already belonged to his children. That this, however, was his intention is quite clear on reading the will of his surviving spouse (his second wife), who confirms the joint will—"by which half of the immovable property is bequeathed to the sons born of the first marriage, *which comes to them as their mother's portion*, and the remaining half is bequeathed to the sons of their own marriage.

But if your lordships are of opinion that as the testator had no power to dispose of the half share of the property devolving on his children of the first marriage from the intestate estate of their mother, therefore it must be deemed that he intended to bequeath to his four sons of his first, and to his two sons of the second marriage his half share, *i.e.*, the remaining half share of the properties; then the children of the first marriage receive, except the minor children of W. M. L. Strydom, jun. (a) in the first distribution the half share they are entitled to; and (b) in the second distribution to the extent of $\frac{1}{4}$ of the whole estate, as it stood at the first marriage according to the distribution proposed in paragraphs (1), (2) and (3) of section 4 of the petition.

Mr. Searle (for applicant): The whole point is as to clause 4 in the first will of the husband and of the second wife. All the heirs have been served with notice

save one who is in the Orange River Colony, and whose whereabouts are unknown, and another who is married to petitioner. The question is: what under this clause are the rights of the children by the first marriage?

[De Villiers, C.J.: Are they minors?]

I do not think they can be, but possibly some of the children of the second marriage may be, though I do not think they are. The real question is, did the children of the first marriage succeed *ab intestato* to half the property, or did the testators under the second will attempt to deal with the whole estate. The presumption is that each dealt only with the half estate. Our contention is that the children of the first marriage should get $\frac{1}{2}$ plus $\frac{1}{4}$. The Registrar holds that they should only get half, and take nothing under the will. The only support any such contention could receive would be, if it had been said in the second will that the children of the first marriage were heirs *ab intestato* of the mother.

The matter was ordered to stand over.

[Applicant's Attorneys, Freidlander and Du Toit.]

JACOBS V. MAREE. { 1902.
Mar. 6th.

Sale and Purchase—Time.

Where a vendor sells perishable goods to a purchaser, who does not take delivery at the time specified in the contract of purchase and sale, the vendor is justified in selling the said goods to a third person, but is bound to account to the original purchaser for any profits he may have made over and above the price paid by such purchaser. Should the vendor lose on such transaction,

Semble, he would have a right to claim from the original purchaser the difference between the price such purchaser agreed to pay and that which was actually realized.

This was an appeal from a judgment of the R.M. of Caledon, in an action in

which plaintiff claimed £7 with interest *tempore moræ* as and for damages sustained:

(1) By reason of defendant having in or about September, 1901, wrongfully and unlawfully sold and delivered to a third party certain 13 bags of onions, which onions plaintiff had previously purchased from him the defendant on or about September 17, 1901, by which wrongful and unlawful act of defendant plaintiff has been deprived of his due and just profits derivable from the said sale.

(2) The retention of certain 13 bags left by plaintiff with defendant for the reception of the said onions, which bags are valued at 4s. 6d., and which defendant neglects and refuses to return to plaintiff.

The Magistrate gave judgment for the defendant with costs. Against this judgment plaintiff now appealed.

The Magistrate's reasons were as follows:

"This was a verbal contract for the sale and purchase of a certain quantity of onions. The main issue of the case turned upon the date of sale and the date of delivering.

"The plaintiff in his evidence stated that he purchased the onions from defendant on September 10, 1901, and agreed to take delivery about a week after. This would be about the 17th *idem*, but instead of that he did not send for the onions until September 27, 1901. I therefore held that plaintiff had committed a breach of contract and that defendant was therefore legally justified in considering the contract at an end, and that he could dispose of the onions elsewhere, and I therefore gave judgment for defendant with costs of suit.

"In conclusion, the plaintiff's evidence was most unsatisfactory. He first swore positively that the purchase took place on September 17, 1901, and after giving his evidence, but before plaintiff's attorney had closed his case, he applied for an amendment to the summons from the 17th to the 10th September, which I refused, as I considered that defendant would be prejudiced by the amendment at that stage of the case, the main issue resting on the date of purchase and date of delivery.

Mr. Benjamin (for appellant): In this case time was not of the essence of the contract. No definite day was fixed for

the taking of delivery. The only mention of time was "when he came to take Botha's onions."

[De Villiers, C.J.: Were the onions ascertained and set apart?]

He purchased *all* the onions in the store. The contract of sale had thus been completed, and the onions were at the risk of the purchaser.

[De Villiers, C.J.: Was any specified number of bags bought?]

No, plaintiff says that there were from 20 to 25 bags before they began to rot. There were only 16 bags sound.

[De Villiers, C.J.: If defendant sold for less than you could have done, you would have to pay for the 20 bags—you ought, at all events, to pay the difference. Would not the vendor be entitled to sell for the benefit of the purchaser, if the onions were becoming rotten?]

No, I submit that the risk had passed to the buyer, that he was bound to take the onions aforesaid, and that plaintiff was bound to deliver them. Even if a time of delivery was fixed, it does not follow that it was of the essence of the contract. *Addison on Contracts* (p. 286, 3rd Edition). *Bettini v. Gye* (1 Q.B.D., 183). Defendant was not prejudiced by plaintiff's failure to accept on a particular day. As to the amount of damages, he sold at 30s. a bag, on which he realised 10s. profit.

Mr. Searle (for appellant): We say that time was of the essence of the contract.

[De Villiers, C.J.: Did he buy all the onions?]

The summons says he bought certain 13 bags, which seem to have been all that were marketable.

[Mr. Searle was stopped by the Court.]

De Villiers, C.J.: It is plaintiff's case that he bought all the onions in defendant's place on a certain day. According to defendant, there were on that day 15 to 20 bags of onions, but it is impossible to quite say how many. A time was fixed—that is certain—and on the day fixed the onions were not fetched by plaintiff as he had agreed to do. From that time the onions began to rot. Now the question is, What ought the vendor to do? In my opinion the vendor was quite justified in selling these onions, and I think he was bound to account to the purchaser for any profits he might have made over and above the price for

which the onions had been bought by the purchaser. But in point of fact the loser was the seller, and possibly defendant would have a claim for the difference between the amount for which he sold the onions to plaintiff and the amount he was paid for them after plaintiff failed to fetch them. But that question does not arise, because no claim has been made by defendant. Plaintiff had not, at all events, proved he sustained damages, and even if the Magistrate's decision went on different grounds to the decision of this Court, plaintiff would not be entitled to succeed. I think the appeal should be dismissed with costs.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys, Van Zyl and Buissinne; Respondent's Attorneys, Dempers and Van Reyneveld.]

<p> REX. V. COHEN. REX. V. MEYER. REX. V. FERIST. REX. V. LAZARUS. </p>	}	<p> 1902. Mar. 6th. </p>
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Brothel—Common Law—Nuisance.

Appellants had been severally charged in the Magistrate's Court with keeping brothels to the damage and common nuisance of persons residing in their respective neighbourhoods and of those passing thereby. Each of the accused had been sentenced to a term of imprisonment with hard labour.

Held (on appeal), that as the keeping of a brothel in such wise as to be a public nuisance is an offence at Common Law, and as the evidence in each of the above cases disclosed that all and several of the houses in question had been so kept, the appeals must be dismissed.

The above appeals were all from women convicted in the Magistrate's Court of the Cape under the Common Law of keeping brothels in such a manner as to be a public nuisance. In the 1st, 3rd and 4th cases the appellants had been sentenced each to six weeks' imprisonment, and in the second case to two months' imprisonment, in all cases with hard labour.

The charge in the Court below was that "— did wrongfully and unlawfully for gain, keep and maintain a certain house, to wit, No.— Street, with intent and purpose that women might, for hire, lend their bodies to the carnal knowledge of divers persons in the said house, in which house certain women did upon divers dates between the dates aforesaid so lend their bodies to the great damage and common nuisance of persons there residing and passing."

The cases were remitted by the Attorney-General to be tried by the Magistrate under Act 43 of 1885. In each case the evidence went to show that appellants had solicited from the windows and stoep of their respective houses, and that their neighbours complained of these practices. Some rebutting evidence was called to show that they were decently dressed, and that other neighbours did not deem them or their respective houses nuisances.

Mr. Wilkinson appeared for the appellants, and Mr. H. Jones for the Crown.

As regarded the appellant Cohen, Mr. Wilkinson stated that she had pleaded guilty in the Court below under the impression that she was charged under the Municipal Regulations, and not under Common Law. (Under the Cape Town Municipal Regulations, the keeping of a brothel under any circumstances is an offence. Under the Common Law it is not an offence unless the house is a nuisance.)

[De Villiers, C.J.: There is a plea on record; we cannot go into that now, unless you take the point that she pleaded to what is no offence in law.]

Mr. Wilkinson: The evidence is that this house (viz., that of Cohen) was not a nuisance. The witnesses for the Crown say that they saw no indecent behaviour on the part of the women. They were all dressed in the ordinary way. The only allegation against them is that they called men in from the street, but there is no proof that they did so for any immoral purpose.

[De Villiers, C.J.: There can be no doubt about that.]

But I submit that the keeping of a brothel is not an offence at Common Law unless it is a nuisance.

[De Villiers, C.J.: This house is a nuisance to the people opposite.]

Then it is only a private nuisance, and their remedy would be by injunction, and not by criminal prosecution. Keeping a brothel is not *per se* an offence at Common Law. *Q. v. Paulse* (9 Juta, 422). But in that case the brothel was a public nuisance. See *Van Leeuwen* (V. 2 p. 311), *Van der Linden* (2, 7, 5).

[Maasdorp, J.: These authorities do not say that it is no offence, but that the police sometimes shut their eyes to it.]

It is only an offence if it be a public nuisance.

[Maasdorp, J.: Is it not a public nuisance if women stand at the door and solicit?]

Even if the crime is indictable, does it follow that it is so under Common Law? The point has never been raised as to whether Act 26 of 1892 does not supersede the Common Law. I submit it does. Under this Act the whole Government of the town is handed over to the Municipality, and the prosecution should have been under this Act. See the preamble to the Act, and also Section 170, Sub-section (8).

[De Villiers, C.J.: I do not see that the summons discloses any offence. There is nothing about soliciting in it, or about nuisance. The mere keeping of a brothel is a statutory offence, but it is no offence under the Common Law unless it be a nuisance. Why were these people not prosecuted under the statute?]

Mr. H. Jones: It was not considered that a fine of £10 was a sufficient punishment for the offence. If a brothel is a nuisance, the keeper can be prosecuted under the Common Law. Here it has been shown in each case to have been a nuisance. As to the form of the charge, it is the ordinary one, and was used in the case of *Q. v. Paulse* and *Q. v. Sinclair* (heard at the Criminal Sessions in 1889). If the charge is in order, the Court cannot interfere in the first case at all events, for in that the accused pleaded guilty.

Mr. Wilkinson (in reply): The charge was not quite the same in *Q. v. Paulse*, and that case does not govern this.

De Villiers, C.J.: The keeping of brothels is not an offence in common law, unless they are kept in such a way as to be a public nuisance. The only doubt which arises in my mind in this case is whether the charge is sufficiently clear that it was a

public nuisance, and I think, reading the charge as a whole, we may take it that it is sufficiently clear that it was a nuisance which was charged against her, because the charge is that she did commit the crime of keeping a disorderly house to the great damage and common nuisance of His Majesty's subjects. Now reading the charge as a whole, I think it is a sufficient indication to the defendant that she is charged with keeping this brothel in such a manner as to be a nuisance to the public, and to this charge she pleaded guilty. The only remaining question is whether the evidence supports the charge. Upon this point we have the evidence of several witnesses. His lordship then proceeded to read extracts from the evidence, and continued: That is a sufficient indication as to how this place is carried on. It was undoubtedly a nuisance to the public, and it was especially a nuisance to the people living in the neighbourhood. In my opinion, therefore, the conviction was right, and the appeal must be dismissed. Mr. Wilkinson admitted that the other cases were similar, and argued briefly on the facts in Meyer's case.

[Appellants' Attorneys: Meyer, J. J. Michau, Cohen, Zerist, and Lazarus, Silberbauer, Wahl and Fuller.]

His Lordship said: I do not think there is anything to distinguish these cases from the one just decided by the Court, and for the reasons given in that case, I think the appeals should be dismissed.

Mr. Justice Maasdorp concurred.

REX V. JACOBS.

This was an appeal from the decision of the Acting Resident Magistrate of the Cape in a case in which two natives, Jacobs, the appellant, and Zaaglan were charged with the theft of a purse containing £14. Jacobs was convicted, and the other man acquitted.

Mr. Wilkinson appeared for the appellant; Mr. Howel Jones for the Crown.

The evidence was to the effect that at his place of work the complainant, a native named Jim Crow, had taken off his clothes and belt. He forgot to put on his belt, and left it there. Next morning the belt was gone. The accused Jacobs was working at the place, and a witness named John Nataam said he saw Crow take off his clothes and

district; the defendant has failed to prove that.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorney: Gus. Trollip.]

THEOPULO V. JOHNSON. } 1902.
Mar. 6th.

This was an appeal from a decision by the Resident Magistrate of the Cape Division.

The appellant was sued in the Resident Magistrate's Court by respondent for the sum of £8 7s., being balance of account. The Magistrate gave judgment for plaintiff, and from that judgment the present appeal was brought. When the case was heard by the Magistrate, the respondent Johnson said he had demanded payment of the account, which was for balance of goods sold and delivered—but defendant said the times were bad, and asked for time. Defendant, who carried on a general dealer's business at 119, Long-street, alleged that the order for the goods was given for the previous tenant, one Garnio, for whom he had acted as manager, and from whom he had bought the business. The Magistrate's reasons were as follows: "I find that defendant held himself out as the owner of the shop, and induced plaintiff to supply him with the goods in question."

Mr. Benjamin (for appellant): The Magistrate was wrong as to the question of fact. The plaintiff never held himself out as owner of the shop. The goods in question had been ordered by the previous owner; plaintiff was a mere manager. Plaintiff evidently had his doubts about defendant's position, for while one of his accounts is made out in defendant's name, the other is in blank. It is true that appellant was occasionally in the shop, but it cannot be inferred from the fact of his presence there that he held himself out as the owner.

[De Villiers, C. J.: The Magistrate found as a fact that he had held himself out as the owner.]

In order to saddle defendant with liability he must have held himself out as the owner at the time the goods were purchased. This he clearly did not do. Plaintiff did not know who was the owner of the shop, or why should he have made out his account in blank? The carrier driver must be wrong in his dates when he says that defendant took over the shop in February.

[De Villiers, C. J.: We have only defendant's own statement that he took over the shop in August, and his conduct does not bear out his statement.

Credit was given to the owner of the shop, whoever he might be. The receipt for the price of the shop dated August 15 shows it was not taken over till then, and bears out defendant's evidence.

Mr. Close (for respondent) was not called upon.

De Villiers, C.J.: There is only defendant's own statement that he did not take over the shop until August 15, 1899. The receipt produced, which was to the effect that Garnio sold the shop to the applicant for the sum of £140, does not state when the sale took place. From all that appears on this note, the sale may have taken place in January, and the receipt have been given in August. At all events, upon an important point of this kind, the least one can expect appellant to do is to produce Garnio. While these goods were being supplied by plaintiff, the defendant was, at all events, in charge of the shop, and when asked by plaintiff to pay the money he promised to do so, saying that when times were better he would pay. This statement does not constitute absolute proof of debt, but, taken in connection with the rest of the evidence, it justified the Magistrate in coming to the conclusion that credit was given to the defendant. For these reasons I am of opinion that the appeal must be dismissed, with costs.

Mr. Justice Maasdorp concurred.

[Appellant's Attorney, F. W. Greenwood; respondent's, A. W. Steer.]

WILSON AND OTHERS V. } 1902.
BRUTON. } Mar. 6th

Funeral Expenses — Mourning
Clothing for Widow.

Defendant had purchased from plaintiffs certain mourning clothing on the death of her husband, in her own name and without the sanction of the executors of her late husband's estate.

Held, on appeal, that she and not the estate of the deceased was liable for the said clothing.

is a matter of impossibility for the defendant to satisfy himself that plaintiff's husband is at present on the farm. He declares that plaintiff and her husband reside in this district, and in the absence of proof to the contrary, and of evidence that the assistance of plaintiff's husband has been solicited and has been refused, I accepted that statement, and allowed the exception. In regard to the second exception, the defendant is sued for a debt which was contracted by him whilst carrying on business in the Transvaal prior to the war. He did not leave the Transvaal of his own free will, but was compelled to do so after the war had broken out, and he came to this district for refuge. He states positively that it is his intention to return to the Transvaal as soon as it is safe for him to do so. It is not stated in evidence, but defendant is at present a member of a local corps, raised for the defence of the town and district, and, as it may be disbanded at any time, it cannot, in my opinion, be said that by such employment and residence he acquires a civil domicile in this district. In support of my judgment, I may quote the decision of the Supreme Court in the case of *Ebert v. Goldman*, given in December, 1900 (10 Sheil, 741).

Mr. Gardiner (for appellant—plaintiff in the Court below): With regard to section 51 of Act 20, 1856, it throws the onus of showing that a married woman's husband is in the district on the defendant, and that his assistance has not been sought. In the present case this onus was not discharged. The first exception, therefore, was bad. As to the question of domicile, *Ebert v. Goldman* (10 Sheil, 741) has been cited, but this case is by no means a strong one on the question. A case in which the Court went very far as to domicile was *Hudson v. Smythe* (10 Sheil, 461). In both these cases the defendant swore that he intended to return to the Transvaal, and yet the change of domicile was presumed. Here he does not swear that he intends to return. His acts show an intention of acquiring domicile. He wishes to buy property here, and he refuses to swear that he intends to return to the Transvaal.

Mr. Buchanan (for respondent): Defendant is not domiciled here. There are only three grounds on which the Court can exercise jurisdiction, viz.: (1) Domicile; (2) the possession of immoveable property within the jurisdiction, or (3) the

fact that this is the *locus contractus vel locus solutionis*. Here, admittedly, domicile is the only ground for suing in this Court; but a refugee, who is in a place against his will cannot acquire a domicile there—*Dicey, Conflict of Laws* (p. 142). The Magistrate found as a fact that respondent was not domiciled in this colony.

[Maasdorp, J.: What do you say about debts which are contracted by a man in a country where he is not domiciled?]

In that case he can be sued in the local courts, because the country in which he is living is the *locus contractus*. Here it is not, as the "Good Fors" were made in the Transvaal, and are payable there. There is no indication of a change of domicile in this case, and the judgment of the Magistrate on both exceptions should be upheld.

Mr. Gardiner (in reply): The presumption is that a man is domiciled where he is resident, and that change of residence connotes change of domicile; it is for the man who changes his residence to prove that he has not changed his domicile.

De Villiers, C.J.: It seems that this debt was incurred in the Transvaal, and if the defendant had not come to this colony temporarily, the proper place of suit would be in the Transvaal. But the defendant has been in this colony, though temporarily. He was driven away from the Transvaal by the King's enemies, and he was in this colony by compulsion, and he states his intention to go back to the Transvaal. It is true that in one part of his evidence he says: "I cannot swear I won't go back to Mooiplaats," but that does not alter his intention of going back to the Transvaal, which is his residence. Under these circumstances I think the defendant could not be sued in the Court below. Different considerations might have arisen if the debt had been incurred in this colony, but upon that I need say nothing more. Seeing that the debt was incurred outside the Colony, that the defendant was here compulsorily, and that he intended to go back to the Transvaal, I think the Magistrate was right in deciding that he had no jurisdiction. The appeal must be dismissed, with costs. In regard to the other point, I do not agree with the Magistrate as to the onus. I think it is not sufficiently proved that the husband is in the

district; the defendant has failed to prove that.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton. Respondent's Attorney: Gus. Trollip.]

THEOPULO V. JOHNSON. } 1902.
Mar. 6th.

This was an appeal from a decision by the Resident Magistrate of the Cape Division.

The appellant was sued in the Resident Magistrate's Court by respondent for the sum of £8 7s., being balance of account. The Magistrate gave judgment for plaintiff, and from that judgment the present appeal was brought. When the case was heard by the Magistrate, the respondent Johnson said he had demanded payment of the account, which was for balance of goods sold and delivered—but defendant said the times were bad, and asked for time. Defendant, who carried on a general dealer's business at 119, Longstreet, alleged that the order for the goods was given for the previous tenant, one Garnio, for whom he had acted as manager, and from whom he had bought the business. The Magistrate's reasons were as follows: "I find that defendant held himself out as the owner of the shop, and induced plaintiff to supply him with the goods in question."

Mr. Benjamin (for appellant): The Magistrate was wrong as to the question of fact. The plaintiff never held himself out as owner of the shop. The goods in question had been ordered by the previous owner; plaintiff was a mere manager. Plaintiff evidently had his doubts about defendant's position, for while one of his accounts is made out in defendant's name, the other is in blank. It is true that appellant was occasionally in the shop, but it cannot be inferred from the fact of his presence there that he held himself out as the owner.

[De Villiers, C. J.: The Magistrate found as a fact that he had held himself out as the owner.]

In order to saddle defendant with liability he must have held himself out as the owner at the time the goods were purchased. This he clearly did not do. Plaintiff did not know who was the owner of the shop, or why should he have made out his account in blank? The carrier driver must be wrong in his dates when he says that defendant took over the shop in February.

[De Villiers, C. J.: We have only defendant's own statement that he took over the shop in August, and his conduct does not bear out his statement.

Credit was given to the owner of the shop, whoever he might be. The receipt for the price of the shop dated August 15 shows it was not taken over till then, and bears out defendant's evidence.

Mr. Close (for respondent) was not called upon.

De Villiers, C.J.: There is only defendant's own statement that he did not take over the shop until August 15, 1899. The receipt produced, which was to the effect that Garnio sold the shop to the applicant for the sum of £140, does not state when the sale took place. From all that appears on this note, the sale may have taken place in January, and the receipt have been given in August. At all events, upon an important point of this kind, the least one can expect appellant to do is to produce Garnio. While these goods were being supplied by plaintiff, the defendant was, at all events, in charge of the shop, and when asked by plaintiff to pay the money he promised to do so, saying that when times were better he would pay. This statement does not constitute absolute proof of debt, but, taken in connection with the rest of the evidence, it justified the Magistrate in coming to the conclusion that credit was given to the defendant. For these reasons I am of opinion that the appeal must be dismissed, with costs.

Mr. Justice Maasdorp concurred.

[Appellant's Attorney, F. W. Greenwood; respondent's, A. W. Steer.]

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Held, on appeal, that she and not the estate of the deceased was liable for the said clothing.

This was an appeal from a judgment of the Resident Magistrate of Simon's Town.

The appellants, Messrs. Wilson, Miller and Gilmore, had sued the defendant, Mrs. Sarah Elizabeth Bruton, in the Resident Magistrate's Court at Simon's Town, for the recovery of the sum of £13 10s. for goods sold and delivered. The defendant stated that on the death of her husband, the late landlord of the Cosmopolitan Hotel, Simon's Town, it was necessary for her to obtain wearing apparel (mourning) for herself and daughter, which she did from plaintiffs. She told plaintiffs that she was going to pay for the goods, but she had not got special authority from the executor to make the purchases. Defendant took exception to the summons on the ground that she was exempt from liability, and that the charge was against the estate of her late husband. The Magistrate gave judgment for defendant, holding that plaintiffs should have filed a claim against the estate in response to the notice of the executors, the Magistrate considering that everything essential for the interment of the deceased—which would have included mourning for his family—should be borne by the estate.

Mr. Wilkinson (for appellant—plaintiff in the Court below).

[De Villiers, C.J.: Do you admit that the estate was liable for this mourning?]

No, the estate has nothing to do with this case. We gave credit to Mrs. Bruton personally. The mourning was not ordered by the executors, and even if it had been, it could not have been charged to the estate. Respondent never told appellants that she was purchasing on behalf of the estate, and it was not till her letter of February 16 was received that they had any idea that she disputed the account. Section 29 of Act 104 of 1833 would not have justified the executors in paying for these articles.

De Villiers, C.J.: So far as the evidence goes, it appears that the defendant, after the death of her husband, bought some wearing apparel from the plaintiffs. She bought it in her own name, and not on behalf of the estate; nor indeed could she buy on behalf of the estate, because she was not executor, and had not obtained the consent of the executors to purchase the goods. Credit was therefore given by

the plaintiffs to the defendant, and the defendant is the only person whom the plaintiffs can sue. The Magistrate held that the estate was liable. In my opinion the Magistrate was wholly wrong. The plaintiffs can only look to the defendant, and to no one else. The fact that the person who supplies the funeral has first charge upon the estate for funeral expenses does not affect the case. The exception will be disallowed, and the appeal allowed, with costs in this Court, and judgment will be entered for plaintiffs, with costs in the Court below.

[Appellants' Attorney: J. J. Michau.]

OBLEWITZ V. CURTIS. { 1902.
Mar. 6th.
„ 7th.

Jurisdiction — Resident Magistrate's Court.

In an action in a Resident Magistrate's Court for the recovery of the price of goods sold and delivered in excess of £20, the Resident Magistrate has no jurisdiction if the defendant pleads a bona fide claim in reconvention for a liquidated debt in excess of the plaintiff's claim.

This was an appeal from a judgment dated January 13, 1902, of the Court of the Acting Assistant Magistrate for the Cape, in an action in which plaintiff claimed £35 for one horse, harness, and cart sold and delivered by plaintiff to defendant at his special instance and request in August, 1901, and the defendant claimed in reconvention the sum of £40 3s. for cash lent, etc., which action the Court dismissed for want of jurisdiction.

In the Court below defendant denied the debt to plaintiff, and excepted to the jurisdiction of the Court in that plaintiff was debtor to him (defendant) in the sum of £40 3s., as per account put in, and that he counter-claimed to that amount.

The chief item in this account was one of cash lent, £26. The other items were for hire of horse and harness and hire of a room.

At a subsequent adjourned sitting of the Magistrate's Court defendant withdrew his exception.

The evidence as to the sale of the horse, cart and harness to defendant was disputed by him.

In his reasons for his judgment, the Magistrate says:

"I dismissed the case for want of jurisdiction, because I found that the claim in reconvention was a *bona-fide* one, capable of being pleaded in compensation and liquidated to an amount exceeding the Magistrate's jurisdiction, and that defendant could not give the Court jurisdiction by withdrawing the exception to it.

Mr. Currey (for the appellant): I must admit that the appellant seems to ask the Court to depart from the recognised principle that if a *bona fide* counter claim is advanced which exceeds the Magistrate's jurisdiction and is capable of set off against the plaintiff's claim the jurisdiction is ousted. The whole question, however, is, was this counter claim a *bona fide* one. The Magistrate ought to have taken some evidence on this point—*De Jager v. De Jager* (3 Juta, 69.) Then, again, in this case there was nothing to show that the account B was liquidated.

[Maasdorp, J.: Those items are all liquidated.]

The account is not sufficiently detailed.

[De Villiers, C. J.: The amount claimed is greater than the set-off; why should not the Magistrate have jurisdiction?]

Section 5 of Act 43 of 1885 restricts the counter-claim to one founded on a bill of exchange, promissory note, good for or other written acknowledgment.

[De Villiers, C. J.: Suppose the summons was for £35 for goods sold and delivered, defendant could set up the defence that he had paid, and therefore he can plead set-off, which is equivalent to payment.]

I was afraid I should be met with the difficulty that the claim in reconvention must be on a liquid document.

[De Villiers, C.J.: See *De Wet v Theron* (9 Sheil, 452)]

Here the original claim was for £35, and the original counter-claim for £40 3s. That includes a claim of £30 for rent. That claim was probably founded on a written lease, or it would have been beyond the Magistrate's jurisdiction. Act 43 of 1885, section 5.

[De Villiers, C.J.: The defendant can set up a counter claim to the extent of £35, because compensation extinguishes the debt.]

Mr. Wilkinson (for respondent): I take it that the Magistrate's jurisdiction is ousted unless power is given to him by Section 5 of Act 43 of 1885. That section is clearly limited to the case where the counter-claim is founded upon a liquid document.

[Maasdorp, J.: If a man claimed £20 on £100 of book debts, would not the Magistrate have jurisdiction to go into the whole case?]

Yes.

[Maasdorp, J.: Then the question is, not what is the debt, but what is the claim the magistrate is asked to try.]

But here the amount of the counter-claim left was still beyond the jurisdiction.

[De Villiers, C.J.: Suppose the defence had been that the £35 had been paid, would not the Magistrate try that fact?]

No doubt.

[De Villiers, C.J.: Then set-off is on exactly the same footing.]

The argument derived from payment would prove that the Magistrate would have jurisdiction to any amount.

[De Villiers, C.J.: It is no doubt in your favour that while the jurisdiction is extended to £250 on a liquid document, it is limited to £100 in the case of an illiquid claim.]

Mr. Currey (in reply): There was no sufficient evidence before the Magistrate that the counter-claim was *bona fide*. No books were produced, and no dates given. The Magistrate is bound to take some evidence of the *bona fides* of the counter-claim.

De Villiers, C.J.: I am of opinion that this appeal must be dismissed. The provisions of section 5 of Act 43 of 1885 extend the jurisdiction of every magistrate to cases founded upon bills of exchange, and so forth, in which the sum demanded shall not exceed £250. Then comes the following proviso: "Provided that as often as any action or suit shall be brought upon any liquid document for any sum exceeding £100, as aforesaid, the Resident Magistrate shall have jurisdiction to try any plea of set-off or compensation, on any cross case or claim in reconvention not exceeding the amount demanded by the plaintiff in his summons, whether the plaintiff shall or shall not succeed in proving the amount so demanded to be due." That proviso does not apply to

suits for the price of goods sold and delivered beyond the ordinary jurisdiction of £20, but on principle I should have thought if the Magistrate had jurisdiction to decide a claim for the price of goods above £20 he ought to have jurisdiction to decide any counter-claim not exceeding, at all events, the amount claimed by the plaintiff. Certainly where, as in the present case, the counter-claim is liquidated, compensation ought to be allowed to be pleaded, for the effect of compensation is to extinguish a debt altogether *pro tanto*. Unfortunately, in former times the Court leaned somewhat against any extension of the Magistrate's jurisdiction, and a series of cases ending with *Michiel v. Brady* (3 Juta, 178), established the principle that a magistrate might refuse to exercise his extended jurisdiction if the defendant had a *bona fide* counter-claim which was in excess of the plaintiff's claim. In deference to those decisions I must reluctantly hold that the Court below was justified in refusing to try the case, and that the appeal must be dismissed with costs.

[Appellant's Attorney: J. J. Michau.
Respondent's Attorneys: Silberbauer.
Wahl and Fuller.]

SEY V. THOMAS. } 1902.
Mar. 7th.

Magistrate's Jurisdiction—Liquid
Demand—Counterclaim.

S. had sued T. in the Magistrate's Court for £17 5s. 6d., work done under a written contract. T. had set up a counterclaim, composed of several items, of £78 3s. As the Magistrate found that two of these items, viz.: £17 18s. paid to a third person to remedy the defective work of S., and £5 5s., surveyor's fees, were liquidated, he held that his jurisdiction was ousted, and dismissed the case.

Held, on appeal, that as the said items of the counter claim were by way of damages, and were therefore not liquidated, the appeal must be allowed,

and the case remitted back to the Magistrate on the merits.

This was an appeal from the decision of the Assistant Resident Magistrate of Stellenbosch, sitting at Somerset West. Sey claimed £17 5s. 6d. for work done and material provided, in respect to a house which defendant was building. This work was done under written contract. Thomas counter-claimed £78 3s., and excepted to the Magistrate's jurisdiction. The Court below upheld the exception. The question was whether the counter-claim was liquidated or unliquidated, and the Magistrate held that so much was liquidated as would oust his jurisdiction. In support of his exception, defendant said that plaintiff had not done the work according to specification, and that he (defendant) had paid another man £17 18s. to complete the work. He claimed the £17 18s. paid for the work done in completing the contract, and £5 5s. for experts' fees for examination and damages caused owing to plaintiff's work being defective. The Magistrate was of opinion that the items of £17 18s. and £5 5s. were of a liquidated nature, and they amounted to a sum beyond his jurisdiction, and that as the counter-claim was a *bona fide* one, he held the jurisdiction was ousted.

Mr. Buchanan (for respondent): In this case the chief question is whether the counter-claim was liquidated or unliquidated. The Magistrate found that it was partly liquidated, and that the liquidated amount exceeded his jurisdiction: he therefore dismissed the case. If this amount were unliquidated he should have dismissed the counter-claim, and given judgment on the claim on convention. I submit that the £17 18s. and £5 5s., which the Magistrate held to be liquidated, were really unliquidated. If a contract is not properly carried out, and another man is brought in to complete it, we have a secondary claim in the nature of damages, being the result of a secondary obligation, such a claim is not liquidated. A sum is not liquidated because it is fixed by the one party. Here we have a surveyor charging five guineas, and a contractor £17 18s., but these are not liquidated charges, because they are not fixed by the parties to this suit. If these moneys are claimed from plaintiff they can only be claimed as

damages. As to liquidated and unliquidated demands see *Pothier on Obligations* (par. 179) who cites the *Digest* (45-1-74). So here defendant practically says to plaintiff: "It is your fault that my house was not properly built, and you must pay for your default. See also *Pothier* (Sec. 182) on primary and secondary obligations, and on principal and accessory obligations. The new contractor bases his charges on what defendant told him he would have to do. Here there was no fixed ascertained sum, for the estimate was only that of a third party—*Emsden on Building* (p. 141).

[Maasdorp, J.: Do not the claims in convention and in reconvention both arise out of the same contract?]

Yes, but the Court has never admitted set-off on that account—*Colonial Government v. Stevens and Another* (10 Juta, 140); *De Wet v. Theron* (9 Sheil, 452).

Mr. H. Jones (for appellant): Defendant is claiming this money as liquidated damages. The amount due to the surveyor and to the second contractor are both fixed.

[De Villiers, C.J.: Suppose a man is injured in a railway accident, and pays £200 for medical attendance, would that be liquidated damages, as against the railway company?]

Yes.

[De Villiers, C.J.: Yes? The Court might have to decide whether or not the amount was excessive]

In *Jooste v. Petzer* (11 Juta, 60) the Court went on this principle.

[Maasdorp, J.: Is it not necessary in cases of contract that the amount should be fixed by the consent of the parties, or, at least that it should be determinable?]

In *Jooste v. Petzer* the price of the oxen does not seem to have been so fixed.

[Maasdorp, J.: Then there was no sale.]

De Villiers, C.J.: The Magistrate, in his judgment, admits that several of the items of the counter-claim cannot be considered as in any way of a liquidated nature, but there are two items which he says are liquidated. These are the sums of £17 18s., the value of the contract entered into with another party to complete the plaintiff's defective work, and five guineas for experts' fees. In my opinion this counter-claim is a counter-claim entirely by way of damages, and it cannot be considered in any way as liquidated, more especially this item

of five guineas, which is a fee which in any case would not be allowed, and if this is excluded, it would only amount to £17 18s., which would not be sufficient to exclude jurisdiction. It is said that in a case of this kind difficulty might arise as to whether the Magistrate should give judgment at all where defendant would really have a *bona fide* claim for damages, but I do not think any real difficulty need in practice occur. Plaintiff sues upon a contract, and he has to prove that he has performed the contract. If, before the Magistrate, the defendant proves he has had to pay another party a sum more than the amount claimed to complete the contract, that would be justification for the Magistrate holding that plaintiff was not entitled. In my opinion the Magistrate had jurisdiction in this case, and the case must therefore be remitted to him for trial on the merits. The appeal will be allowed, with costs in this Court; costs already incurred in the Court below will be costs in the cause.

[Appellant's Attorneys: G. Trollip.
Respondent's Attorneys: Findlay and Tait.]

REX V. WILLET. { 1902.
{ Mar. 7th.

Liquor Law—Government Notice No. 241—Aboriginal Native—Barman.

A person whose general appearance presents the leading characteristics of an Aboriginal Native must be taken for such, and as such falls under the provisions of Government Notice No. 241, even though it may be shown that there are traces of European blood in such person.

A barman selling to a Native can be convicted under the regulations, assuming that they are not ultra vires a question not decided.

This was an appeal from a decision of the R.M. of Simon's Town. The appellant, described as "Manager of the Masonic Hotel Tap," was charged with contravening Section 1 of Government Notice 241 d—d, in that upon or about

January 2, 1902, and at or near Simon's Town, in the said district, the said Thomas Willett did wrongfully and unlawfully, being then and there the manager of the licensed premises, known as the "Masonic Hotel Tap," sell, or supply to one Rose Coetzee, an aboriginal native, a certain quantity of intoxicating liquor, to wit, two bottles of brandy, known as Cape brandy, at Simon's Town aforesaid. Prisoner pleaded "Not guilty." He was found "Guilty" and fined 20s.

Rose Coetzee stated: Accused sold me two bottles of brandy on or about January 2, 1902. I am a bastard. My mother was a bastard Hottentot, and my father was a Boer. I live at Kalk Bay. I was on a visit to the Kafir Location at Simon's Town when I bought the brandy. My uterine grandfather was a Malagasy. My father and mother were married.

Martha Oliphant stated: I am a Basuto. I was with the last witness when she bought the brandy. Accused asked her where she stayed. She said "on the other side of Simon's Town." He said "I do not want to serve all the people, as I do not know them all." He did not ask what country woman or race she was. He would not serve her at first.

Nicholas Ryan stated: I would not say Rose Coetzee is a Kafir. I would call her a mixed breed. She might be a cross between white and Kafir. I would not take her to be an aboriginal native, but she resembles a Hottentot. I would have taken her to be a Cape woman.

Dr. H. Clarke (District Surgeon) stated: Rose Coetzee is very dark, and has all the characteristics of a Hottentot. She appears, however, to have some European blood. She is more of the Hottentot than of the European.

For the defence, accused stated that he was barman to Frederick Willet, who was the holder of the licence of the premises in question. He honestly believed Coetzee to be a Cape woman.

Mr. Wilkinson (for the appellant): Two questions arise in this case: (1) Was the woman to whom the liquor was sold an aboriginal native? (2) Did Willet fall under the terms of the Government notice? As to the first point, there is strong evidence that the woman was not an aboriginal native.

[De Villiers, C. J.: The Court has decided that an admixture of European

blood does not prevent a person from being regarded as an aboriginal native if the features of the aborigine predominate.]

In some cases of children, one of whose parents is a European and the other a Kafir, it may well happen that in the same family some of the children will take after the white parent and others after the Kafir. Can it be said that the former are not, and their full brothers and sisters are aboriginal natives?

[De Villiers, C. J.: That was our decision.]

I think in the case referred to by your Lordship, the question was whether a whole tribe were aborigines or not. I would also point out that the regulation in question forbids *aborigines* and not people who *look* like aborigines to be served with liquor. This regulation being of a penal character should be strictly construed. Then, again, Thomas Willet is not the holder of the licence, he is only a barman. The holder of the licence is responsible, and should have been summoned, if anybody. He is liable even if he is not present in the bar when the infringement of the liquor law takes place.

Mr. H. Jones (for the Crown): The Court has always regarded the barman as equivalent to the holder of the licence. *Q. v. Otto* (6 Sheil, 261, 436). *Q. v. Ware* (5 Sheil, 21) is a stronger case...see especially the judgment of De Villiers, C. J.

Mr. Wilkinson (in reply): This is not a case of a sale by the wife or husband of the licensee, or by one who has taken temporary transfer of the licence. Accused is merely a barman.

[De Villiers, C. J.: He is the holder's brother.]

Yes, but he is neither the holder of the licence nor a manager.

De Villiers, C. J.: The question might have been legitimately raised of whether the regulations were *ultra vires* or not, but that question not having been raised, I will not say anything more about it. As to the question whether there has been any contravention of the regulations as they stand, I think there can be no doubt. The charge is of selling to an aboriginal native, and the regulations define an aboriginal native as any person of the Bantu race, any Hottentot, Bushman, or the like. There seems to be no doubt as to this woman being a member of the Bantu race. She says that

one of her parents was a European, and that some of her ancestors came from Madagascar, but that is her own statement, and, after all, the best test is her own appearance. On that point evidence has been called to show that to all intents and purposes she is a Kafir woman. The doctor can trace possible European blood, but such minute traces are not sufficient to do away with the general effect of this person's appearance. On the whole, I think the Magistrate was justified in coming to the conclusion that the woman was an aboriginal native. Another objection taken is that the defendant was not the holder of a licence. Well, he was acting as the agent of the holder. It seems that he was the brother of the holder, and for the purposes of selling at this tap he was the holder of that licence, or else he could not sell. I think we may take it that if he sells he can be found guilty of a contravention of the regulations, the object of which is to prevent sale to aboriginal natives. For these reasons I am of opinion that the appeal must be dismissed.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller.]

REX. V. CHARLTON.

1902.
Mar. 7th.
" 8th.

Lord's Day Observance—Act 19 of 1895—Public Entertainment—Charge for admission. *Where certain persons, having previously obtained the permission of the Town Council of Cape Town, subject to the provisions of Act 19 of 1895, thereafter proceeded to give a number of Sunday evening concerts in a place of public entertainment, at which no fee was ostensibly charged for admission, but 1/- was charged for programmes, and notice issued stated that "admission was by voluntary contribution, the right to refuse admission being reserved."*

Held, on appeal, that the holding of such concerts was a contravention of Act 19 of 1895.

This was an appeal from the decision of the Assistant Resident Magistrate of Cape Town.

The appellant was convicted of contravening sections 3 and 5 of Act 15 of 1895—the Lord's Day Observance Act and was fined £1. These sections dealt with keeping open places of amusement on the Sabbath, and exacting or receiving fees for admission thereto. The evidence taken in the Court below was as follows: Detective Morrison said that on the evening of the 5th January he went to the Good Hope Gardens. About 60 or 70 yards from the gate was a table at which were two persons. Witness saw people go up to the gate and tender money. One of the men at the table picked the money up, and put it in a desk. Some paid for programmes at the table; others did not. There was a space of about three feet for people to enter. Witness advanced through the entrance, and put 6d. on the table. A man at the table called out "No programme." Witness advanced two yards, came back, and said, "I beg your pardon; what did I understand you to say?" He was told that programmes were a shilling. He tendered a shilling, and was given a programme, and 6d. he had previously tendered. On the 12th inst. he again went there, and tendered a sovereign, receiving 19s. and a programme. Subsequently he saw a youth pass the entrance without paying. A man at the table caught him by the sleeve, and drew his attention to the fact that he had not paid. He thereupon tendered a coin, and was allowed to enter.—Edward Preston, detective in the Cape Police, said he went to the Good Hope Gardens on the night of the 12th. At the barrier to the concert in the Gardens he noticed three persons at a table. He saw several persons pay to pass the barrier. He saw none go in without paying. He noticed that they paid 1s. each. When witness came to the table he asked what was the admission. He was told 1s.; he tendered 2s. 6d., and received 1s. 6d. change and a programme, after which he passed in. Defendant was not at the table.—Captain Lorrimer said that on the 5th he put 10s. in the plate and wanted to take his change, but a slightly-coloured man said, "Hold on, gov'nor, we'll do that." He then handed it to a man sitting in the rear of him, who gave him 7s. back. Witness intended

to put 3s. in the plate. He thought it was a voluntary public subscription. On the 12th of January he went to the concert free. He was not in uniform.—For the defence, William Charlton said he was at the Gardens on the 5th and 12th of January. The persons who attended to the gate were under his instructions. His instructions to the gatekeeper were that the concerts were entirely free, and they were not allowed to stop anyone. If the persons who came in the gate wished to contribute, they could do so. He had seen people go through the gate without contributing. They had never made any charge for admission to his knowledge. They had advertised the fact that the concerts were free. There was no charge made for the programmes. Three people could walk through the gate abreast of each other. The concerts were a business speculation. The instructions of witness were that the programmes were to be given to anyone who came in the gates. He heard the men at the gate say to persons who inquired that the customary contribution was a shilling. When a person put down a sovereign, the man at the gate was instructed to give him 20s. change.—William Edward Tyler said he had the authority of the Town Council himself for the carrying on of these concerts. No one was charged for admission on the evening of the 5th. There were no complaints as to anyone being charged for admission. Witness remembered the evening of the 5th, when Captain Lorrimer put down 10s. Witness asked him what he should take, and the captain said, "Three or four shillings." The proportion of people contributing was about one in ten.—Cornelius Martin Fisher said he was in the service of the last witnesses on the evening of the 5th inst. His instructions were not to charge anyone that came to the concerts. A good many people went in without paying. He never charged anyone.—Clarke said that on the 12th January he was acting for Mr. Tyler. He was there all the evening, and had been told not to refuse admission to any respectable person. There was no charge made to anyone that evening. Several persons went into the Gardens without contributing.—Arthur Mortimer Jones said that he frequently attended the Sunday concerts. He understood that he was able to go in free if he cared. He had seen other people being admitted without contributing.

H 2

Mr. Benjamin (for the appellant): In the first place if no fee for admission was charged, but only contributions which were *bona fide* voluntary were taken, there has been no infringement of Act 19 of 1895. Charlton and Tyler both gave instructions to their employees not to make any charge. Hence if these men did make a charge they did so on their own responsibility, and their principals are not liable.

[Maasdorp, J.: What do you say about admission being by "voluntary contribution?"]

The evidence shows that no contributions were insisted on.

[De Villiers, C.J.: The appellant candidly admits that this was a business speculation.]

It was so in a sense, but even if a profit did accrue to the principals, that does not prove that they were guilty of any violation of the Act. If the agents did demand money, that does not render the principals criminally liable. In them there was no *mens rea*. The evidence is perfectly clear that appellant never ordered that money should be taken; and the balance of evidence is against the allegation that money was ever demanded. The only evidence that it was, is that of police traps, and even their evidence does not go very far. To charge 1s. for a programme was no infringement of this Act, though it might be under Act 35 of 1888: but if programmes were sold, that was not a fee charged for admission. Then as to the evidence; surely some independent witnesses should have been called. Then to come to the technical point, the summons does not set out any offence under the Act. The appellant was charged under Section 5 with wrongfully and unlawfully receiving money. He should have been charged with wrongfully and unlawfully keeping open a place of public entertainment. It is no offence to take money on Sunday, and no offence is set forth in the summons.

[Maasdorp, J.: He had leave to keep the place open, but he charged admission money, and therein lay the offence.]

No, the charge is that he kept open a place of amusement on the Lord's Day. To this he might have pleaded consent of the local authority. My chief points are: (1) There was no *mens rea* on the part of the accused; (2) the evidence that money was demanded as an entrance

fee is very weak; (3) the summons does not set out any offence under the Act.

Mr. H. Jones (for the Crown) was not heard.

[De Villiers, C. J.: I do not wish to say a word as to the policy of the Act. The only question the Court has to determine is whether there has been an infringement of the terms of the Act. An objection is raised to the form of summons, and no doubt it would have been more formal to simply have charged the defendant with keeping open a place of amusement contrary to the provisions of the Act. To that the defendant's answer would have been "That we got the consent of the Municipal authorities." Then there would be the reply to that: "True you have the consent of the Council, but you have charged for admission." Instead of that the prosecutor raised the whole question at once, and came to the gist of the offence, the gist being charging fees. I think the summons in this form gives ample notice to the defendant of the extra charge against him, even if it is not strictly formal, and he could not in any way be prejudiced by the form of the summons. The substantial question now is: "Has there been a contravention of the Act?" Now, the Act, after prohibiting amusements on Sundays, provides that with the consent of the local authority having jurisdiction, places may be permitted to be used on Sunday, without fee for entrance or admission, for the purposes of concerts and so on. The question is, "Does the evidence show that fees were charged for admission?" Now, the purport of the evidence of the defence is that some persons did come in without paying fees, but the witnesses even for the defence admitted that the majority did pay, nine-tenths paying a shilling each. It is true that they paid a shilling each for the programme, but that programme was a mere evasion of the law—the programmes probably cost a farthing each. Therefore the shilling each was charged for entrance. There is the notice: "Music for the people; Sunday concerts," and ends, "Admission by voluntary contribution." "The right to refuse admission being reserved" immediately follows. There was nothing to prevent the gatekeepers from refusing admission to those who did not pay a shilling for the programme, but the great majority, after seeing this no

tice, would prefer to pay a shilling at once, and not risk the chance of admission being refused. Moreover there was one witness who swore positively as to a charge being made. A detective stated that he saw a youth pass the entrance without paying. A man at the table caught the youth by the sleeve, and drew his attention to the fact that he had not paid. The youth thereupon tendered a coin, and was allowed to enter. In cross-examination the witness says: "I was charged on both nights." Now, it might well be said that the defendant was not aware of that particular case, but defendant must have been aware of the conditions under which persons were admitted into the building. He must have known that the great majority of persons did so pay, and that very few persons, after this notice, would venture to go in without offering to pay. Under these circumstances, there was a clear evasion of the Act; in point of fact the concert was not without fees. For these reasons I am of opinion that the appeal must be dismissed.

[Appellant's Attorney, C. Brady.]

STEPHAN V. EXECUTORS OF { 1902.
STEPHAN. Mar. 8th.
" 12th.

Will—Construction.

By one clause of his will the testator nominated the plaintiff, with nine others, as his heirs—the plaintiff as to one-fourth and the others as to three-fourths of the residue of his estate. By another clause the testator (who in his lifetime was a partner in business with the plaintiff) directed that, in case the plaintiff should decide to continue the business, he should, on receiving payment of any bonds belonging to the partnership business, pay to the other heirs one-fourth of the amount thus received, “he being entitled to one-fourth as heir of appearer and one-half as partner of appearer.”

Held, that the half of the partnership estate thus received

was dealt with on a different footing from the rest of such estate, and that as to such half the plaintiff is entitled to one half, being one-fourth of the amount received by him, and that he was entitled to the remaining half of the partnership estate as partner.

A special case was stated for the opinion of the Court between Hendrik Rudolph Stephan and the executors of his late brother, Johan Carel Stephan. The point at issue was the construction of certain paragraphs of the will of the late Mr. Stephan, who died in February, 1900.

The special case was as follows:

1. The plaintiff is Hendrik Rudolph Stephan, of Cape Town.

2. The defendants are the said Hendrik Rudolph Stephan and Johannes Henoch Neethling Roos, in his capacity as secretary for the time being of the Board of Executors, who are sued in their capacity as executors testamentary of the estate of the late Johan Carel Stephan, otherwise known as Johan Carel Jacobus Stephan, hereinafter styled the testator.

3. On or about November 9, 1898, the testator executed his last will and testament, and on January 17, 1899, he executed a codicil thereto. On February 6, 1900, he died, leaving the said will and codicil of full force and effect. Annexed hereto are true copies of the said will and codicil, and for convenience of reference the paragraphs of the said will have been numbered 1 to 26.

4. The plaintiff and the testator, for many years prior to the death of the testator, and up to the date of his death, carried on business together in partnership, under the style or firm of Stephan Bros., each having a half-share in the said business, and since the testator's death the plaintiff has continued to carry on the said business, as provided in paragraph 21 of the said will.

5. In paragraph 19 of the said will the testator instituted as his heirs the plaintiff and certain other eight persons named therein, subject to the conditions set forth in paragraphs 20 to 23, and by the codicil he revoked the institution in

so far as one of the said persons, Samuel Novella, who predeceased him, was concerned.

6. In paragraph 20 of the said will the testator bequeathed one-fourth of the residue of his estate, after payment and satisfaction of his liabilities, and certain legacies and charges not necessary to specify, to the plaintiff, and the other three-fourths to the other heirs in equal shares.

7. In paragraph 21 he directed that the plaintiff would be entitled to remain in full possession of the residue of his (the testator's) estate during his (plaintiff's) lifetime, and to carry on the partnership business for his own account and profit during such lifetime.

8. In paragraph 22 he directed that, if the plaintiff whilst so carrying on the said business should sell immovable property or receive payment of mortgage bonds belonging to the said business, he should pay over to the other heirs one-fourth of the proceeds of such sale or receipt, he (plaintiff) being entitled to one-fourth as testator's heir, and one-half as testator's partner in the said firm of Stephan Bros.

9. In paragraph 23 he directed that no longer than six months after his death a full and true inventory should be taken both of his private estate and of the partnership business, and that his other heirs should be paid out on the valuations and accounts in the said inventory whenever such payments should, in terms of the said will, be made to them.

10. On or about July 27, 1900, the defendants, in accordance with the terms of the said will, framed the said inventory. The testator left at his death property belonging to the said business, and also property in his private estate which did not belong to the said business.

11. Thereafter, on or about the 18th July, 1901, the plaintiff, whilst carrying on the said partnership business, sold the farm Jacobus Kraal, situate in the division of Malmesbury, which farm is registered in the name of the said firm of Stephan Bros. and belonged to the partnership business, for the sum of £250. Subsequent to the testator's death, and whilst carrying on the said business, the plaintiff effected improvements on the said farm, which have enhanced its value.

12. The said farm is brought up in the said inventory at a valuation of £500.

13. Amongst the assets of the said business are certain life policies, as will appear from the extract from the said inventory hereto annexed, marked C, which said policies have been ceded to the said firm, and the premiums whereof have been, since the date of the cessions in each case, paid by the partnership business. In the said inventory the said policies were brought up at their surrender value at the time the inventory was framed.

14. Since the date of the said inventory the plaintiff has from time to time paid the premiums on the said policies.

15. The parties are desirous of having it determined on what basis the proceeds of the partnership business are to be divided as between the plaintiff and the other heirs, who are represented by the defendants.

The plaintiff contends (a) that with regard to the proceeds of the said farm Jacobus Kraal, the heirs other than the plaintiff are entitled to the sum of £125, being one-half of the testator's half-share or one-fourth of the whole value thereof, as set forth in the said inventory, as provided by paragraphs 22 and 23 of the said will; or, in case this Honourable Court should be of opinion that plaintiff is not so entitled, that he is entitled to claim to be reimbursed the value of any improvements which he has effected on the said farm subsequent to the testator's death, to the extent that the same have enhanced the value of such farm. (b) That with regard to the said life policies he (plaintiff) is entitled to receive cession of the same from the defendants, he to account to the estate for half of the surrender value as set forth in the said inventory. (c) That the half of the surrender value which plaintiff thus accounts for must be distributed as follows: One-half to the plaintiff, and the other half to the other heirs.

The defendant executors contend: (d) that the plaintiff is bound to account for and pay over to them for distribution one full half of the proceeds of the sale of the said farm, after deduction from such proceeds of any amount which the plaintiff may since the testator's death have beneficially expended out of his own funds in successful permanent im-

provements of the said farm, to the extent, however, only, if any, to which the value of the said farm has been enhanced for the purposes of the said sale by the expenditure of such amount. (e) That the amount, if any, to be so deducted should be determined by agreement, either by this Honourable Court or by arbitration if this Honourable Court should so direct. (f) That the half of the said proceeds so determined, when received by the executors, should be distributed by them: (1) As to one-fourth, to the plaintiff absolutely; (2) as to one-fourth, to the plaintiff as usufructuary under the will, with reservation of the rights of the other heirs to receive the same upon the death of the plaintiff, or the earlier happening of any of the contingencies contemplated in paragraphs 21 and 22 of the said will; (3) as to half, to the other heirs absolutely and immediately in equal shares. (g) That as to the said policies, the plaintiff is not entitled to claim cession thereof for the surrender values, though he is entitled from time to time as any policy may become payable, and at his death as to any policy then not yet payable, to deduct from the proceeds all sums paid by him after the testator's death in maintaining such policy, together with interest at 6 per centum per annum upon such sums. (h) That, upon the amount of any policy being received, the net proceeds after such deduction must be distributed half to the plaintiff and half to the executors, who, as to this half, must award one-fourth to the plaintiff and three-fourths to the other heirs in equal shares.

Wherefore the parties pray for judgment upon their several respective contentions, or for such other order as may be fitting, directing them in regard to the several matters in dispute, and they ask that the costs of this suit may be directed to be paid out of the estate of the testator.

The Will in question was as follows:

LAST WILL OF J. C. STEPHAN.

Be it hereby made known, that on this the 9th day of November, 1898, in presence of the subscribed witnesses, personally came and appeared Johan Carel *alias* Johan Carel Jacobus Stephan, resident at Loading Place, bachelor, in the Division of Piquetberg, and being of sound and disposing mind, memory, and

understanding, as appeared at the passing hereof, declared it to be his intention to make and execute his last will and testament, as he hereby doth make and execute his last will and testament, in manner as follows:—

1. The said appearer hereby revokes and annuls all wills and other testamentary acts passed by him heretofore, and declares hereby to give and bequeath and legate, firstly, the following, namely:—

2. (a) To his sister, Dorothea Florentina Susanna Hinsbeck (born Stephan) wife of Frans Johannes Hinsbeck, the sum of two thousand pounds sterling.

3. (b) To his brothers, Lawrence and William each two thousand pounds sterling.

4. (c) To Reverend Edwards, now of Malmesbury, the sum of fifty pounds sterling.

5. (d) To Christina Stevens, appearer's cook, the sum of twenty-five pounds sterling.

The above legacies mentioned shall be subject to the following stipulations, namely:

6. (a) They shall be paid out to the several legatees mentioned, or their order, two months after the date of the death of the appearer.

7. (b) They shall be paid out free of any succession duty; such duty, if any, shall be paid by appearer's estate.

8. (c) Should one or more of the aforesaid legatees predecease the appearer (excepting Christina Stevens and Reverend Edwards) the legacy or gift accruing to the legatee so predeceasing the appearer shall devolve upon and go to his or her heirs according to law, and in case such legatee so predeceasing the appearer has no legal heirs, then and only then shall the legacy, bequest, or gift be null and of no effect.

9. (e) To Cecilia Agetina Charosina the sum of fifty pounds sterling, to be paid to her order by the appearer's executors hereinafter named in five yearly instalments of ten pounds sterling.

10. (f) To Jacob Johnson and Charles Constable each the sum of two hundred pounds sterling to be paid to them or their order by appearer's executors hereinafter named, in monthly instalments of three pounds sterling to each, until they have received the whole amount legated to them.

11. (g) To Elizabeth Novella, daughter of Georgina Novella, the sum of three thousand pounds sterling, and to Joseph Novella and Samuel Novella each one thousand pounds sterling, the bequests being subject to the following conditions:—

12. (a) Should Elizabeth Novella, predecease the appearer, or having survived the appearer, die before having attained her 25th year, or without having left lawful issue before attaining her 25th year, then and in that event the said sum of three thousand pounds sterling shall go and devolve upon her brothers Joseph and Samuel Novella in equal shares. Should she, however, leave lawful issue, then the said sum of three thousand pounds shall devolve upon and go to such issue.

13. (b) The said Elizabeth Novella, Joseph Novella and Samuel Novella, should they not have attained the age of twenty-five years at the death of the appearer, shall not be entitled to their legacies until they shall have respectively attained the age of 25 years, but shall in the meantime be entitled to draw half-yearly the interest which may accrue and be due upon the legacies aforesaid, the executors of the appearer being hereby empowered to put out the said legacies on mortgage on immovable property until the said legatees shall have attained their 25th year.

14. (h) To John Daniel van Gems, Abraham Benjamin van Gems and William Charles van Gems, children of Betta van Gems, each, the sum of one thousand pounds sterling, subject to the conditions that they shall not be allowed or entitled to draw the said amounts before having attained their 25th year, the executors of the appearer being hereby empowered to put out the said legacies on mortgage on immovable property, until such time as the said legatees shall have attained their 25th year, the said legatees being entitled to draw whilst minors through their guardians hereinafter named, and when majors themselves half-yearly the interest which may accrue and be due upon the legacies aforesaid.

15. (i) That appearer's executors named herein shall pay yearly the sum of fifty pounds to each of the children, John Daniel van Gems, Abraham Benjamin van Gems and William Charles van Gems until they shall have reached their major-

ity, said amounts being for the maintenance and education of the said children in addition to the interest due them on their legacies; should, however, they become at any time entitled before their majority to participate as heirs in appearer's said estate, then and then only the payment of the £50 to each of the said children Van Gems shall cease, and from that time when they participate as heirs in appearer's estate, shall the executors of appearer's estate pay them each until they shall have reached the age of majority the sum of fifty pounds towards their maintenance and education, such money to be taken from the interest or capital accruing to them out of the inheritance due them out of appearer's estate.

16.(j) To Andries Jacobus Bester, Carl Hinsbeck, Wilhelmina Hinsbeck, Hendrina Hinsbeck, Samuel Novella and Elizabeth Novella, each, 250 fully paid up £1 shares in the South African Milling Company Limited; should appearer, however, before his death, dispose of, sell or otherwise make away with the said 1,500 shares, then this legacy is to be considered cancelled and to be of no effect; should the appearer sell, dispose of, or otherwise make away with part of the 1,500 shares legated, then the balance only shall accrue to the legatees, and no more, and be divided equally among the six legatees aforesaid, and they shall have no further claim upon the appearer's estate.

17. (k) To each child, whereof the appearer is the godfather, the sum of one hundred pounds sterling, provided satisfactory proof be adduced through baptismal certificates, that appearer is the *bona fide* godfather of such child or children; and further that this will only apply and refer to children born before date hereof, and provided such claims be filed within six months after appearer's death.

18. (l) To Robert Johnson the sum of two hundred pounds sterling, to be paid to him or his order by the appearer's executors in monthly instalments of three pounds sterling, until he shall have received the whole amount legated to him.

All the legacies and bequests contained hereinbefore are to be paid free of succession duty, appearer's estate having to pay such duty should one or more of the legatees die before having received the whole amount which has to be paid in monthly instalments to such legatee or legatees, then and in that event the

balance still due and in the hands of appearer's executors shall revert and fall back into appearer's estate.

19. The appearer declared hereby to nominate, appoint and institute as his heirs his brothers Henry Rudolph, Lawrence and William; his sister Dorothea Florentina Susanna Hinsbeck (born Stephan), wife of Frans Johannes Hinsbeck; Elizabeth Novella, Samuel Novella, John Daniel van Gems, Abraham Benjamin van Gems, and William Charles van Gems, of all the appearer's estate and effects, both real and personal and of whatsoever kind the same may be, and wheresoever situated, and whether the same be in possession, reversion, remainder or expectancy; and should one or more of such heirs come to die after the appearer's death, then the lawful representatives shall come into his, her, or their place, according to the laws of succession. The above-named heirs are, however, instituted subject to the following conditions, namely:—

20. I. After payment and satisfaction of all the liabilities of the appearer and payment and satisfaction of all the legacies, gifts or bequests and charges and payments contained herein, one-fourth of the residue of the appearer's estate then remaining over shall devolve upon and go to Henry Rudolph Stephan; and the other three-fourth of the residue of the appearer's estate then remaining over shall go to the other heirs above-named (share and share alike) that is, each of such heirs shall receive one-eighth of three-fourths of the residue of appearer's estate.

21. II. The said Henry Rudolph Stephan shall be entitled and allowed to remain in full, free and unencumbered possession of the residue of the appearer's estate (after deduction and payment of the liabilities of the appearer, and settlement of the legacies and charges herein contained) during his, the said Henry Rudolph Stephan's natural life-time, and the other heirs aforesaid shall not be allowed or entitled to claim, or have any right to their inheritances by virtue of their being heirs of the appearer (subject however, to the the reservations and conditions hereinafter mentioned) until after the death of the said Henry Rudolph Stephan the appearer being desirous and anxious not in any way to put any obstacle nor to embarrass the present business carried on in co-partnership by ap-

pearer and the said Henry Rudolph Stephan, but on the contrary, to give the said Henry Rudolph Stephan every opportunity to carry on the said business as heretofore of Stephan Brothers, for his own account and profit and loss during his life-time; should, however, the said Henry Rudolph Stephan, liquidate the business of Stephan Brothers or discontinue same, or take in a partner into the firm of Stephan Brothers, or float same into a company, or otherwise change the personnel or status of the firm, then and on the happening of any one of such contingencies of events, the other heirs of the appearer aforesaid, excluding the share to be received by the said Henry Rudolph Stephan of one-fourth, shall be entitled and allowed to claim their three-fourths of the estate of appearer accruing to them as aforesaid.

22. Should the said Henry Rudolph Stephan decide to carry on the business of Stephan Brothers, and none of the contingencies happen as set forth in this clause and clause preceding this, and whilst so carrying on the business, sell, alienate, dispose of, or make away with, at any time of any of the immovable property, or receive payment of any mortgage bonds belonging to the partnership business, or to the appearer personally and privately, then and in that case should it be partnership property belonging to the firm of Stephan Brothers, he shall pay over at once to the heirs of appearer, the fourth part or share of the proceeds of the sale of such immoveable property or mortgage bonds received, he being entitled to one-fourth as heir of appearer, and one-half as partner of appearer in the firm of Stephan Brothers, but in case the immoveable property belongs to appearer's private estate which has been sold or mortgage bonds realised or repaid, then and in that case the said Henry Rudolph Stephan shall as heir of appearer be entitled to retain one-fourth of the money so repaid, and pay over the remaining three-fourths to appearer's other heirs. Should the said Henry Rudolph Stephan sell or alienate all the landed property belonging to the firm of Stephan Brothers he shall be considered, as far as these presents are concerned, to have discontinued the said business of Stephan Brothers, and the heirs would in that event be entitled to their inheritances.

23. III. In order to avoid all disputes and differences, the appearer hereby declares it to be his will and desire that not longer than six months after his death a full and true inventory and account shall be taken of appearer's private estate and also that of Stephan Brothers, and that appearer's other heirs shall be paid out their three-fourth share in his private estate, and one-fourth share of the firm of Stephan Brothers, on the valuations and accounts as set forth and contained in the said inventory, whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the said Henry Rudolph Stephan should he continue and carry on the business, nor on the other hand, shall such heirs be responsible for any losses.

24. Any moneys accruing to the minor heirs of appearer shall be administered by appearer's executors.

25. And the appearer further declared to nominate Henry Rudolph Stephan and the secretary for the time being of the Board of Executors of Cape Town, Wale Street, to be the executors of his will, administrators of his estate and effects, and guardians of his minor heirs, hereby granting to them all such powers and authority as are required by and allowed in law, and especially that of assumption.

26. Lastly the appearer declared to reserve to himself the power from time to time, and at all times hereafter, to make all such alterations in, or additions to this will as he shall think fit, either by a separate act, or at the foot hereof, desiring that all such alterations or additions so made under his own signature shall be held as valid and effectual as if they had been inserted herein.

Thus done and passed at Vredenburg, Malmesbury Division, on day, month and year aforewritten, in presence of the witnesses.

J. C. STEPHAN.

As Witnesses:—

LUDWIG F. ROLL.

FRED. WERDMULLER.

CODICIL.

It is my further wish and desire as testator of the foregoing will, on account of the death of one of my heirs named Samuel Novella, to revoke and cancel all inheritances, bequests and legacies made to, as well as all benefits that

should have accrued to the said Samuel Novella under my will in case he should have survived me, and to declare the said inheritances, bequests, legacies and benefits to the said Samuel Novella as set forth in the foregoing will from this date to be null and void and of no effect whatever.

I further desire hereby to exclude once and for ever the next of kin of the said Samuel Novella, should any one of them at any time after my decease presume to lay any claim or demand on any such inheritance, bequest, legacy and benefit as are mentioned in the foregoing will, and which are now from this date by virtue of this codicil declared to be revoked, cancelled, null and void and of no effect whatever.

It is my further wish and desire to revoke and cancel, as I do hereby revoke and cancel in toto the bequest of "One Thousand Pounds" sterling (£1,000) bequeathed in the foregoing will to "Joseph Novella," and to which he should otherwise have been entitled to after my decease, and to declare the said bequest of One Thousand Pounds sterling (£1,000) to Joseph Novella, from this date to be null and void and of no effect whatever, virtually as if such a bequest had never been made.

Given under my hand at Lading Plaats, Berg River, district Piquetberg, on this Seventeenth day of January, A.D., 1899.

J. C. STEPHAN.

As Witnesses:—

1. EDWARD CASHEL.
2. R. FRYER.

Mr. Searle, K.C. (with him Mr. J. E. de Villiers), for plaintiff. The important clauses of the will are 21, 22 and 23. The will begins by making a number of legacies. Clause 19 appoints certain heirs, viz., three brothers, a sister, the two Novellas, and the three Gemses. If the plaintiff's construction of the will be correct, Henry Rudolph Stephan is to get three-quarters of the property in the business, and the other heirs one-quarter between them. As to property not in the business, H. R. Stephan is to take one-quarter and the other heirs three-quarters. The farm is worth £500, and of this we are entitled to one-quarter as heirs and also to one-half. The business property is on a different footing, as I

have said. This, I submit, is the only possible construction of the will. As to the life-policies, clause 22 does not mention these, but only bonds; but clause 23 directs that an inventory of appearer's private estate and also that of Stephan Bros. should be made, and in this the life policies would naturally be brought up as would the mortgage bonds and other assets.

[De Villiers, C.J.: Does the policy belong to the partnership estate?]

Yes, that appears from the special case. Our only object is to get the opinion of the Court as to the division of the partnership estate. The manner in which the private estate should be divided is common cause. I do not see how clause 21 can be construed unless we admit that the partnership and private estates were to be dealt with on a different footing. The testator evidently wished this business to be carried on by his heir personally. If the firm were dissolved or wound up the proceeds would become private estate. The defendant's contention involves some very elaborate calculations which I must confess I have great difficulty in following: but I understand that they hold he should only get $\frac{1}{2}$ plus $\frac{1}{4}$ of $\frac{1}{2}$ (equal $\frac{3}{4}$) and $\frac{1}{4}$ of $\frac{1}{2}$ (equal $\frac{1}{4}$) as usufructuary. They say that they are to get half at once and a quarter as usufructuary. In the event of the business being wound up, we have to look to clause 21. If wound up the proceeds become private estate. If there is any doubt as to the policies I would certainly press my point as to the farm.

Mr. Gardiner (with him Mr. Schreiner, K.C.) for defendant. The testator could deal only with half the partnership property. He clearly wished to have the partnership estate kept up and penalised the heir in the event of his parting with it. Sections 20 and 22 are contradictory. I must admit that our construction of the will introduces two constructions of the term "one-quarter," but that is the only way in which the will can be explained. We say you take half as partner and a quarter of half as usufructuary. According to plaintiff's contention, H. R. Stephan would profit by winding up the business, for in this event he would get three-quarters of the whole instead of $\frac{1}{4}$ of $\frac{1}{2}$ plus $\frac{1}{4}$ (equal $\frac{3}{4}$). Thus a positive inducement is held out to him to realise, and that is obviously opposed

to the wishes of the testator. We claim to be paid out on our share of the proceeds and not on the mere inventory value. Clause 23 is very difficult to understand, and conflicts with clause 21. We must put 23 aside when we come to deal with the special clause 22. In clause 20, $\frac{1}{4}$ means $\frac{1}{4}$ of appearer's estate; in 23 it means $\frac{1}{4}$ of the whole.

[De Villiers, C.J.: On what principle do you draw the distinction between the policies and the rest of the property?]

We base the usufruct of $\frac{1}{4}$ on clause 21.

[De Villiers, C.J.: Your contention as to the policies comes to this, that when the testator says $\frac{1}{4}$ he means $\frac{3}{4}$.]

Clause 20 is the governing clause, and that gives us $\frac{3}{4}$ of $\frac{1}{4}$. Then again these policies must be dealt with as they fall in. Plaintiff cannot claim to take them over at surrender value.

Mr. Searle (in reply): Clause 21 is a penal clause, and directs what is to be done in the event of H. R. Stephan liquidating the business of Stephan Bros. Clause 23 provides for proceedings on death of the testator, and that $\frac{1}{4}$ shall go to plaintiff as heir and $\frac{3}{4}$ of the partnership property. Here there is not a single word about usufruct. Clause 23 shows that ours is the only possible interpretation. Defendant says that we are to get $\frac{1}{4}$ and he $\frac{3}{4}$ of the estate, and in face of clause 23 he makes no distinction between the private and partnership estates.

[Maasdorp, J.: They are allowed to claim $\frac{3}{4}$ under clause 21. It is already theirs, but they can claim it then.]

If that was the intention of the testator, clause 23, which draws a distinction between the private and the partnership estates would have no meaning. The contention for defendant was that the will made no distinction between the private and the partnership estates save as to usufruct. This contention is clearly opposed to clause 23.

[Maasdorp, J.: The testator clearly intended to give $\frac{3}{4}$ of the partnership estate to the defendants under clause 21 in the event of H. R. Stephan liquidating the business, so may he not have intended to give $\frac{3}{4}$ under clause 22?]

The will would not have been drafted in the terms it was had this been his intention. Our interpretation is the only one which supports clause 23, and gives a reasonable construction to clause 22.

Cur. Adv. Vult.

Postea, March 12.

The Chief Justice gave judgment.

De Villiers, C.J.: The point to be decided is whether under the 22nd clause of the will of the late Mr. Stephan the plaintiff is entitled to a quarter of the proceeds of certain mortgage bonds, or whether he is entitled to three-quarters. Now, there is no doubt that in the earlier portion of the will, where the appointment of heirs is made, Hendrick Stephan received only a quarter. Then came the 22nd clause. The words of this clause are too clear to get over. Clearly it was intended to place such partnership property on a different footing from the rest of the estate. In regard to such partnership property the testator intended that if Hendrick Stephan should receive any proceeds from a mortgage bond, he should pay over a quarter to the other heirs, and be entitled to receive a quarter, as heir of the testator, and the other half as partner. In the opinion of the Court, the first contention of the plaintiff was correct.

In reply to the Court, Mr. Searle, K.C., said the farm in question was sold for £500.

The Court declared that the plaintiff was entitled to £375 and the remaining heirs to £125. In regard to the second contention of the plaintiff, which had reference to certain life policies, the Court expressed no opinion, the plaintiff's counsel having withdrawn this part of the case.

[Plaintiff's Attorneys, Van der Byl & Van der Horst; Defendant's Attorneys, Van Zyl & Buissinné.]

RADZIWIŁL V. RHODES. } 1902.
Mar. 12th.

Mr. Wilkinson applied for a postponement of this action *sine die*. There was an affidavit on the other side.

[The Chief Justice: What is the action for?]

The action is upon a bill for £2,000. I apply for the postponement of the case. Notice of this application was served upon the defendant's attorneys yesterday. The main ground of my application is this: that a few days after service of the summons upon the defendant Rhodes in this action, criminal proceedings were instituted upon the very document upon which we are suing in this action. It would be highly prejudicial to the higher

interests of justice if this action were tried before the criminal proceedings have been completed.

Mr. Benjamin (for respondent): I oppose any postponement, my lord. There is really no reason why a postponement should be granted.

[The Chief Justice: There is an affidavit that Mr. Rhodes is unable to attend. Are you prepared to lead the evidence?]

I will proceed on the affidavit.

[The Chief Justice: But you ask for a postponement, too.]

The defendant made application for the prayer for provisional sentence to be dismissed. This was the very note upon which proceedings had been taken by Mr. Louw against the plaintiff and Mr. Rhodes.

Mr. Wilkinson: In the action by Mr. Louw the present plaintiff was defendant. She had allowed judgment to go against her, as she was undoubtedly liable to Mr. Louw, and had been very properly advised not to defend the case.

The Princess is at present ill.

[The Chief Justice: As criminal proceedings have to be taken in respect of the very note now in suit, it is only fair that a postponement should take place until after the result of the criminal proceedings is known.]

Will your lordship allow me to make one observation—on the very anomalous nature of the proceedings of commencing criminal proceedings on a document which is being sued upon?

[The Chief Justice: Ah, well, we cannot discuss that.]

[Applicant's Attorney, J. J. Michau; Respondent's Attorneys, Van Zyl and Buissinne.]

ADMISSIONS. { 1902. Mar. 12th.

Mr. M. Bisset moved for the admission of George Henry Hull as an advocate.

Granted, applicant taking the usual oaths.

Samuel James Joseph Wiggett was, on the motion of Mr. Alexander, admitted as an attorney and notary. Applicant was duly sworn.

On the motion of Mr. Buchanan, George Estcourt Massingham Seymour was admitted as an attorney and notary; oaths to be taken before the Registrar of the High Court of Kimberley.

Mr. Howel Jones moved for the admission as an attorney and notary of Ebenezer Berry Hargreaves.

Counsel said that there had been breaks in the applicant's service, but he had altogether served for three years and two days.

The application was granted, the oaths to be taken before the Resident Magistrate of Kokstad.

Mr. Buchanan moved for the admission of George Christian Vosloo as a conveyancer.

Granted: oaths to be taken before the Resident Magistrate of Cradock.

PROVISIONAL ROLL.

ABEND V. MAKEIN. { 1902.
Mar. 12th.

Mr. Wilkinson moved for a decree of civil imprisonment.

Defendant did not appear.

The application was granted.

MILLS V. LAMBERT.

Mr. Buchanan moved for a decree of civil imprisonment in respect of a debt of £20, and £9 6s. 3d. costs.

Defendant said he had made an offer to pay £2 down and £1 a month. On oath he said he had no means to pay the debt at once. He was a farmer, and owned a farm, which was mortgaged to the full extent.

Defendant elected to go into the box and give evidence.

Cross-examined by Mr. Buchanan: The debt was in respect of a horse. Plaintiff did not offer to take the horse back. Witness offered to let him have the horse back, but he refused. Some time ago witness did not make an offer to pay £10 every three months. He had paid £5. The horse was bought in December, 1900, since which time the debt had been due. Witness had sold the horse for £20 about eight months ago.

A decree was granted as prayed, execution to be stayed on payment of £1 10s. per month, the first payment to be made on the 15th inst.

IRWIN V. BRITTON.

Mr. Gardiner moved for confirmation of a writ of arrest under the 8th rule of Court,

Mr. Benjamin appeared for defendant, and said that defendant was in court in custody.

Judgment was granted for defendant, and he was discharged from custody.

ESTATE OF DE VILLIERS V. DU TOIT.

Mr. Benjamin applied for provisional sentence on a promissory note for £394 6s. 6d.

Granted.

JUNIEN V. EBRAIM.

Mr. Wilkinson moved for the final adjudication of defendant's estate.

Granted.

ILLIQUID ROLL.

VAN DER BYL V. JORDAAN. } 1902.
Mar. 12th.

Mr. Goch moved for judgment, under Rule 329d, for the sum of £95 15s. 8d., balance of account for goods sold and delivered.

Granted.

COLLECTOR OF CUSTOMS V. MERAIN.

Mr. Sheil, K.C., moved for judgment, under Rule 329d, for the forfeiture of certain articles of jewellery to the value of £250 or thereabouts, in terms of section 51 of Act 10 of 1872, which were found concealed in the baggage of the defendant on his arrival from England in the steamer Gaika, on or about the 22nd January, 1902, after he had denied to a Customs official that there was any jewellery in the said baggage, in terms of section 51 of Act 10 of 1872.

The Court granted judgment as prayed with costs.

MECKDAL V. BALL.

Mr. Howel Jones moved under Rule 329d, for judgment for £95, in terms of agreement.

Granted.

AHLBORN V. VAN DER MERWE.

Mr. Alexander moved for judgment, under Rule 329d, for £46 1s. 8d., less £10 paid, with interest and costs.

Granted.

AUBET V. HERBST.

Mr. Benjamin applied for judgment, under Rule 329d, for the sum of £8 17s. for goods sold and delivered, with interest and costs. Plaintiff and defendant lived within different jurisdictions.

Granted.

SHANBAN V. ROSENBLATT.

Mr. Alexander moved under Rule 329d, for judgment for £340, brokerage due, with interest and costs.

Granted.

REHABILITATIONS.

Mr. M. Bisset moved for the rehabilitation of Petrus Jacobus Swart.

After the trustee's report had been read, the Chief Justice said the application must be refused, with leave to apply again.

Mr. Buchanan applied for an order for the rehabilitation of Hermanus Philippus Steyn.

An order was granted.

GENERAL MOTIONS.

ARMSTRONG V. ARM- } 1902.
STRONG. } Mar. 12th.

Mr. Wilford moved for a decree of divorce, this being the return day of a rule nisi.

Granted.

FRISCH V. FRISCH.

This was a motion for a decree of divorce, the defendant having failed to return, as ordered.

Mr. Benjamin appeared for plaintiff.

A decree was granted.

DUNCAN V. DUNCAN.

Mr. Wilkinson moved for a decree of divorce. Defendant had failed to return.

Granted.

Ex parte BOTHA.

Mr. Upington moved for a rule nisi under the Derelict Lands Act to be made absolute.

Granted.

Ex parte BOTHA.

Mr. Buchanan applied for a rule *nisi* calling upon Gideon D. Botha to show cause why certain moneys should not be paid to the petitioner (Johanna M. Botha) to be made absolute.

Granted.

COHEN V. JODAIKEN.

Mr. Alexander made application for a rule *nisi*, restraining respondent from securing certain moneys, to be made absolute.

Granted.

DAVIS AND SONS V. PAT- { 1902.
TERSON AND OTHERS. { Mar. 12th.
Agent—Interdict.

D. & Sons had been appointed agents to a certain cycle company for all parts of South Africa east of longitude 22° and south of latitude 28°. At a place within these limits respondents opened a shop for the sale of the goods of the aforesaid Company, and represented themselves as the Company's agents. Applicant now sought to have the said respondents interdicted from making these representations, and moreover asked that they should be ordered to furnish an account of sales of the goods aforesaid.

Held, that as applicants would be prejudiced by respondents continuing to hold themselves out as agents for the said firm—as applicants were such agents and respondents were not—an interdict must be granted as prayed, with costs.

This was a motion for an order calling upon respondents to show cause why an interdict should not be granted (1) restraining them from either, directly or indirectly, advertising or representing themselves as the agents, or agent of the Raleigh Cycle Co., Ltd., or from either directly or indirectly carrying on business

and selling and dealing in Raleigh cycles and relative accessories under the style of "The Raleigh Cycle Agency," or any other style or name calculated to lead the public to believe that they held the agency of the said Raleigh Cycle Company, Ltd., in Kimberley, or the division of Kimberley, or any part of the said Colony of the Cape of Good Hope, east of longitude 22 degrees, and south of latitude 28 degrees; (2) why they should not be ordered to render to the applicant a full, true, and correct statement of account of all the sales effected by them in connection with the business carried on by them under the said style of "Raleigh Cycle Agency" at Kimberley since the beginning of the previous December, and (3) why they should not be ordered to pay the costs of the application.

It appeared from the affidavit of Arthur F. Baker, of Port Elizabeth, that in 1896 the applicants were appointed agents for the Raleigh Cycle Company. The letter appointing them agents stated that the company appointed the applicants agents, provided that the total net amount of the business done by them should not be less than £3,000 per annum. The letter further stated: "Should the total net amount be less than £3,000 per annum, owing to political or other crises, we shall be happy to take these matters into consideration, and make all reasonable allowance." The agency was for the part of the Colony east of longitude 22 degrees, and south of latitude 28. This included the town of Kimberley where applicants had an agency. Recently Messrs. Ryan and Co., for whom the respondent Patterson was acting as manager, had opened a shop about 100 yards distant from the agency, and had advertised that they (respondents) were the agents for the company. The respondents said they had been communicated with by Mr. Blake, of the firm of Messrs. Julian Stephens, about the agency. Mr. Blake had visited the Colony, and had said that the company was not satisfied with the business applicants were doing. On his return Mr. Blake had an interview with the manager of the Raleigh Company, and he afterwards wrote a letter, which had been sent to the respondents, and which stated that providing the respondents were willing to agree to certain proposals, the company would give them the agency, but they would

have to give applicants two months' notice. Respondents alleged that applicants were neglecting the agency, but this was denied. Respondents further alleged that applicants had broken their agreement of agency, not having purchased £3,000 worth of cycles during any of the last three years.

Mr. Searle (for applicants): As the affidavit of applicants shows, respondents have opened a rival shop about 100 yards from that of the applicant's. The applicants would seem to have accepted the agency in Kimberley on the distinct understanding that they should be the sole agents there, and in the Eastern Province. There was to be one agent for the Eastern and another for the Western Province. Nobody would take up an agency if a rival agent were to be appointed, and there are letters from White, Ryan and Co. showing that they were entitled to take over the agency for cycles. It would never pay anybody to take over such an agency unless it were a sole agency. We have a *prima facie* case, as respondents have simply "jumped" this agency. Respondent's affidavits are very lame. He excuses himself by saying that this area was not within the area of applicant's agency, viz., to the east of 22 degrees of East longitude. White, Ryan and Co. cannot show that they have been appointed agents for the Eastern Province. I submit that it was understood that applicant's agency was to be a sole agency, even though the word "sole" does not appear in the contract. White, Ryan and Co. cannot produce any letter appointing them. We ask for an order restraining them from representing themselves as the agents for the Raleigh Cycle Company.

Mr. Buchanan (for the respondents): This is no case for an interdict, since no clear right has been shown. Certainly applicants cannot show it under their contract. Even assuming that applicant can take advantage of his position as agent, he has quite mistaken his remedy. He should have sued for damages, and ought not to have applied for an interdict.

Mr. Searle was not heard in reply.

[De Villiers, C.J.: It is clear from the correspondence that the plaintiffs have been appointed as the agents of the Cycle Company for all parts

of this colony east of longitude 22 and south of latitude 28, and unless the respondents can show that they have also been appointed as agents of the same company, I think they should be interdicted from representing themselves as being such agents. Now, this is a point upon which the respondents can give information. Applicants cannot prove the negative, but they have made out a sufficient *prima facie* case to show that the respondents have not been appointed, to throw the burden upon respondents of showing that they have been appointed. There are no documents and no evidence to show that respondents have been appointed agents. They produce a letter in which the Cycle Company says that the applicants have not complied with all the terms of their contract, but there is no statement in that letter that they revoke the appointment of the applicants, or appoint the respondents as agents. It must damage the agents that there should be other persons stated to be agents. If the respondents had been appointed agents they would have been quite within their rights in representing themselves as such, and it would then have been left to the applicants to seek their remedy against the company; but, as I said before, there is nothing to show that respondents have been appointed agents. Such a representation must, in the nature of things, be an injury to the applicants. The respondents cannot be restrained from selling Raleigh cycles; that is a power everyone has. There is nothing to prevent a dealer from selling, and the Court cannot restrain the respondents from selling Raleigh cycles. It is said that such injury as the applicants may suffer can be compensated by damages, but I see a difficulty about that. It would be difficult to prove that purchasers were affected in consequence of this representation; it would be almost impossible to prove how far this representation led to the plaintiffs being damaged. Seeing that the applicants would certainly be prejudiced, seeing that it is clear they are the agents, and seeing that it is clear respondents have not been appointed agents, I think the Court should protect the applicants by granting an interdict restraining respondents from representing themselves as being the agents of the Raleigh Cycle Co. for any part of this colony east of longitude 22 and south of latitude 28. But it is quite possible that

at any moment the respondents may be appointed such agents, and therefore the Court will reserve to the respondents the right to apply to the Court at any time for a discharge of the interdict. Respondents to pay costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Findlay and Tait.]

IN THE MATTER OF THE APPLICATION
OF THE UNION-CASTLE MA'L STEAM-
SHIP COMPANY (LIMITED).

Mr. Searle, K.C., moved for leave to alter certain title deeds.

The Court granted the application the words, "now registered in London as the Union-Castle Steamship Company," to be registered in the transfer.

BATTEN V. BATTEN.

Mr. Benjamin applied for the appointment of a commission to take the evidence of R. E. Davenport, at Maritzburg, Natal.

The Court granted the application, and appointed Mr. Frederick Spence Tatham as commissioner to take the necessary evidence

DAVIES V. THE WOODSTOCK MUNICIPALITY.

Mr. C. de Villiers applied for a day to be fixed for the trial of the above action.

The Court appointed Friday, May 9, as the date of trial.

Ex parte WILLIAMS.

Mr. Solomon applied on three motions for leave to transfer certain land situate at Kokstad.

The Court directed that the usual course should be followed, and the matter brought before the Judge in Chambers.

Ex parte FRAME AND WIFE.

Mr. Wilford applied for the registration of certain notarial ante-nuptial contract.

The application was granted.

IN THE ESTATE OF THE LATE CHARLES
O. MATHEW.

Mr. Buchanan applied for the payment of certain moneys for the maintenance of the deceased's minor children. The Master's report was favourable.

The Court granted the order, in terms of the Master's report.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

REX. V. BELLNAGG. { 1902.
Mar. 13th.

Drunkenness in Public Place—
Sec. 28, Act 25 of 1891.

In order to justify the exercise of the extended jurisdiction conferred by Act 25 of 1891, Sec. 28, on Resident Magistrates, four previous convictions must have been recorded within one year of the fifth.

[De Villiers, C.J., mentioned a case which had come before him for review. In this case a woman named Katie Bellnagg was charged before the Assistant Resident Magistrate of Cape Town with contravening section 9 of Act 27 of 1882 by being drunk in a public place. She was found guilty, and there being three previous convictions against her, she was sentenced to twelve months' imprisonment. His lordship pointed out that four previous convictions within one year of the fifth must be recorded before sentence of twelve months' imprisonment could, under the 1895 Act, be imposed. That condition did not exist in this case, and the conviction would be quashed.

PROVISIONAL CASE.

WIENER AND CO. V. JAMALODIEN.

Mr. De Villiers moved for the discharge of the provisional order sequestrating defendant's estate.

Provisional order discharged, as prayed.

GENERAL MOTIONS.

Ex parte GASSON AND OTHERS.

Mr. Wilford moved for the appointment of a trustee to carry out the trusts contained in a certain ante-nuptial contract.

The Chief Justice pointed out that the record did not show clearly whether or not both the original trustees appointed under the contract were dead. He accordingly ordered the matter to stand over, so that a further affidavit could be filed making that point clear, and stating when the last surviving trustee died.

EPSTEIN V. EPSTEIN. { 1902.
Mar. 13th.

Leave to sue *in forma pauperis*.

Held, that the Court will not grant leave to sue *in forma pauperis* where the applicant is capable of earning sufficient money to pay legal expenses.

This was an application for leave to the applicant, Rosa Epstein, to sue her husband, Bernard Epstein, *in forma pauperis* for divorce on the ground of his adultery. The parties were married in the Jewish Synagogue, Belfast, in 1897.

Mr. Wilford appeared for the applicant.

The applicant was in court, and in reply to the Chief Justice, said that she did not work, and had no means. There were no children of the marriage. She did nothing, and just stopped with some friends. She did not work, because she was not long here, and could not get work.

The Chief Justice: You could get lots of work here if you wanted to work. Continuing, His Lordship said that the Court had laid down that where leave to sue *in forma pauperis* was given, it must be a clear case of distress, and the applicant must be a person who had no money and could not earn any.

It was pointed out that the case was already before the Court. It was set down for a certain day, but on that day nobody appeared, and the case dropped.

No order was made on the present application.

SEALE V. THOMPSON. { 1902.
Mar. 13th.

Ejectment — Motion — Action — Tender—Waiver.

Under the terms of a lease the lessor was entitled to put an end to the lease if the rent due for any month was not paid on or before the 25th of the following month. On the 25th of February negotiations were passing between the parties for a voluntary cancellation of the lease, and accordingly the lessee omitted to tender the rent for January. The parties not being able to agree as to the terms of cancellation, the lessee on the 28th of February tendered the rent, but the lessor insisted on his right to put an end to the lease for non-payment of rent; and sought, by motion, to eject the lessee.

Held, that the case was not one for summary ejectment on motion.

This was an application upon notice given the respondent calling upon him to show cause why an order should not be granted compelling him forthwith to deliver up possession of certain premises, situated at the corner of Longmarket and Adderley streets, Cape Town, the lease having become null and void by reason of respondent having failed to pay the rent, as stipulated in the lease.

The affidavit of the applicant stated that the respondent had from him a lease of the premises known as Seale's Chambers. The lease expired on January 1, 1903, and the rent, £32 10s. monthly, was to be paid monthly, with the proviso that should the lessee fail to pay any month's rent within 25 days after it became due, that would constitute a breach of the agreement, and the lessor should have the right to cancel the lease and take possession of the premises. The applicant alleged that at present the sum of £65, being rent for January and February, was due to him by respondent. On February 26 applicant's at-

torneys received from respondent's attorneys a letter, dated February 25, from which it appeared that the respondent was anxious to have the lease terminated, as he was unable to continue paying the rent, and certain conditions on which the respondent would agree to the cancellation of the lease were mentioned, it being also stated that the offer was without prejudice to respondent's claim in an action he was bringing against applicant for damages for breach of agreement. In his reply to this letter, the applicant's attorney stated that Mr. Seale would agree to the cancellation of the lease on Mr. Thompson paying the rent for January and February, and delivering up the keys of the premises before noon on the following day. Mr. Seale, however, expressly reserved the right to cancel the lease, by reason of respondent having failed to pay the rent within the time stipulated in the lease. A reply was received stating that it would be impossible for the respondent to accept Mr. Seale's conditions, and on February 28 the rent due was tendered. Applicant now moved, as stated above, on the ground that the rent had not been paid in terms of the lease.

In his replying affidavit the respondent said that when he entered upon the premises leased he had great expense, having, with applicant's consent and approval, made alterations and erected partitions dividing the premises into thirteen offices, which, with the knowledge and approval of the applicant, he sub-let, thereby deriving substantial benefit. Afterwards applicant, without any reason, gave notice that he would enforce the fourth section of the lease, in consequence of which respondent had been unable to sub-let, and since January last the premises had become vacant. Respondent then detailed the negotiations which took place with regard to the termination of the lease, applicant having at one time offered him £300 to agree to its cancellation.

[Mr. Close for the applicant; Mr. Searle, K.C. (with him Mr. Upington) for the respondent.]

In an answering affidavit the applicant denied that he ever consented to the erection of the partitions, and said that he had given leave to sub-let on two special occasions only. He admitted that, owing to the trouble and anxiety he had

had in connection with the lease, he offered respondent £300 to terminate the lease and vacate the premises, which offer the respondent did not accept.

Mr. Close (for applicant): This application for ejectment is based on clause 10 of the lease, "Shall the lessee fail to pay any month's rent within 25 days after it becomes due, this shall constitute a breach of this agreement, and the lessor shall have the right to cancel the lease and re-enter on the premises. The rent was really due on the last day of the month, but the lessor gave 25 days of grace if the rent was not paid within that period the lease was to be forfeited. Respondent did not pay the rent for January before February 25; clearly, therefore, he was in default.

[De Villiers, C.J.: But it is stated that the rent was tendered on February 28, and this is not denied.]

That does not prejudice our right under the 4th section of the lease. It is true that a tender was made on February 28, but no tender had been made on the 25th. It would be very hard on the landlord if this privilege of the days of grace were to be abused. The rent was over due on February 28.

[De Villiers, C.J.: If the tenant being under an erroneous impression, deferred his tender until three days after he rent was due the Court will not go out of its way to give an extensive interpretation to the landlord's rights.]

The tenant never made an unconditional tender at all, and this he was bound to do. It was significant that he asked our attorney whether the lease would be cancelled if he failed to pay the rent by midnight on February 25, and he was told that that was entirely in Mr. Seale's hands. Whatever took place after this was without prejudice, and the respondent cannot take advantage of it. As to an ejectment being granted on motion, the Court did this in *Mills v. Jones Bros.* (9 Sheil, 543).

[De Villiers, C.J.: Of course the Court has discretion on that point?]

Yes.

[De Villiers, C.J.: You seem to be taking a purely technical point and to be insisting on your pound of flesh.]"

No, I submit that the tenant has been very leniently dealt with. We have granted him a privilege which he now at-

tempts to abuse. If our right be of a technical character, it is a perfectly clear right.

Mr. Searle, K.C. (for respondent), was heard on the question of costs. In the *Wesleyan Church v. Eayrs* (12 Sheil, p. 47) the Court decided that it would not grant ejectment on motion. Then we are not at one as to the facts regarding what took place on February 24 and 25. We offered to pay the rent on the 25th. It is true we did not actually send a cheque, but that is a purely technical point. I can only suggest that the case should go to trial. That is the course, at all events, we should wish to be followed.

Mr. Close (in reply): Should the Court decide that an action should be brought I submit that the costs of this motion should form part of the costs in the action.

De Villiers, C.J., in giving judgment, said: I think it would be quite impossible to decide the question upon the evidence before the Court. The rent fell due at the end of January, and on February 25 it had to be paid, and if it was not paid on that date under the strict terms of the lease the applicant was entitled to cancel the lease. But there are circumstances in this case to show that the respondent was misled. I don't say he was intentionally misled by the applicant but he seems to have thought that as some negotiations were going on, it was not a pressing matter that he should pay on that day. In an action the Court would be able to judge as to how far he was justified in acting as he did. It may well be that after hearing the whole of the evidence as to what took place, the Court may come to the conclusion that the respondent was not justified in supposing that the applicant waived his right to take advantage of non-payment of the rent on the 25th, but at present the Court is not in a position to decide. One thing is clear to me, and that is that the respondent did believe he was not bound to pay at once, and as soon as he discovered that the applicant intended to take the benefit of the terms of the lease a tender of the rent due was made, that was three days after the 25th. Under the circumstances, it is quite impossible for this Court to grant a summary ejectment. All the Court

can say is, "Let the applicant go to action, for here there is no such clear case as to justify the Court in giving summary ejectment." The only remaining question is as to costs, and in my opinion the applicant ought to have known that this was not a case for summary process. The application will therefore be refused with costs. The applicant can go to trial in the ordinary way, and bring his action for ejectment.

[Applicant's Attorneys: Berrangé and Son; Respondent's Attorneys, D. Tenant, jun.]

Ex parte HAYTON. { 1902.
Mar. 13th.

Mr. Solomon moved for an order authorising the Registrar of Deeds, Vryburg, to issue certified copies of certain mortgage bonds, which had been lost or mislaid.

The Court granted a rule nisi calling upon all persons concerned to show cause by April 12 why such an order should not be granted, the rule to be published once in English and Dutch in the "Government Gazette" and twice in English and Dutch in the Vryburg newspaper.

Re ESTATE OF THE LATE JOHANNES JACOBUS FERREIRA.

Mr. De Waal, on behalf of the executors in the above estate, moved for the confirmation of the sale of certain property.

Order granted as prayed.

STANDARD BANK V. THOMPSON AND OTHERS.

Mr. Upington, on behalf of the applicants (the defendants in the action), moved the Court to fix a day for the trial of the above action by a jury.

Mr. Searle, K.C., appeared for the respondents.

The Court set the case down for trial on Tuesday, May 13.

Ex parte WOOD.

Mr. Buchanan moved, on behalf of the above tutor dative of certain two minors, for an order authorising the Master to pay out certain moneys for improving the property belonging to the minors. After paying for the maintenance and education of the minors

(who were aged 10 and 12 respectively), rates, taxes, etc., there would be an annual surplus sufficient to pay off by instalments, before the children reached their majority, the bond which it would be necessary to raise.

An order was granted as prayed.

POCHE AND CO. V. ALTCHEDJIAN.

This was an application for an order restraining plaintiffs from proceeding with their action, pending security being given for the costs.

Mr. Searle, K.C. (for applicants): Plaintiff filed their declaration without giving any security. We got notice of its having been filed on the 12th, and applied to have the declaration withdrawn and judgment signed against them. We now ask to have it struck out until security has been given. If it stands, we must plead within eight days.

[De Villiers, C.J.: No, the Court would relieve you from pleading until security is given.]

We could get no relief for another month, and I submit that the present application is therefore perfectly justifiable.

In reply to the Chief Justice, Mr. Solomon (who appeared for respondents) said he did oppose applicant's postponing the filing of their plea till respondents had given security.

On the motion of Mr. Searle, K.C.,

The Court granted an order relieving the applicant from pleading until security be given, the costs of the applicant to be costs in the cause.

Mr. Solomon for the respondents.

IN THE ESTATE OF THE LATE DAVID JOHNSTON.

Mr. Solomon applied for leave to mortgage certain property, in which minors were interested.

The Master reported favourably, and the Court granted the application in terms of the Master's report.



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before DE VILLIERS, C.J.]

REX V. MALAN AND { 1902.
BRUYNS. } April 12th.

Warrant—Escape from gaol—
Martial Law—Liberty of
subject—Act 6 of 1900.

Where the Attorney-General directs that the case of a person charged with high treason shall be dealt with by the Commissioners referred to in chap. 3 of Act 6 of 1900, the accused is entitled to be released from custody.

A person confined in gaol by order of the military without a proper warrant cannot, for escaping from gaol, be committed under the Colonial Act of 1888.

De Villiers, C.J.: Two cases have come before me in review from the Resident Magistrate of Clanwilliam, in which the prisoners were respectively charged with making their escape from the Clanwilliam gaol, where they are alleged to have been confined on a charge of high treason. I requested the Magistrate to furnish me with certified copies of the warrants under which the prisoners were so confined, as well as copies of any depositions taken against them. His re-

port in the one case—that of J. W. Malan—is as follows: The prisoner's warrant at the time of his escape was not in possession of the gaoler. He was removed from Calvinia by the military during November last with other prisoners, but the warrants appeared to have gone astray, and none were with them when they arrived here or have since been received, but I have now the original preliminary examination in my possession from which record I have prepared attached copy of warrant." The first remark I would make on this report is that the gaoler at Clanwilliam was not justified in receiving a prisoner without a lawful warrant for his custody, and that, according to previous decisions of this Court, the prisoner could not be punished for attempting to escape from illegal confinement. But it appears that, as far back as May, 1901, the Magistrate of Calvinia had given a warrant to another gaoler, namely, the gaoler of Calvinia, to keep the prisoner in the gaol of that place on a charge of high treason. That warrant could not justify the detention in the Clanwilliam gaol, and indeed only became known to the Resident Magistrate of Clanwilliam after he had been asked for his report. On further investigation I find that on the 14th of January of the present year the Attorney-General sent a written direction to the Magistrate of Calvinia that the case be transmitted to and dealt with by the commissioners referred to in chapter 3 of Act No. 6 of 1900. The effect of this direction was to entitle the prisoner to his discharge from custody. The only sentence the commissioners can pass is one of disqualification from being regis-

tered as a voter or from serving in certain public capacities for a period of five years. The 45th section of the Act expressly directs that the summons to appear before the commissioners shall be served on the accused in the same manner as if it had been a civil summons, and the 49th section provides that where the accused, after being duly summoned, fails to appear before the commissioners, they shall find him guilty of the charge without hearing any evidence. When once, therefore, the Attorney-General decided that the prisoner should be dealt with on the minor charge all necessity for his further detention ceased, and he was entitled to be released from custody. The Act was passed nearly twelve months after the outbreak of the war, and if the Legislature had intended that persons to be charged before the commissioners should be detained in custody it would most certainly have said so. The prisoner was not, however, released, but was sent on to Clanwilliam by the military authorities, and there, for escaping from confinement, he was sentenced, not by a military court, but by the Resident Magistrate of the district to six months' imprisonment with hard labour. In the second case—that of Jacob Daniel Bruyns—the Magistrate reports as follows: "The prisoner, with others, was removed by the military from Calvinia on 15th November last, but no warrants accompanied them, and up to the present they have been held under informal warrant signed by my predecessor, no deposition being taken. The preliminary examination on the charge of treason was held by the Magistrate of Sutherland. In his minute, dated 25th February, received here on the 11th March, it is to be observed that he reports the Attorney-General had indicted the accused as a Class II. rebel." The Magistrate, however, seems not to have been aware of the fact that, as far back as the 11th of April last year, the prisoner had been released on substantial bail, and that notwithstanding such release, he had been again seized and sent on to Clanwilliam as a prisoner. This detention was therefore doubly illegal, for not only was the prisoner entitled to the benefit of the fact that he was to be summoned before the commissioners on the minor charge, but he had actually given bail with two sureties for his ap-

pearance in any competent court to answer any charge for high treason that might be made against him. As a further justification for convicting the prisoner of the offence of attempting to escape from gaol, the Magistrate states that the prisoner had also been committed for trial on a charge of theft. Nothing, however, was said of this commitment in the charge for attempting to escape, that charge only stating that the prisoner was confined on a charge of high treason. The preliminary depositions forwarded by the Magistrate make it exceedingly difficult to believe that the prisoner is the person who had been charged with theft. The person so charged was Jurgens Jacobus Bruyns, and not Jacobus Daniel Bruyns; he was described as a farmer, and not as a mason, and his age is given as 19 years, whereas the prisoner's age is stated in the depositions to be 37 years. Moreover, I find from the depositions against Jurgens Jacobus Bruyns for the theft of sheep that he also was released on bail. As to the other charge of theft against Jurgens Jacobus Bruyns, he is there stated to be only twenty-one years of age, and could hardly be the same man as the one now stated to be thirty-seven years old. Be that, however, as it may, it is clear that the prisoner's sentence was based on the assumption that he was legally detained on a charge of high treason, and as the escape was really from military custody, the conviction of a contravention of the Colonial Act of 1888 cannot be supported. It has been suggested to me that the Magistrate may possibly have acted in the capacity of Deputy Administrator of Martial Law in sentencing the two prisoners, but the offence charged was a contravention of a Colonial Act, and not of so-called martial law regulations. It would indeed appear that the two jurisdictions sometimes overlap, and this gives rise to an extraordinary state of things. The law provides that all magistrates' sentences above a certain limit shall be subject to the review of a judge of the Supreme Court, and that every person convicted of a criminal offence, whatever the sentence may be, shall have the right of appeal to a higher court. By electing to prosecute under a martial law regulation, instead of under the law of the land, the prosecutor has it in his power to deprive an

accused person of the safeguards which the law has provided for the liberty of the subject. I cannot, in the present case, assume that the Magistrate passed the illegal sentences in his capacity as Deputy Administrator of Martial Law, and I feel bound to add that a system under which the magistrates of this colony have to administer martial law regulations appears to me to be unfair towards the magistrates and fatal to the due administration of justice. I have discussed this matter with both my learned colleagues, and they fully agree with me that the sentences are illegal, and that the additional duties imposed upon the magistrates are inconsistent with the due performance of their duties as the administrators of the ordinary law of the Colony, and ought, if possible, to be avoided. The Privy Council has decided in the case of *Marais* that the military authorities cannot be held liable during the continuance of the war for any illegality committed by them in this colony. After the war they may be liable to be called to account, but, in the meantime, the proper course seems to be to leave the sole responsibility with them, and not to throw upon our magistrates the invidious task of weakening the confidence of the people in the administration of justice. In the cases of *Nathaniel Kock* and of *Sigcau* I ventured to point out that the best security for the peace and good behaviour of the natives was inflexible justice. Both of them had been illegally detained in prison, but the Supreme Court ordered their release, and the result has been that, so far from increasing the disaffection of the natives, as was confidently foretold, this simple act of justice has made them more peaceable and well disposed than ever. The prisoners now in question are Europeans, and not natives, but that can hardly be a reason for denying to them the ordinary rights of British subjects. If they have committed offences, by all means let them be brought to trial, but so long as they are dealt with by judges and magistrates, charged with the solemn duty of administering justice according to the laws of the land, they are amenable only to the laws of the land. The convictions in both cases must be quashed. Of course if the prisoner Bruyns is really the man who is indicted for theft he will be detained in gaol under a

proper warrant if the time has not expired within which he can be detained in confinement.

After judgment, Mr. Sheil mentioned that he had received a telegram from the Magistrate of Clanwilliam stating that there was no doubt that the J. D. Bruyns was the Jurgens Jacobus Bruyns detained on a charge of theft. If, however, the Court was in any doubt about the matter, he would request that the matter be referred back to the Resident Magistrate under section 48 of Act 20 of 1856, so that the doubt might be cleared up. Mr. Sheil also read a telegram from the Resident Magistrate of Sutherland, who had in looking over the list mistaken J. D. Bruyns for Nicholas D. Bruyns, who was charged with high treason.

The Chief Justice said if counsel would look at the dates he would find that the party was in any case now entitled to his release. The sole effect of the judgment was that he escaped the three months' hard labour.

ADMISSIONS.

Mr. Searle, K.C., moved for the admission as an advocate of Walter Adam Burn. Counsel mentioned that the applicant was at Bloemfontein, and he asked that the oath should be taken before the Registrar of the Court there.

Granted.

Mr. Upington moved for the admission of Henry Wood Gush as an attorney and notary.

Granted, oaths to be taken at Umtata.

Mr. Buchanan applied for the admission of John Theodore Moll as an attorney and notary.

Granted, applicant taking the usual oath.

Stanley John Henry Bayly was, on the motion of Mr. M. Bisset, admitted as an attorney, notary, and conveyancer, the oaths to be taken at East London.

Ex parte GREENING.

Attorney—Admission.

Where an English attorney produced a receipt for payment of his subscription to the funds of the English Law Society.

Held, that such receipt could not be accepted in lieu of a certificate for the purpose of admission as an attorney of the Supreme Court.

Mr. Wilkinson moved for the admission of Robert Greening as an attorney. The petition stated that the applicant was on the rolls of the English Incorporated Law Society, and he produced a receipt for his annual subscription to the said society, showing that at a recent date he was on the rolls.

The Chief Justice said that the practice was laid down in the case of *Milner*, and he would be reluctant, sitting alone, to alter that practice. If it were altered it should be done by a full Court.

Mr. Wilkinson said that the receipt could not have been obtained if the applicant had not been on the rolls. He submitted that the receipt was quite as good proof as a certificate.

Mr. Searle, K.C., said that he had just been asked to mention on behalf of the Incorporated Law Society that the society could not give their consent to the application in view of the previous practice. At the same time they would not oppose.

An order for the admission of applicant was granted, subject to the production of the necessary certificate. The Chief Justice said that in the meantime applicant could not, of course, practice, but if the Court was not sitting the oath could be taken before the Registrar when the certificate could be produced. The form of the certificate would be found in *Milner's* case.

Mr. Murray Bisset applied for the admission of William Henry Cameron Macintyre as a conveyancer.

Granted, the applicant to take the oath at East London.

PROVISIONAL ROLL.

PHILIP BROS. V. GRAND JUNCTION RAILWAYS.

Philip Bros. v. Grand Junction Railways.

Mr. Alexander applied for provisional judgment for the sum of £1,113 due on a promissory note.

Granted

VOLLMER V. LOUW.

Mr. Murray Bisset applied for provisional judgment for the sum of £70 due on a promissory note, with interest and costs; also for provisional judgment under Rule 329d for the sum of £57 12s. 4d., and for provisional judgment under the same rule for £60.

Granted.

LAWRENCE AND CO. V. KHAN. } 1902. { April 12th.

Insolvency — Fraudulent alienation.

Defendant had sold certain two shops, and a few days thereafter his estate was compulsorily sequestrated. As the bona fides of these sales was questioned by certain of defendant's creditors, the Master of the Supreme Court had attached the goods in these shops under Section 13 of the Insolvent Ordinance. Defendant now applied to have this attachment removed.

The Court ordered the attachment to be continued until six weeks after a trustee had been appointed in the insolvent estate, that he might be able to take action to set aside the sale of the shops if so advised. The purchasers of the shops were ordered to pay the costs of opposition, with leave to include them in any claim for damages they might have in reconvention.

This was an application (1) to have a provisional order of sequestration made absolute, and (2) for a continuation of the attachment of certain immoveable property at Claremont, already effected by the Master's Messenger pending the appointment of a trustee in the said insolvent estate. Provisional sequestration of the estate of Hassan Khan (the defendant) had been granted by the Chief Jus-

tice, in Chambers, on March 18, 1902, on the petition of B. Lawrence and Co., Ltd., of Cape Town.

The petition alleged that the insolvent had recently disposed of his assets with intent to defeat or delay his creditors.

The affidavit of the defendant admitted that he had sold certain shops situate at Claremont for £400, but denied that this had been done with intent to defeat or delay his creditors. He said that these sales were *bona fide* in the ordinary course of business and for full value. That the purchasers retained no part of the purchase price, and that he intended to apply the proceeds of these sales to pay off his creditors.

The affidavit of Amajet Khan, of Claremont, stated that he had purchased one of the said shops for £237 16s. 1d., and generally confirmed the affidavit of defendant as to the *bona fides* of the sale, and that on March 19, 1902, the Messenger of the Court closed the shop by the order of the Court.

The affidavit of Abdurahaman Khan alleged that he had purchased another of defendant's shops *bona fide* for £162 10s. 3d. That this was the fair value of the shop-stock and goodwill, and that although he had paid this sum, and neither defendant nor his estate had any further interest therein. That on March 19, 1902, the Messenger of the Supreme Court closed the shop by order of the Court.

The affidavit of Aaron Shirvald stated that he was a traveller for the firm of Gerald and Co., confectioners, of Cape Town; that he was at both the shops of Hassan Khan on March 11, 1902, two days before the alleged sale to Amajet Khan and Abdurahaman Khan, and that to the best of his knowledge the stock in the one shop was then worth upwards of £200, and the stock in the other between £350 and £400. On that day Hassan Khan promised to pay to Gerald and Co. an account of £12 in the course of the following week. On the following Monday, witness called at the shop in the Main-road, and saw Abdurahaman Khan and Amajet Khan; they told him that Hassan had gone to see his lawyer, and proposed compounding with his creditors for 10s. in the pound. They never said that they had bought the shops. On that day deponent noticed that the stock in the Main-road shop had been considerably reduced. He con-

sidered the prices realised totally inadequate to the value of the property and goods sold.

James McG. Bennett, in an answering affidavit, deposed that the shops were sold for £380 (and not £400) when Hassan Khan contemplated insolvency, and that at the time of the sale he owed Abourrahman and Amajet each a year's wages. That about eight days before the alleged sale deponent visited both shops and took particular notice of the stock; he estimated the value of the stock in the Main-road shop at from £350 to £400, and in Buchanan-road at about £200. On accompanying the Master's Messenger to attach the stock in these shops, deponent noticed a marked diminution, and estimated the value of what was left in both shops at from £350 to £400.

Mr. Buchanan (for the plaintiff) cited *Kersfeld's Executor v. Friedman* (4 Shiel 140). There, it is true a rule *nisi* was granted, but the principle on which we now ask to have the attachment continued is the same. Section 4 of the Insolvent Ordinance makes it an act of insolvency to alienate, transfer, give, cede, mortgage, or pledge any goods or effects with intent, or in such manner as to defeat or delay creditors in obtaining payment. Section 13 authorises attachment by the Master's Messenger on the sequestration of the estate, and this attachment must continue if there be any grounds for suspecting fraud until the whole matter has been investigated by the trustee and (if necessary) has been decided by action. No section of the Ordinance exactly meets this case, but Section 49 seems in point by analogy. A sale made by a man contemplating insolvency must be *bona fide*, and for a just price. Section 70 is also applicable by analogy. Also Section 83 (as to the recovery of things alienated *mala fide*) looks to the time before sequestration. Section 91 upholds alienation made to the alienee, of a creditor who has been unduly preferred, provided they were made *bona fide*, and for value, but then the said creditor may pay over the value of the things so alienated to the trustee of the estate. We do not say that there has been any undue preference in this case, but the sums paid for these businesses show that the sales were not *bona fide*.

Mr. C. W. de Villiers (for defendant opposing the attachment of the property): We only received the affidavits yesterday, and hence have had no opportunity of replying. Nothing was said about fraud in plaintiff's petition, and the onus of proving it is on the plaintiffs. Shinvald and Bennett only looked in a cursory manner round the shops, and it was impossible to form a reliable estimate of the value of the stock in that way. My clients on the other hand have taken stock carefully. Section 13 of the Insolvent Ordinance does not apply in this case, for the property which has been attached is no part of the insolvent's estate. The sale was perfectly *bona fide*, and the price paid was based on a careful stocktaking. Besides, these two shops are not brought up in Hassam Khan's schedules; they are no part of the estate, and it would be very hard on the purchasers were they prevented from carrying on their business.

The Court granted final sequestration as prayed, and ordered that the attachment effected by the Master's Messenger on the two shops do continue for a period of six weeks after the appointment of a trustee to enable the latter to take action to set aside the sales of the said shops, and that the costs of opposition be paid by the said Amajet Khan and Abdurrahman Khan, with leave reserved to the latter to include the costs so paid in any claim for damages they may claim in re-convention. The creditors were directed at once to proceed to the election of a trustee.

[Plaintiff's Attorney's: Silberbauer, Wahl and Fuller. Defendant's: Faure and Zietsman.]

GOLDMAN V. BAIRD.

Provisional sentence in this case was granted on the application of Mr. Percy Jones.

PHILIP BROS. V. GRAND JUNCTION RAILWAYS.

Mr. Alexander applied for provisional sentence on a bill of exchange for £995 4s. 5d. due March 31, 1902, with interest and costs.

Granted.

SOUTH AFRICAN SUPPLY AND COLD STORAGE COMPANY V. G. MANSFIELD.

Mr. Murray Bisset applied for a decree of civil imprisonment in respect to an unsatisfied judgment of the Resident Magistrate of Cape Town for £91 5s. 4½d.

The defendant appeared in person.

In reply to the Chief Justice, defendant said he only received a salary of £10 a month, and had a wife to support.

The Chief Justice asked Mr. Bisset if his clients were prepared to accept £2 a month.

Mr. Bisset replied that the sum was insufficient. Defendant lived on the premises of the applicants free of cost.

The Chief Justice asked the defendant if he could pay £5 a month.

Defendant said he feared it was impossible at present.

The Chief Justice said he would make the amount £4 10s. a month.

Mr. Bisset said he was instructed to accept an offer of £5 a month.

Judgment was given for a decree of civil imprisonment, to be suspended on payment of £4 10s. a month, the first instalment to be made on 1st May, plaintiffs having leave to apply again.

SHERWOOD V. CARTER.

Mr. Searle, K.C., applied for a decree of civil imprisonment in respect to an unsatisfied judgment for £295 6s. 3d. Counsel said that after the writ was taken out a further application was made to attach the half interest of the defendant in a certain patent in which plaintiff and defendant were jointly interested. The application was made on the 12th April last year, but at the instance of the defendant it stood over until the 1st May. Between these dates it appeared that defendant ceded his half interest to other parties. After the order was granted plaintiff discovered this.

Defendant, who appeared in person, said he knew nothing about this. During his absence summons was served on his wife, and before he came back judgment was given against him. He had a good claim against Mr. Sherwood. He went to England, and came back in March of last year. He left again on the 17th April. He first heard from his wife in January of judgment having been given against him.

Defendant, on oath, said he was a mechanical engineer. He did not earn anything in that capacity—not since the war had been on. He had no income.

Cross-examined by Mr. Searle: Witness had other patents—one for a railway chair, which he believed to be valuable. Messrs. Colley had paid his expenses to go home to try and dispose of the patents. His expenses were paid in consideration of giving certain interest in his patents. Witness came out from England this year with his sister, whom he did not support. A separation order had been granted between witness and his wife; he had to pay £6 a month towards her support. He had not paid this except on one occasion. Witness had employed three solicitors, and the action had in his absence been defended by his solicitors, who had, however, withdrawn the defence. Between the 12th April and the 1st May, the period during which the plaintiff's application for attachment stood over, witness did not sell his interest in a certain patent. A syndicate had been formed in respect to the half share witness had in a patent.

No order was made.

SCHOONRAAD V. SCHOONRAAD.

Mr. C. de Villiers moved for an order for the final adjudication of defendant's estate.

Granted.

STEPHAN BROS. V. ADAMS.

Mr. J. E. R. de Villiers applied for an order for compulsory sequestration.

Granted.

CHRISTIAN AND CO. V. GRAND JUNCTION RAILWAYS.

Mr. Percy Jones moved for provisional sentence on a bill of exchange for £320 18s. 1d.

Granted.

AFRICAN TRUST AND ASSURANCE COMPANY V. BARKER.

Mr. Alexander applied for provisional sentence on a mortgage bond for £360.

Granted.

VAN DER BYL AND CO. V. HAMED.

Mr. Percy Jones moved for provisional sentence on a promissory note for £69 10s. 5d., less £10 paid on account.

Granted.

VAN DER BYL AND CO. V. OMAR.

Mr. Bisset applied for an order for final sequestration.

Granted.

VAN DER BYL V. GAFFOOR.

Mr. Murray Bisset applied for an order for the final sequestration of defendant's estate.

Order granted.

UMTATA MUNICIPALITY V. BAKER.

Mr. Percy Jones applied for provisional sentence on a promissory note for £126 10s. 5d., with interest and costs.

Order granted.

PRINCE, VINTCENT AND CO. V. GRAND JUNCTION RAILWAYS.

Mr. Upington applied for provisional sentence on five bills of exchange, for respectively £640 15s., £415 16s. 6d., £571 3s. 6d., £657 17s. 9d., and £376 13s. 9d.

Granted.

ESTATE MCKENZIE V. DREYER AND CO.

Mr. Upington for plaintiff; Mr. Benjamin for defendant.

On the application of Mr. Upington, the case was ordered to stand over, the question of costs of postponement also to stand over.

BRITTAIN V. PRITCHARD.

Mr. Buchanan moved for provisional sentence on a promissory note.

Granted.

HOOLE V. OSMOND.

Mr. Howel Jones applied for provisional sentence on a mortgage bond for £300, and that the property be declared executable.

Granted.

FROST V. GEDDES.

Mr. Benjamin, for plaintiff; Mr. Upington for defendant.

On the application of Mr. Upington, this case was ordered to stand over till next provisional day.

ESTATE BLAKE V. DU PLESSIS.

Mr. Langenhoven applied for provisional sentence on a mortgage bond of £1,200, and that specially hypothecated property be declared executable.

Granted.

TUCKER V. SYMONS.

Mr. Howel Jones applied for provisional sentence on a mortgage bond of £450, and that the property be declared executable.

Granted.

MORUM BROS. V. PELEM.

Mr. Close applied for an order declaring certain landed property in Lady Grey to be executable in respect of an unsatisfied judgment for £257 11s. 8d. delivered in the Magistrate's Court at Lady Grey.

Granted.

DE VILLIER V. DU PLESSIS.

Mr. Rowson applied for provisional sentence for £60, being interest on a certain mortgage bond.

Granted.

CORRY AND CO. V. BLOWS.

Mr. J. E. R. de Villiers applied for provisional sentence on two bills of exchange for £63 13s. and £34 2s. 2d., less an amount paid on account, with interest and cost.

Granted.

LYONS V. ROYTOWSKI AND ANOTHER.

Mr. C. de Villiers, for plaintiff, moved for the discharge of a provisional order for sequestration of defendants' estate.

Granted.

MARAIS V. DU PLESSIS.

Mr. Langenhoven moved for a decree of civil imprisonment in respect of an unsatisfied judgment of the Supreme Court.

Respondent did not appear, and the Court granted the order as prayed.

REID AND NEPHEW V. DE VILLIERS.

Mr. C. de Villiers moved for a decree of civil imprisonment. Defendant had that morning paid the capital sum, but the costs, which amounted to about £14, had not been paid.

A decree was granted, execution to be stayed for a fortnight.

ILLIQUID ROLL.

PHILLIP BROS. V. SUTTON. { 1902.
April 12th.

Mr. Goch moved, under Rule 329d, for judgment for £56 10s. 1d., for goods sold and delivered; also for £28 7s. 2d., money lent and advanced.

Granted.

COLONIAL GOVERNMENT V. MATTHEWS.

Mr. Sheil, K.C., moved for judgment, under Rule 329d, for £53 16s. 1d., quit-rent and stamp duty due on a certain farm, and for £28 2s. 6d., for survey expenses, title deed, and stamps, with costs of suit.

Granted.

COLONIAL GOVERNMENT V. ENGELBRECHT.

Mr. Shiel, K.C., made a similar application, in this case the amounts being £39 15s. and £73 19s. 8d.

Granted.

COLONIAL GOVERNMENT V. BOK.

A similar application was granted in this case on the motion of Mr. Sheil, K.C.; the amounts in suit were £53 16s. 1d. and £4 12s. 3d.

KUTTEL V. THOMAS.

Mr. Russell moved for judgment, under Rule 329d, for £1,680, the purchase price of certain property bought by defendant.

Granted.

JOSEPH V. BRIDGES.

Mr. Alexander moved, under Rule 329d, for judgment for the sum of £42 10s., for brokerage on the sale of certain property.

Granted.

WARNER AND CO. V. BURGHARTH AND CO.

Mr. Buchanan moved for judgment, under Rule 329d, for £134 4s. 8d., balance of account for goods sold and delivered.

Granted.

SUPREME COURT

[Before the Hon. Mr. Justice MAAS-DORP.]

ADMISSION. { 1902.
April 14th.

Mr. C. W. de Villiers moved for the admission of Tielman Johannes de Villiers Roos as an advocate.

Order granted, and the oaths administered.

PROVISIONAL CASE.

KAISER BROS. V. KAVANAGH.

Mr. J. E. R. de Villiers moved for provisional sentence for £7,500, due upon certain conditions of sale, with interest *a tempore morae* and costs of suit. Transfer of the property in question, which is situated in Russell-street, Cape Town, was tendered.

Provisional sentence granted as prayed.

REHABILITATIONS.

Mr. C. W. de Villiers moved for the rehabilitation of Alfred Sandbach, whose estate was sequestrated in November, 1896.

Order granted as prayed.

Mr. Alexander moved for the rehabilitation of Willem Adriaan Froneman. The estate was sequestrated in April, 1899. The schedules showed debts proved amounting to £1,728, and a deficiency of £1,187. After payment of expenses, £111 14s. was left for distribution, and a dividend of 1s. 8d. awarded. There was nothing unfavourable in the trustee's report.

Order granted as prayed.

Mr. C. W. de Villiers moved for the discharge of William Young from insolvency. Notice to creditors had been given in the "Gazette," and the Master

had given a certificate to the effect that at the first and second meetings in the above insolvent estate no creditors appeared, no debts were proved, and consequently no trustee was elected.

Order granted as prayed.

Mr. Rowson moved for the rehabilitation of William Edward Fryer, whose estate was finally sequestrated on September 13, 1897, the schedules showing assets £4,674 and liabilities £5,499, so that the estate yielded a substantial dividend of something like 17s. 2d. in the £. The report of the trustee was favourable.

Order granted as prayed.

GENERAL MOTIONS.

GREEN POINT AND SEA
POINT MUNICIPALITY { 1902.
V. PEDERSEN. April 14th.

Mr. Searle, K.C., moved in this matter, which was an application for an interdict restraining the respondent, Wilhelmina Pedersen from occupying, or permitting anyone to occupy, certain houses at the corner of Ryan-road and High Level-road, Sea Point, until such time as they are completed, in terms of the plans and specifications approved by the applicants, and until respondent receives certificates of completion and occupation from the applicants. The matter was previously before the Chief Justice in Chambers, *ex parte*, when it was directed that notice be served upon respondent. This had been done, but no replying affidavit had been filed, nor had anything been done by respondent. The buildings were not completed in accordance with the plans approved by the Council, the stormwater being carried, not into the stormwater sewers, but into the household drainage sewers, doing damage to these. He also stated that one of the houses had been occupied before the water was laid on. Correspondence had passed showing that applicant had been warned that the houses could not be occupied until the stormwater drainage was in order, and the certificate of completion granted. It was further stated that the builder of the houses, who was the father of the respondent, had given the Municipality a vast amount of trouble in continually contravening the regulations.

An affidavit of the Building Inspector corroborated that of the Engineer, and the Inspector further stated that the occupier of one of the houses had informed him that the builder had told her that she could occupy the house.

The Court granted an order as prayed.

BRADY V. THE MASTER OF { 1902.
THE SUPREME COURT { April 14th.

The Master of the Supreme Court
Insolvent estate—Trustee—
Realization of assets.

Where no creditors in an insolvent estate have attended any meeting, and no trustee has consequently been elected, the Master of the Supreme Court has no power under the Insolvent Ordinance to liquidate the estate even so far as may be necessary in order to pay the costs of sequestration.

This was an application on notice calling upon the Master to show cause why an order should not be issued authorising or directing him to sell and dispose of the assets of the insolvent estate of one Leibbrandt, and to pay thereout the sum of £7 14s., being the taxed bill of costs of the applicant of and incident to the voluntary surrender and administration of the said estate, and which sum, though duly demanded, the respondent had refused to pay or to realise the said estate.

The petition of the applicant set forth that the estate of Johann Sebastiaan Leibbrandt was voluntarily surrendered by the insolvent in February last upon the petition of the insolvent, and the order of sequestration was made on the 28th February, 1902.

According to the schedules, the estate shows liabilities £320 6s. 11d. and assets £34 12s. 6d.

That the applicant acted as attorney for the insolvent on the surrender of his estate, and prepared and filed his petition and schedules, and paid the fees incident thereto, and the Master's fees. The costs were taxed at £7 14s.

That the first and final meeting of the insolvent estate was held on the 14th March, 1902. No creditors appeared thereat, nor have any creditors proved

since, nor was any trustee appointed, and consequently the assets of the insolvent are vested in the Master of the Supreme Court, the present respondent.

That he had requested the respondent to realise the assets in order to pay the applicant the amount of his taxed bill of costs, but he had refused to do so.

That the costs are costs of administration, and preferent, and are still unpaid, and there appear to be sufficient assets in the estate to pay the same if the person in whom they are vested, viz., the respondent, will realise the same.

The Master, in his report, pointed out that the applicant had applied to him to sell sufficient of the assets to cover his taxed costs, as however, he (the Master) had performed all the duties required of him by the Ordinance, he declined to comply with the request.

The Court was aware that it was not the duty of the Master to sell the assets of insolvent to meet the claims of creditors. The Master pointed out to applicant that it was for him to see that a trustee was elected, from whom he could recover his costs, and informed him that he was prepared to call another meeting for the election of a trustee on payment of the fees. This course the applicant declined to adopt.

Mr. Wilkinson (for the applicant): I would submit that the Master should realise sufficient to pay the taxed bill of costs. There is no necessity for the appointment of a trustee. The Insolvent Ordinance provides for only one meeting for creditors if the assets in the estate are less than £75. *Du Preez v. Trustee of Botes* (2 Juta, 386) shows that it is not necessary to prove the costs of a voluntary surrender—they are part of the costs of sequestration. The estate is vested in the Master: he is in the position of a trustee, and should act as such.

[Maasdorp, J.: You say that everything must be done at the one meeting if the assets are not over £75?]

In this case the assets were so small that it was not worth the while of any of the creditors to appear. If the Master does not act as trustee the creditors will never get anything, and if no trustee is appointed, it is clearly his duty to act. See *Macfarlane v. Brunnette* (6 Sheil, 278). *Du Preez's* case was decided under the 8th section of the Ordinance. Doubtless the Master would

realise sufficient to pay his own costs, and why should they be to all intents and purposes preferent to any other costs of sequestration.

[Maasdorp, J.: Who says that he has done so?]

It is only natural that he should.

[Maasdorp, J.: No trustee is allowed to sell, save to pay debts that have been proved.]

Costs of sequestration do not require proof.

Mr. Sheil, K.C. (for the Master) was not heard

The Court refused the application with costs.

Maasdorp, J.: This seems to me to be a most extraordinary application. It is virtually an application for an order upon the Master instructing him to proceed with the liquidation of the estate. Well, there is nothing in the Insolvent Ordinance which gives the Master any such power. The estate is only vested in the Master until such time as a trustee can be appointed to proceed under the Insolvent Ordinance to liquidate the estate, or, under certain circumstances, if the insolvency is not proceeded with the estate becomes re-invested in the insolvent upon the proper steps being taken. Under these circumstances the Court can not grant the order prayed for. The applicant must have certain remedies, and he must discover what the proper remedy is in this case. The application will be refused with costs.

[Applicant's Attorney: Brady; Respondent's: Reid and Nephew.]

IN THE ASSIGNED ESTATE OF MARCUS HEYDENRYCH AND CO.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to pass transfer of certain property without the production of the original deed of assignment, which had been lost. Counsel stated that there was a duplicate signed document made at the time.

The case was ordered to stand over until the consent of other parties to the agreement had been obtained.

Ex parte HAYTON.

Mr. Buchanan moved to make absolute a rule nisi authorising the Registrar of Deeds at Vryburg to issue certified copies of certain two mortgage bonds.

Granted.

THE ESTATE BRISTER. { 1902.
April 14th.

Option of purchase—Executor Minors' contingent interest.

The late J. B. had let certain property to the firm of J. B. & Co., with the option of purchase at his death, for £7,700. J. B. & Co. did not attempt to exercise this option until six years after J. B.'s death, but continued to pay rent. They had greatly improved the property, both in J. B.'s life-time and after his death. One of the partners in J. B. & Co. was also one of J. B.'s executors. He and his co-executor now asked for an order (1) directing the Registrar of Deeds to pass transfer of the said property to J. B. & Co. for the purchase price of £7,700, and (2) to direct that duty should be paid on transfer as though a sale had been effected six months after J. B.'s death. Certain minor children had a remotely contingent interest in the property.

The Court granted the first prayer of the petition, but refused the second.

This was an application for leave to transfer certain property situate in the town of Port Elizabeth.

The petition of Thomas Stevenson and William Brister Belt, both of Port Elizabeth, in their capacity as executors testamentary to the estate of the late James Brister, showed that the late James Brister, was the owner of certain two plots of land situate in Port Elizabeth, and extending from Main-street to Chapel-street. In these premises he formerly carried on the business of a furniture dealer, etc., under the style of Jas. Brister and Co., and he disposed of his said business to the said Wm. Brister Belt and Edward Roper Martin, who have since carried on the same for their own account under the said style. On or

about the 5th April, 1892, the said Jas. Brister gave to the said firm of Jas. Brister and Co. the complete control of the said landed property, upon the payment of an annual rental of £600, so long as he should live, with the option of taking over the same at his death for £7,700, upon certain terms and conditions set forth in a letter from him hereunto annexed marked "A." At his death Jas. Brister left a paper headed "Memos. for Guidance," in which appear the words: "James Brister and Co. have the right to take over Main-street." The said firm paid the stipulated rent, and fulfilled the other conditions referred to in the said letter of April 5, 1892, until his death. At various times, both during the lifetime and after the death of the said James Brister, the firm of J. Brister and Co. made additions to the said building, at a cost of £2,984 12s. 5d. At the death of Jas. Brister the said firm did not give any formal notification to petitioners that they had exercised their option granted in the said letter of April 5, 1892, but as the deceased had during his lifetime given the first-named petitioner to understand that the said Jas. Brister and Co. were taking over the said property, and as the second-named petitioner was both an executor to the estate of the late Jas. Brister and a partner in the firm of Jas. Brister and Co., it was tacitly assumed that no such formal notification was necessary, but that the said firm could demand transfer of the said property at any time after the death of the said Jas. Brister, and in or about 1898 the second-named petitioner showed to the first-named petitioner the said letter of April 5, as a reminder that the property belonged to his said firm, and that transfer would be taken in due course. Since the death of the said Jas. Brister, the said firm of Jas. Brister and Co. have continued to pay £600 per annum, and as this sum was a better return than 6 per cent. per annum on the purchase price of £7,700, the first-named petitioner considered it for the benefit of the estate to allow the arrangement to continue without interference. The said firm of Jas. Brister and Co. have now asked the petitioners to transfer the said property to them for the purchase price of £7,700, and offer to carry out the terms of the letter of April 5, 1892, and

petitioners are prepared to do this, being satisfied that they are entitled to such transfer in accordance with arrangement made with the late Jas. Brister, but as the second-named petitioner is one of the executors of the late Jas. Brister, as well as a partner in the firm of Jas. Brister and Co., and as no formal notice was given by the firm to petitioners, they consider that the ruling of the Court should be obtained as to whether, under all the circumstances, the words *at my death*, in the said letter of April 5, 1892, do not mean *after my death*? The petitioners are of opinion that no persons will be prejudiced by the passing of such transfer, as they are advised that, should transfer be refused, the said Jas. Brister and Co. will be entitled to recompense for the improvements made *bona fide*. The Divisional Council valuation of the property is now placed at £10,000

Wherefore the petitioners pray that your Lordships will be pleased to grant an order authorising and directing the Registrar of Deeds to pass transfer of the said landed property to William Brister Belt and Edward Roper Martin, trading as Jas. Brister and Co., for the purchase price of £7,700, and that transfer duty be paid thereon, as though a sale had been effected on June 6, 1897, being six months after the death of the said Jas. Brister, or at such other date as your Lordships shall direct.

The letter marked "A" was as follows:

Port Elizabeth,

April 5, 1892.

Messrs. J. Brister and Co.,

Dears Sirs,—Referring to our conversation about my property in Main-street and Chapel-street, I am willing to hand over to you the complete control of the property, including the cottage in Chapel-street, you accepting the position and responsibility of landlord from this date, paying the agreed rent of £600 a year quarterly so long as I may live: also all rates and taxes that may be levied on the property, together with the insurance on the property, except for this year, 1892, which I will pay and retain the rent of the cottage until the end of June, 1892. And I also give you the option of taking over the whole property at my death for the sum of £7,700; £6,000 can remain on mortgage: the bal-

ance at 6, 12, 18, and 24 months.—Yours very truly,

(Signed) JAMES BRISTER.

The report of the Registrar of Deeds, after recapitulating the facts, proceeds: "Instead of exercising the option at the date of Mr. Brister's death, which apparently occurred on December 6, 1896, the firm continued to pay the rent, and has only recently approached the executors with the object of procuring transfer. It appears, however, that, although paying a rental, the firm treated the property as its own, and both during the lifetime of Mr. Brister and after his death it expended considerable sums in effecting improvement." . . . I consider it desirable that the ruling of the Court should be obtained as to the right of the firm to take over the property. I am of opinion, however, that that portion of the prayer which relates to the payment of transfer duty cannot be entertained. Under section 13 of the Transfer Duty Act the Civil Commissioner is given certain discretionary powers, and he should be allowed to exercise them in this case, but it would be an advantage if the Court, in case the sale is confirmed, would indicate the date which should be treated as the date of sale.'

Mr. Buchanan (for applicants): The only difficulties which arise in this case are: (1) That one of the purchasers is an executor; (2) at what date is the purchase to be regarded as completed. As to the first point, the price offered is a fair one, and was fixed by Mr. Brister himself—the transaction is perfectly *bona fide*, and the estate will not suffer by the sale. As to the second point, if transfer is not passed within twelve months after the date of the sale, 12 per cent. is charged on the purchase price. The Registrar of Deeds seems to think that transfer duty should be paid, not on £7,700, but that a fresh valuation of the property should be made. Of course, under section 13 of Act 5 of 1884 the Civil Commissioner can have a valuation made, but it would be manifestly unfair to make Brister and Co. pay transfer duty on the enhanced value of the property, seeing that they themselves have increased its value by their own improvements.

Maasdorp, J., said that he would order that transfer be passed, in terms of the letter dated the 5th April, 1892, and that it must be taken that the contract upon which transfer would be passed was made

on the date of the death of the deceased. As the Registrar pointed out, no further order could be made as to the manner in which transfer duty should be calculated.

His Lordship asked if there were any minors interested.

Mr. Buchanan said that from a telegram he had received there would appear to be interested minors.

His Lordship said that upon the document as it now stood he could express his opinion. But some interested parties might be able to put a different complexion on the case. As it appeared that there were minors, he thought the matter should be referred to the Master, and the order would not be issued until the Master had reported.

Postea, April 26, the Master reported "There are minor grandchildren, who are at this stage only indirectly concerned, their parents being alive. The only way in which they may be affected is in the distribution of the residue of the estate in the event of the early death of the survivor of the testator's two youngest daughters, an event which may not happen until there are no more minor children. With regard to the sale, the Master recommended that it should be confirmed. An order in terms of the decision of the Court of April 14 was issued accordingly.

Applicants' Attorney: G. Trollip.

Ex parte HUGO.

Mr. Searle, K.C., moved for leave to the petitioner to sue her husband for restitution of conjugal rights by edictal citation.

The applicant stated on affidavit that she was married to Petrus Francois Hugo on February 21, 1893, and there was one child of the marriage, a girl of seven. After marriage she and her husband resided at the Farm Modderfontein, Prieska district. The respondent was a farmer, but owned no landed property, although he was possessed of some movable property in the shape of live-stock, etc. In 1900 the respondent left the applicant, and joined a commando of Transvaalers, under the leadership of Steenkamp. A considerable part of the live-stock had been taken away. The petitioner stated that she had received no monetary assistance since March 18, 1900. She received one letter from him from Holland, and subsequently another letter about a year

ago, dated from a place called Gibeon, in the German territory on the West Coast of Africa. The petitioner desired to sue him for restitution of conjugal rights, failing which, for divorce.

The matter was allowed to stand over for production of the letters mentioned, and for any further information that could be brought before the Court.

RE THE ANTENUPTIAL CONTRACT OF THE LATE ARCHIBALD ORIGHTON BELL AND PREDECEASED SPOUSE JOSEPHINE BENJAMINA BELL (BORN BURNETT).

This was an application for the appointment of a trustee in the place of the trustees appointed by the antenuptial contract, both of whom were now deceased.

Mr. Wilford, who appeared for the applicant, said that the matter was before the Court last provisional day, and was postponed for the purpose of an affidavit as to the death of one of the trustees being produced. The original affidavit had clearly stated that the one trustee was dead, but was not clear as to the death of the other. The necessary affidavit was now put in.

Order granted as prayed, George Henry Gasson being appointed trustee.

Ex parte MCNAMARA.

Mr. McGregor said that was the return day of the rule *nisi* granted under the Derelict Lands Act in the above matter, but he asked that it be allowed to stand over until May 1.

Mr. Sheil, K.C., appeared on behalf of the Government, to consent to the postponement.

Postponement granted, the question of costs also being postponed.

COLONIAL GOVERNMENT V. MARITZ.

This was the petition of Henry de Smidt, in his capacity as Assistant Treasurer of the Colony and Receiver-General of the Revenue, and as such representing the Colonial Government.

The petition set forth that on the 5th March, 1898, one Christoffel Carolus Johannes Maritz passed a mortgage bond in favour of the Colonial Government under Act 15 of 1887, for the sum of £114 8s. on first mortgage, of certain

pieces of land situate at Douglas, in the division of Herbert, being agricultural lots No. 71 and No. 82.

That it was provided in the mortgage bond that the said Maritz should pay interest on the capital sum of £114 8s. to the Colonial Government on the 1st day of January in each year at the rate of 4 per cent. per annum, reckoned from the 20th October, 1896, and that in the event of failure to pay the interest within three months after the day on which the same should have become due the whole of the capital sum and arrears of interest should thereupon become forthwith legally due and payable without any notice whatsoever.

That Maritz had never paid any interest on the said capital sum of £114 8s., and that from inquiries which had been instituted by the Civil Commissioner of Herbert it appeared that Maritz was an absconded rebel, at present with the Boer forces.

Petitioner was desirous of suing Maritz by edictal citation for the recovery of the capital amount of the mortgage bond, and interest from 20th October, 1896, and he prayed for an order for the attachment of the said landed property *ad fundandam jurisdictionem*, and that upon the return of the writ of attachment he might be allowed to issue summons by edict against Maritz for the capital sum, and interest with costs, and that the Court might direct as to the mode of serving the summons and as to the time for the appearance of the defendant.

Mr. Sheil, K.C., appeared for the Government, and moved in terms of the petition.

The Court granted leave to attach the property *ad fundandam jurisdictionem*, and to sue by edict, returnable on the 12th June next; personal service, if possible, failing which, one publication in the "Government Gazette" and one in the "Gazette" of the Orange River Colony.

COLONIAL GOVERNMENT V. POTGIETER AND COLONIAL GOVERNMENT V. VENTER.

These were similar applications to the last mentioned. In the former the amount claimed was £242 8s., with interest and costs, and in the latter £236, with interest and costs.

Mr. Sheil, K.C., appeared for the Government.

The Court made orders similar to that granted in the case of Maritz.

IN THE ESTATE OF THE LATE BAREND
PIETER DU PLESSIS.

Mr. Close moved on behalf of the petitioner, in his capacity as executor testamentary, for leave to purchase for the benefit of the children who are heirs in the above estate certain property. The purchase price was to be paid out of moneys belonging to the estate, and as the father of the children had the usufruct of this money, he was to have the usufruct of the ground purchased. The father had purchased this property for himself for £2,000, paying £750 in cash and passing a bond for £1,250 for the remainder, and he was now to put the property into the estate on the payment of the mortgage bond alone. The two major children had consented to this being done, and the Master's report was favourable.

Order granted as prayed.

IN THE MATTER OF THE PETITION OF
AMY GARDNER GUSH.

Mr. Russell moved for leave to sue for restitution of conjugal rights *in forma pauperis*. Plaintiff alleged that her husband had deserted her. She was instituting an action for restitution of conjugal rights.

The applicant stated that she was a hospital nurse. She had not sufficient money to pay an attorney.

The application was granted, the case being referred to Mr. Gardiner.

HLANGE V. TABATA.

Mr. Bisset moved for leave to sue *in forma pauperis*. The case concerned certain property which plaintiff alleged he had bought, and for which defendant held the title deeds.

The application was granted, the case being referred to Mr. Bisset, a rule *nisi* being granted calling upon the respondent to show cause why he should not give up the title deeds aforesaid.

Postea, July 14: The rule was made absolute.

BLAKE V. BOSCH.

Mr. Alexander moved for leave to attach £55 17s. 5d., in the hands of the High Sheriff of Cape Town, belonging to defendant, pending an action to be instituted, and for leave to sue by edictal citation.

Leave was granted, the return day being fixed for the 12th June, personal service to be effected; otherwise, service by publication, once in the "Government Gazette" and once in the "Gazette" of the Orange River Colony.

DANVERS V. ARCHER AND DANVERS
AND CO. V. ARCHER.

Mr. Upington applied to attach certain moneys, amounting to £13 1s. 9d., in the hands of Messrs. Mannering and Stevenson.

Granted, with costs against the respondent, Archer.

MCKENZIE AND CO. (LTD.) V. HOWES
BROS. AND CO. (LTD.).

Sir Henry Juta, K.C., moved for leave to sue by edictal citation in the above matter. The petition of McKenzie and Co. stated that on November 5, 1901, they entered into a contract with the respondents for the supply of Australian butter, and they had a right of action against respondents for £1,650 damages for breach of that contract. On March 26, his lordship, Mr. Justice Maasdorp, granted an order attaching 500 cases of butter, to found jurisdiction. Jurisdiction having been founded, the applicants now asked for leave to sue by edictal citation, and also to serve *intendit* and notice of trial together with the citation.

Maasdorp, J., said that, as this butter had been attached, they might consider whether it was not advisable to dispose of it.

Sir Henry Juta said that, of course, if it was fresh butter, it would be better in the interests of all to sell it, although if it was in tins, it might not matter; but he did not think the respondents had representatives here who could act for them in that connection.

Leave was granted to sue by edictal citation, July 12 being fixed as the return day, and also to serve the *intendit* and notice of trial along with the citation.

RE MINORS WADDELL. { 1902.
Ex parte CURREY, N.O. { April 14th.

Minors property—Option of purchase.

A division of certain property having been made, it was discovered that the portion assigned to certain minor heirs had been leased with an option of purchase to the lessee. The lessee now insisted on his option, and the trustee for the said minors asked for an order authorizing the sale, or, in the alternative, setting aside the option as ultra vires. The Master recommended the confirmation of the sale.

The Court granted an order authorizing the sale of the property.

This was an application for an order of the Court granting leave to sell certain property bequeathed to the above minors, or, on the other hand, to set aside, as being *ultra vires*, and not to the benefit of the minors, a certain clause in a lease giving an option to purchase.

The petition of William Arthur Currey, in his capacity as secretary to the General Estate and Orphan Chamber, and as such trustee for the minors Edward George Waddell and Albert Victor Augustus Waddell, children of Richard Waddell, and his predeceased wife, Fanny Ada Waddell, was as follows:

1. The petitioner, as secretary of the General Estate and Orphan Chamber, was, by order of Court dated March 17, 1899, duly appointed trustee of the said minors.

2. On March 17, 1899, the father of the said minors, together with one George W. Parry, in their capacity as executors testamentary to the estate of the late Fanny Ada Waddell, presented a petition to this Hon. Court praying for an order authorising the raising of a loan of £6,000 upon the security of certain properties, situated at Wynberg and Kenilworth, and registered in the name of Richard Waddell.

3. That your petitioner craves leave to refer this Hon. Court to the petition and

annexures thereto filed of record with the application.

4. That this Hon. Court, on March 17, 1899, in answer to such prayer, made an order in terms of the Master's report, and your petitioner was duly appointed trustee.

5. That in terms of the said Master's report and order of Court, the property situated at Wynberg, and described in the deed of transfer in favour of the said Richard Waddell on September 28, 1898, was transferred on March 29, 1899, to the said minors as their share of the property of the deceased Fanny Ada Waddell, and the property situated at Kenilworth was transferred to the said Richard Waddell as his share.

6. That after petitioner had been appointed such trustee, and after he had taken transfer as above, he was informed by one B. W. Davies, of Station-road, Wynberg, who was the tenant of the premises in question, as well as by the said Richard Waddell, that the said B. W. Davies held the premises under a lease from the said Richard Waddell for a term of five years from March 1, 1897, to February 28, 1902, with the option of purchase for £2,000, and your petitioner thereafter received notice on January 7, 1902, intimating that he, the said Davies, intended exercising the option of purchase.

7. That as the wife of the said Richard Waddell died on June 10, 1894, and the will was dated April 9, 1891, under which will the said Richard Waddell has adiated and received benefit, your petitioner submits that the said Richard Waddell had no right to give the said Davies, or anyone else, the option of purchase over the said property, and that, therefore, the option mentioned in the said lease of March 11, 1897, is *ultra vires*, and of no effect.

8. That the property was valued by a sworn appraiser at the time application was made in 1899 at £2,500, but it has now been valued by a sworn appraiser at £1,600. The price fixed in the lease is therefore an increase on the present appraised value.

9. That your petitioner is anxious to have the decision of this Hon. Court as to whether the option given in 1897 is legal or not, and to the benefit of the minors, and if so, whether your Hon. Court would authorise the sale of the property to B. W. Davies, and authorise

the Registrar of Deeds to register the necessary deed of transfer from your petitioner in his aforesaid capacity to the said B. W. Davies.

Wherefore your petitioner prays that it may please your lordships to grant an order, either setting aside the option clause in the said lease of March 11, 1897, and ceded to the said Davies on October 14, 1897, as being *ultra vires*, and not to the benefit of the minors; or in the alternative, for an order authorising your petitioner, in his aforesaid capacity, to give transfer to the said Davies, and for authority to the Registrar of Deeds to register such deed of transfer, and that the costs of this application may be paid out of the revenue derived from the said property; and for alternative relief.

Mr. Searle (for petitioner) stated briefly the facts of the case.

[Maasdorp, J.: Is Davies represented?]

[A gentleman, stated to be a law agent, here rose and stated that he had a power of attorney from Mr. Davies.]

Sir H. Juta, K.C. (as *amicus curiae*), pointed out that only counsel could be heard in the Supreme Court.

Mr. Searle: The option was an improper option, and therefore there was the alternative prayer. The Master in his report said that, if the property was sold for £2,000, there would be no actual loss to the minors, because if it were put up by auction, it would not fetch more than that. It appeared that the property had now been valued, and while one valuator gave the value as £2,250, the other gave it as £1,600, so that, taking the average of £1,925, the Master thought the sale for £2,000 should be confirmed. As for the trustee, he left the question as to whether the property should be sold or the option clause set aside in the hands of the Court.

The Court granted an order in terms of the Master's report, allowing the sale of the property, costs to come out of the proceeds.

[Applicant's Attorney: D. Tennant, jun.]

RE ESTATE OF LATE { 1902.
SLUITER. } April 14th.

Minor—Maintenance—Allowance
to Natural Guardian.

*S. had by an unwitnessed
holograph will left the life*

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usufruct of his estate to his wife and the corpus to his child (still a minor). The Court having previously decided that the widow could not claim benefits under this will, had authorized the administrators of the estate to pay £250 annually for the maintenance of the child. The widow now asked for the life usufruct of the whole estate to enable her to maintain the child more suitably, and as a recompense for any expense and trouble she might be put to in so doing. The income from the estate was £1,000.

The Court ordered that, pending a further order of Court, £500 per annum should be paid to the mother for the use of the child and to meet any extra expense she might incur on the child's account.

This was an application for an order authorising the executors to pay from time to time to the widow of the late Herman van Loeven Sluiter the whole of the usufruct of the estate of deceased.

The petition of the applicant set forth that she had been married to deceased in this colony out of community of property. That by the said marriage there was only one child, a girl now 11 years of age. That on August 25, 1897, deceased had made a holograph will, by which, after leaving a sum of money to his brother, he appointed petitioner heiress to the residue of his estate in trust for the child, or children of the marriage, petitioner to have the usufruct during her lifetime, and upon her death the estate was to be divided equally among the children of the marriage. That, as this will was not duly attested, it was ineffectual as far as petitioner and the legatee were concerned, and that the one child of the marriage was the sole heiress of the estate. That petitioner (contrary to the obvious intention of her late husband) had been left without means to support herself, and that the board of executors, as ex-

cutors of the estate of deceased, refused to pay more out of the usufruct than was required from time to time for the maintenance and support of the child, without an order of Court to that effect, as they maintained that the said usufruct was for the benefit of the child only. They therefore refused to pay more than £250 per annum. Petitioner submitted that this sum was insufficient for the child's requirements, and that petitioner, as her guardian, was entitled to some remuneration. The estate was worth about £25,000, and the annual income therefrom was about £1,000. Petitioner prayed for an order directing the aforesaid executors to pay over to her the entire usufruct, in the terms of the will.

The Master recommended that such portion of the usufruct as might be necessary for petitioner's support be paid to her, and considered £500 per annum a reasonable sum for this purpose. The Master further called the attention of the Court to the fact that the testator only appointed executors to his will and not administrators of his estate, but that the board of executors had exercised the function of administrators and had declined to pay the minor's money into the guardians' fund, as is customary where administrators have not been appointed. By this the minor was the loser, as the Board only allows simple interest at 4 per cent., but the Guardians' Fund allows compound interest at the same rate.

Mr. Searle, K.C. (for petitioner): The two questions before the Court are: (1) Should the board of executors be ordered to pay this money into the Guardians' Fund? (2) what sum should be allowed her for the child's maintenance and education. The Master suggests £500 a year, and that certainly is not an unreasonable sum considering the value of the estate.

[Maasdorp, J.: Should not the mother be under some kind of supervision?]

She is the natural guardian. At all events, it is not in the interest of the minor that the board of executors should continue to act as administrators for the Guardians' Fund, who give better interest for the cash balance in the estate, but the Board proposed to invest this money at a higher rate. The Court has never laid down that even an executor is bound to liquidate the estate piecemeal

and pay in any balance to the Master of the Guardians' Fund, and here the Board has taken out letters of administration.

[The Master: Only testators appoint administrators; we do not.]

[Maasdorp, J.: If the estate is not finally liquidated it should not be paid in piecemeal. Have the executors yet done their duty as executors?]

The Master: Not quite; they still have some money in hand.]

[Mr. Searle: They have some thousands in bonds, some of them at 6 per cent., and others at 7 per cent. or 8 per cent. But it is only incidentally that the point whether executors are bound to pay in balances to the Guardians' Fund, as they realise arises. My chief application is for an allowance for Mrs. Sluiter, and I submit that £500 a year is a very reasonable sum.

Maasdorp, J.: Whoever retains the money, whether the Board of Executors or the Master, a report must be made to the Master as to the manner in which the money allowed the applicant is expended. I am asked to express an opinion as to the position of the Board of Executors, and so far as my opinion is concerned, I think that it cannot be contested that they have only as executors to liquidate the estate. As to the period required to do so, that depends upon the nature of the estate and the investments on account of which it may be quite correct for the executors to delay the liquidation; but if they delay the liquidation unduly, then the Master should move. I don't think the Court should now grant an order to pay over the money to the Master piecemeal. I will not grant such an order now, but if, on further information, the Master wishes to move again, he can do so. With regard to the application of the mother, it seems that when the matter was before the Court on a former occasion, the Chief Justice pointed out that there should be no instruction or direction that the administration should be for the benefit of the mother—as owing to the nature of the will, and the fact that no probate would be granted upon it, the testator did not, according to law, confer any benefit upon that mother. The question only arises now, in how far should the minor be benefited by the expenditure of moneys on her by her natural

guardian—the mother—and what amount should be beneficially expended by the mother for the minor. It is suggested that £250 would be sufficient under the circumstances for the education and maintenance of the minor, but it seems to me, considering that a large amount of money annually comes to the minor, that it would be to the advantage of the minor that the mother herself should be placed in such a position as to be able to maintain the child personally. The mother, having no means, cannot properly maintain the child, unless she make a home for the child, and it cannot be expected that the mother should go to great expense and make a home for the child unless she can be assisted from the money that comes to the child for that purpose. Referring to the Master's report, it seems that the Master himself considers that £500 would be a reasonable amount to allow. Now that amount will be allowed only until further order of the Court—it may be that circumstances may arise making it advisable to remove the expenditure from the mother—consequently the authority will be given to pay this amount until further order of the Court, and while this money is so payable, the mother will make a report to the Master showing that the money is properly expended. At present the Court will make no order as to the question arising between the Master and the executors.

[Applicant's Attorneys: Van Zyl and Buissinne.]

As parte WAITE AND { 1902.
ANOTHER. } April 14th.

Antenuptial Contract—Trustee.

Where a man by antenuptial contract settled certain property upon his future wife in trust for her support and for that of any issue of the marriage, and children of the said marriage having since been born, the consorts asked for leave to sell the property and reinvest the proceeds. The Court granted an order authorizing the sale and transfer to purchasers, but directed that the proceeds should be paid

over and bonds passed to certain trustees to be appointed by the consorts to be held upon the trusts mentioned in the antenuptial contract.

This was an application for leave to sell certain property.

The petition of Herbert Waite and Minnie Beatrice Waite (born Ensor) stated that the petitioners were married at Port Elizabeth under an antenuptial contract on October 29th, 1891. In this contract the first-named petitioner ceded and transferred to the second petitioner two pieces of ground situate in Port Elizabeth, and further described in the said contract. This cession was made by the first-named petitioner in consideration of his intended marriage, and for divers other good causes and considerations. The rents, profits and benefits accruing from the said property during the joint lives of the intended consorts were to be applied to the maintenance and support of the second-named petitioner, and for the maintenance, support and education of the issue of the then intended marriage up to and until the youngest child should have attained the age of 21 years, or be married, when the property was to be realized and paid out to the child, or children, then alive, or should no such child or children survive the mother, the property should become hers solely and exclusively, and should be disposed of as she might think fit. Should the second predecease the first petitioner, there being issue of the intended marriage, the proceeds of the property were to be paid out as aforesaid on the death of the first petitioner. Other clauses of the contract provided for the disposal of the property in case (1) the intended wife should predecease her husband, there being no issue of the marriage; and (2) the husband should predecease the wife, leaving issue. In this case the wife was to continue to enjoy the rents and profits of the land aforesaid for the support of herself and of her children, and on her death or re-marriage the proceeds of the property were to be applied to the support and education of the children until the youngest of them should attain the age of 21, or be married, when the said proceeds were to be distributed as afore-

said. During her lifetime the wife was to be trustee of the property. Should she resign the trusteeship, or become incapacitated from acting, or forfeit, or wish to be relieved of the same, the spouses reserved to themselves jointly during their joint lives the power to appoint any other fit and proper person as trustee, and on the death of the first dying, the survivor was to have the like power; a life policy effected by the husband upon his own life for £2,000 was also assigned to the wife by the said antenuptial contract upon the same conditions.

The petition proceeded to state that there was issue of the said marriage, two boys and three girls. That the said ground with the buildings thereon cost the first-named petitioner £2,250 in July, 1891, and that they are now let at £20 16s. 8d. a month. Petitioners had now an opportunity of selling the property for £10,250. Of this sum £2,250 was to be paid on or before transfer, with option to purchasers to pay £8,000 on or before transfer, or to allow the said sum of £8,000 to remain on first mortgage at 6 per cent., of which £1,000 was to be paid off within the first year, and another £1,000 in the second year; the remaining £6,000 to remain on first mortgage at 6 per cent., subject to six months' notice on either side. Petitioners regarded such offer as most advantageous to those concerned under the said antenuptial contract and prayed for an order to enable them to sell the said property under the conditions aforesaid, and to reinvest the balance of the proceeds, after paying all expenses of sale for the purposes named in the said antenuptial contract.

The affidavits of the Secretary of the Divisional Council of Port Elizabeth and of a sworn appraiser, both stated that the price offered for the property was exceptionally good.

The Master's Report was as follows: "The terms and conditions of the sale appear to be most advantageous to the seller, but the trustee referred to in the antenuptial contract has not been appointed. I think this should be done, the policy ceded to him, and the proceeds of the sale of the property should be invested by him, otherwise the settlement is merely an arrangement to evade the claims of creditors."

Sir H. Juta, K.C. (for applicants): The property is vested in Mr. Waite, subject to the same conditions as the policy of insurance upon trust or in the trustee after provided for in the antenuptial contract. Mrs. Waite is the only trustee mentioned, and it is only in the event of her dying, or becoming incapacitated that the appointment of another trustee is provided for; all persons interested agree to this sale, and I am instructed to say that petitioners have no objection to the secretary for the time being or the Ægis Insurance Co. being joined with Mrs. Waite as co-trustee. We ask the Court to sanction this sale; to authorise Mrs. Waite to pass transfer, as the property is registered in her name, and that the proceeds of the sale be handed over for investment to trustees to be appointed by the consorts in terms of the antenuptial contract.

The Court ordered the sale to be confirmed; that Mrs. Waite be authorised, as trustee, to transfer the property mentioned in the petition registered in her name; and that the money be paid and bonds be passed to the trustee, to be held upon the trusts mentioned in the antenuptial contract.

[Applicants' Attorneys: Van Zyl and Buissinne.]

FRYER V. FRYER.

Mr. Alexander applied for a decree of divorce. On the 19th February an order was granted calling upon defendant, Henry Francis Fryer, to return to or receive plaintiff by a certain date. He had failed to do so.

A decree was granted, with costs, plaintiff to have custody of the minor child, defendant to pay £7 10s. a month towards the child's maintenance until it attain the age of 16.

Ex parte WILLIAMS.

Mr. C. de Villiers moved to make absolute a rule nisi under the Derelict Lands Act.

Granted.

Postea (June 20th), the rule was made absolute.

Ex parte WASSERMAN.

Mr. Buchanan moved for leave to sue for restitution of conjugal rights by edictal citation.

Leave was granted as prayed, the citation being returnable on the 12th July, notice of trial to be personally effected.

ANNEN V. ANNEN.

Mr. J. E. de Villiers asked that the return day in this case, in which application was to have been made to make absolute a rule nisi for leave to sue *in forma pauperis*, should be extended until the 12th July. Defendant was supposed to be in the Transvaal, and the rule had not been served upon him.

The application for extension was granted.

Postea (July 14th). The return day was extended to August 14.

Ex parte FERREIRA.

Mr. Buchanan moved for leave to rectify certain deeds of transfer passed on April 29, 1886, in which, as was admitted, the portion of a certain farm transferred has been incorrectly described.

Order granted.

Ex parte BENDLE.

Mr. Russell moved for leave to the petitioner to sue *in forma pauperis* for restitution of conjugal rights, failing which for divorce.

The case was referred to Mr. Russell for report.

RE ESTATE OF THE LATE BEATRIX ALLETTA OLIVIER.

Mr. Bisset moved for leave to sell certain property and purchase other property at Oudtshoorn. The Master's report was favourable.

An order was granted in terms of the Master's report.

Ex parte BUTLER.

Mr. Percy Jones applied on behalf of the petitioner, who lives at Beaufort West, for leave to raise a loan of £125 on a certain life policy, the proceeds to be devoted towards the maintenance and education of a minor daughter, and for the petitioner's two major sons to be appointed as trustees. The policy had been ceded to two persons in trust for the

minor daughter. These two gentlemen now resigned in favour of such persons as the Court should appoint.

The matter was referred to the Master for report.

BARRATT V. MCKENZIE AND CO.

This was an application for a commission *de bene esse*.

Mr. Searle, K.C., appeared for applicant; Mr. Benjamin for respondent.

Mr. Searle said that the only question in the case was that of costs. Plaintiff required to take the evidence of Captain Webb, who would prove the instructions given by him, as plaintiff's agent, to the defendants.

A commission *de bene esse* was granted, conditional upon security for costs being given by the 2nd May, costs of the application to be costs in the cause. Mr. Leopold Frederick Bemays, Brisbane, was appointed commissioner.

CRIMINAL SESSIONS :
SUPREME COURT

APRIL, 1902.

[Before the Chief Justice Sir J. H. DE VILLIERS.]

REX V. RADZIWILL. { 1902.
April 28th.
" 29th.
" 30th.

Postponement of Trial—Absence of Witnesses—Practice.

Application for the postponement of a criminal trial on the ground of the absence of material witnesses refused in the absence of any affidavit stating the names of the witnesses, and in what respect their evidence was material.

Mr. Wilkinson, who appeared for the accused, said he had an application to make, and that was that the trial should be postponed to the next Criminal Sessions, and the application was based on

the following grounds: They had witnesses who were at present in Europe those witness would prove that certain evidence that had been given before the Magistrate on behalf of the prosecution, and which would presumably be given at the present trial, evidence of a most important and damaging nature, was utterly false.

De Villiers, C.J.: Whose evidence?

Mr. Wilkinson: The evidence of two witnesses who are at present in Europe. It is impossible for us to get those witnesses before—

De Villiers, C.J.: No. I mean whose evidence do you say is false?

Mr. Wilkinson: Well, I would prefer not to indicate which portion of the evidence that is.

De Villiers, C.J.: But I think you should do so, and you should state what witnesses you wish to contradict.

The evidence would account for the way in which they became possessed of these bills, and for the making of the bills. That was one portion of the evidence, and he submitted that if they could satisfactorily account for the possession of those bills, and, more than that, if they could satisfactorily account for the way in which those bills came into their possession, and for the actual making of the bills, then he submitted that on that account alone the evidence for the prosecution would utterly fail, without going into other matters.

De Villiers, C.J.: Have you any affidavit?

No, but an affidavit to that effect can be made immediately. These are my instructions, and I make those statements with a full sense of responsibility.

De Villiers, C.J.: Yes, I daresay you do, but practice requires an affidavit.

Then we will have an affidavit made to that effect immediately.

De Villiers, C.J.: What you have stated you wish to prove by affidavit?

The Chief Justice (to the Attorney-General): What do you say, Mr. Graham?

Mr. Graham: Of course, my lord, I object most strongly to any postponement.

De Villiers, C.J.: If the Attorney-General objects there can be no postponement.

Mr. Wilkinson: Do I understand that your lordship has given judgment on the postponement?

De Villiers, C.J.: Yes. Do you wish to address the Court again?

Mr. Wilkinson: I had refrained from alluding to the second part of the evidence, in reference to which our evidence is contradictory. That is the evidence that was given as regards the typewriting. We can clearly establish that the whole of that evidence is founded upon an utter mistake. I won't use any stronger words than that.

Graham A.G. (*sotto voce*): No, you had better not.

Mr. Wilkinson: My friend says I had better not, but any stronger words would be out of place. Proceeding, Mr. Wilkinson said he would submit strongly that in the first place, if this were an application made on behalf of the Crown on the ground that material witnesses were absent without whom he could not go to trial, there would not be any strong reason for objecting. In this case he put it as strongly as he could that, by going to trial without witnesses who might have an important bearing on the case, they would be incurring a most imminent risk of a complete miscarriage of justice. When an announcement of this sort was made, and the nature of that evidence was indicated, he could not understand how the Crown could persist in opposing the postponement, if their object was not to snatch a conviction, but to elicit the truth, the whole truth, and nothing but the truth. He would therefore urge upon his lordship, in the interests of justice, in the interests of the community, and of the lady who at present, at all events, must be considered as innocent, and who supposed that she had evidence that would completely rebut certain evidence of the Crown, that the trial might be postponed.

De Villiers, C.J.: An application is made for the postponement of this case on the grounds that there are two witnesses in Europe who can contradict evidence here. I asked for the names of the two witnesses whose evidence was to be contradicted, and counsel for the defence declined to give them.

Mr. Wilkinson: No, my lord, I did not understand—

De Villiers, C.J.: You said you would rather not give the names of those whose evidence is to be contradicted.

Mr. Wilkinson: But I went on to refer to the evidence that we were going to contradict.

De Villiers, C.J.: Then whose evidence was it? I will give you another opportunity.

The evidence of Dr. Scholtz.

De Villiers, C.J.: Upon what point?

Upon the point of the genuineness of the signatures, and where the bills were made, and how they were made, and how they came into our possession.

De Villiers, C.J.: Then whose names did you decline to mention?

The names of the two witnesses whom I desire to call.

De Villiers, C.J.: Then I think it is worse if he refuses to give the names of witnesses whom he wishes to call. Upon that point no such application should be made. It is usual, when an application of that kind is made, to be prepared with an affidavit in support of the statements of counsel. Here there is no such affidavit, but we are informed that one can be made immediately. If there had been the slightest grounds for believing that justice would be imperilled in consequence of the absence of these two unnamed witnesses, I should certainly have ordered the postponement, but there is no reason to fear anything of the kind, and therefore the application will be refused.

Forgery—Production of Forged Document.

Held, that if a forged document can be traced to the possession of a person accused of forging it, and that person fails to produce it on notice, a conviction may be sustained notwithstanding its non-production.

Graham, A.G., said that this was a note the prosecution could not produce. It bore the alleged signature of Mr. Rhodes and Dr. Scholtz.

Mr. Wilkinson (for defendant) said all the notes mentioned in the indictment should be produced, and he took objection to the evidence.

De Villiers, C.J.: It is a pity you did not raise that objection at first. What are your authorities, Mr. Attorney?

The Attorney-General submitted, first, that on general principles he was entitled to produce evidence as to this note, and he pointed out that, supposing a person was accused of having forged a document, and undoubted evidence was produced of the existence of that document—that the document had actually been in the possession of the Crown—and that, during the course of the trial, before going to the jury, the accused person obtained possession of that document and destroyed it, surely it would be impossible to suggest that on that count evidence in regard to that note should be excluded. He submitted that once they had satisfied the Court of the existence of the note or bill, and that it had been traced back to the possession of the accused, the jury, if they were convinced that the note had been forged or uttered, were entitled to bring in a verdict of guilty on that count. He quoted *Taylor on Evidence*, par. 408, to show that secondary evidence could be led even in a case of forgery, although then notice must have been served upon the accused person to produce the document, and such person must have failed to do so before secondary evidence could be taken as to the contents of the document. The authorities only laid down that reasonable notice must have been given the accused to produce that document.

[De Villiers, C.J.: That such notice has been given has not been proved yet?]

The Attorney-General: It is filed of record. These documents were served on accused by the Sheriff. The Attorney-General quoted *R. v. Haworth* (4 C. and P. 254) *R. v. Hunter* (3 C. and P. 591), in support of his contention, and also pointed out that he had personally argued that very point in *Q. v. Searle* (1898, July 15), in which he prosecuted when he was last Attorney-General. It was the case of a Cape Town Post-office official, and the point was whether they were entitled to call secondary evidence when the documents were not forthcoming. It was then held by Maasdorp, J., that such evidence was permissible. As a matter of fact, the jury did

not find the prisoner guilty on those counts, as the evidence was not particularly satisfactory, but the principle was decided in favour of the argument he now brought forward.

Mr. Wilkinson did not reply in argument, saying that he left himself entirely in the hands of the Court.

De Villiers, J.: I think the evidence is admissible. There may be some difficulty in proving forgery where the document is not produced, but that difficulty may be met in many cases. For instance, where a person has never in his life signed a promissory note, and he states that he could not have signed a certain promissory note not produced because he had never signed a promissory note, that would be conclusive evidence. In the same way, in the present case, Mr. Rhodes was satisfied that he never signed any promissory notes in favour of the Princess Radziwill, and that will be sufficient evidence to go to the jury. But I think that the ordinary principle regarding missing documents should be applied in a case like the present. If the document was traced to the possession of the accused, and she could not produce it, then secondary evidence might be led as to the contents of the document. I see now notice has been given to accused to produce the document, and therefore, in the absence of such production, the evidence is admissible.

[Applicant's attorney, J. J. Michau.]

SUPREME COURT

[Before the Hon. Mr. Justice MAAS-DORP.]

ADMISSIONS. { 1902.
May 1st.

Mr. Benjamin moved for the admission of Edward Walter Joyce as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Registrar of the High Court of Kimberley.

Mr. Benjamin moved for the admission of Henry Wrensch as a conveyancer.

Order granted, and the oaths administered.

MCKENZIE V. DREYER AND CO. { 1902.
May 1st

Ostensible Partner—Liability.

Held, that where a man has ceased to be a partner in a firm, but has given no public notice of his withdrawal therefrom, and has thereafter held himself out as a partner, he is estopped from denying his liability on a promissory note given by the firm subsequent to his withdrawal therefrom and accepted in consequence of his having held himself out to still be a partner.

This was a motion for provisional sentence on an acknowledgment of debt, under which Dreyer and Co. undertook to pay a sum of £31 10s. on November 4, 1901, and a similar sum on December 21, 1901. The acknowledgment of debt had been given to P. G. H. Wilmott and Co., who had ceded it to the estate of the late James McKenzie, for which they had been acting as agents. Provisional sentence was asked for £63, with interest on half that sum from November 4, and interest on the other half from December 21. Mr. Upington moved.

Mr. Buchanan appeared for John L. Irvine, who had been sued as one of the partners of the firm, but who denied that he was a partner. The affidavit of Irvine stated that he was a partner with Dreyer, in the firm of Dreyer and Co., from February 1 to May 31, 1901, when the said partnership was dissolved by mutual consent. The acknowledgment of debt sued upon had never been signed by him, and the date of the document being September 21, it had been signed after the dissolution of partnership.

In an answering affidavit, P. G. H. Wilmott said that in July, 1901, he was acting on behalf of plaintiff, and then sold to Messrs. Dreyer and Co. certain furniture for £93, receiving £30 and the acknowledgment of debt for £63. He understood that the firm consisted of both defendants, for the reason that the letters, including the document sued on, had not only the title of the firm Dreyer and Co. upon it, but set forth the names

of the two defendants as the partners, and in addition to that the defendant Irvine had expressly told him that he was a partner of the firm. He (Mr. Wilmott) had not seen in the "Government Gazette" or anywhere else any notice of the dissolution of partnership, nor was it ever notified to him. Whilst the negotiations for the sale were going on, he called at defendants' office and asked to see Mr. Dreyer, but the latter was not in. The defendant Irvine was there, and on Mr. Wilmott mentioning his business, Irvine distinctly said, "You can give it to me; we are partners." To neither of the demands made by Mr. Wilmott or his attorneys did defendant take or set up the defence now raised. The affidavit further set forth that, owing to the defendants action, a case brought in the Magistrate's Court had to be withdrawn, and proceedings taken in the Supreme Court, necessitating extra expense.

Mr. Upington (for applicant): Irvine's defence is that the partnership was dissolved before the sale to the firm by McKenzie's executors took place, but no notice of dissolution of the partnership had been published, and the document sued upon bears the name of Irvine, as one of the individual members of the firm. A retired partner may be liable for partnership debts if no notice of the dissolution of the partnership has been given (*Story on Partnership*, p. 275, section 160, and p. 515, section 324, 5th edition). The latter passage refers particularly to the rights of third persons in the event of the dissolution of a partnership. In this case Irvine's name still appears on letters sent out by the firm, and Wilmott states on affidavit that Irvine held himself out as a partner. Hence, if an innocent third person gives credit to the firm, Irvine is estopped from setting up the defence that he is no partner. I submit the Court should grant provisional sentence, and leave it to defendant to establish his contention in the principal case.

Mr. Buchanan (for defendant Irvine): The only ground for holding Irvine liable is that no notice of dissolution was given. In order to hold a former partner liable the transaction must have been entered into during the subsistence of the partnership and must be in connection with the partnership business. It was Wilmott's duty to find out who were the partners.

[Maasdorp, J.: But Irvine said that he was a partner.]

We have not had an opportunity of denying that, and defendant's affidavit states that he retired before negotiations were pending. McKenzie had had no previous dealings with the firm, and therefore no notice to him of Irvine's retirement was necessary. The passages cited from *Story on Partnership* are quite in our favour. Irvine's denial of partnership is equivalent to a denial of his signature. If Irvine's name is left on the notices that does not constitute him as a partner.

Maasdorp, J.: In this case the plaintiff has sued upon an acknowledgment of debt which he alleges was made by these two defendants as partners in the firm of Dreyer and Co. It appears from the affidavits put in that this acknowledgment was given in satisfaction of a contract of sale which took place in July, 1901, and it also appears from the affidavits that in July, 1901, when the negotiations were proceeding for that contract, the defendant Irvine stated to Mr. Wilmott that he was one of the partners in the firm. It must be taken, therefore, that it was upon the credit of both Dreyer and Irvine that that transaction was entered into. While this acknowledgment of debt was not given until September 21, it does not appear that between July and September any notice was given, or that it had come to the knowledge of Mr. Wilmott that this partnership had been dissolved. The first question is whether, as a matter of fact, this partnership had been dissolved before this contract was entered into, and the second as to whether notice had been given to anyone dealing with the firm of the fact of such dissolution. As to the dissolution of the partnership we must refer to the affidavits, and it is there distinctly stated that in July Mr. Irvine stated to Mr. Wilmott that he was a partner in the firm, and if he was a partner what value can be attached to his statement in his affidavit that the partnership was dissolved on the 31st of May, 1901. If the contract was entered into at a time when he was alleged to be a partner then it was upon his credit as well as that of his partner that this transaction was entered into and consequently the debt was in-

curring by Mr. Irvine as well as by Mr. Dreyer at that time. It may be a question hereafter as to whether the partnership was dissolved or not, and some other questions of law may arise if the parties go into the principal case, but the view I take is that the statement made by Mr. Irvine, that he was a partner, has the legal effect of estopping him from setting up the defence that he was not a partner, and that that transaction was entered into on the strength of the joint partnership, and that, therefore, provisional sentence must be given. Also as throwing some doubt upon the statement made by Mr. Irvine, as far as the document is concerned, I may point out that on the acknowledgment of debt itself the name of Mr. Irvine still appears as one of the partners in the firm of Dreyer and Co. Under all the circumstances provisional sentence must now be given, but the defendant can still go into the principal case if he wishes.

Provisional sentence was granted with costs, including costs of the postponement.

[Applicants Attorneys: Walker and Jacobsohn; Respondent's Attorney, Bernard.]

FROST V. GEDDES. } 1902.
May 1st.

Provisional Sentence — Promissory Note—Liquid document.

F. and G. had signed certain promissory notes in favour of M. by making themselves jointly and severally liable. F. had paid these notes after they became due, and now asked for provisional sentence against G. for the entire amount, alleging that they were for G.'s accommodation, and that he (F.) had received no consideration.

Held, that as these notes did not show ex facie that G. was indebted to F. provisional sentence must be refused.

Semble, provisional sentence cannot be given upon a bill alleged to be an accommodation bill.

This was a motion for provisional sentence upon three promissory notes signed by the plaintiff and defendant jointly in favour of Mrs. Muff. The summons alleged that these notes were signed by the plaintiff as an accommodation to the defendant, and had on becoming due been paid by the plaintiff. The notes were dated August, 1898, and two of them were for £50 each, while the third was for £50 10s.

Mr. Upington for the plaintiff; Mr. Buchanan for the defendant.

In an affidavit the defendant wholly denied that the promissory notes were signed for his accommodation, and detailed the circumstances under which plaintiff joined him as a partner. In 1897 defendant was carrying on business as a law agent and broker, and plaintiff joined him as a partner, agreeing to pay the sum of £250 as goodwill. He had paid £100 on account, but had not paid the balance of £150. Under the agreement the plaintiff was to keep all the books of the partnership business, and was to have equal powers with defendant in respect of signing of cheques, while the profits and losses were to be shared equally. Some time afterwards, on plaintiff's suggestion, a branch of the business was opened at Simon's Town, under the name of Geddes and Frost. This was under the control of plaintiff, who alone had power to sign the partnership name of Geddes and Frost, while a separate banking account was opened for the said branch, and the plaintiff alone had power to operate upon such account. In 1898 an action was instituted against defendant by Mrs. Muff for the recovery of certain money, being the balance of the purchase price of certain property which she had sold, and the price of which had passed through the hands of the firm of Charles Geddes. When summons was issued against him personally, instead of against the firm, defendant conferred with plaintiff, and it was agreed that the action should be allowed to proceed in that form. While the action was pending the plaintiff, without defendant's knowledge and con-

sent, withdrew from the partnership funds a sum of £300, ostensibly for the purpose of paying partnership debts, and deposited the same to the credit of his own private account. Judgment was given for Mrs. Muff in the action mentioned above, but in consequence of plaintiff's action, it was impossible to satisfy the judgment, and it was thereafter arranged that the partnership should be dissolved. This was given effect to, but subsequently the partnership was revived, and one of the conditions of the revival was that the notes now sued on should be signed by defendant and plaintiff in partial discharge of the debt due by the partnership of Charles Geddes and Co. to Mrs. Muff, and that they should be met either out of the assets of that partnership as the assets should be collected, or out of the funds of the new business which they were to carry on. Thereafter a further and final dissolution of the partnership took place, and defendant restarted business on his own account. After alleging that in some respects plaintiff had failed to carry out the partnership conditions, defendant went on to say that no fair settlement between himself and plaintiff could be arrived at until the books of both the Cape Town business and the Simon's Town business had been carefully examined and audited by some impartial person, and upon the receipt of summons in this case he caused his attorneys to write to the plaintiff's attorneys, suggesting that such a course should be adopted, but the defendant had refused to accede to that suggestion. In conclusion, the defendant said that as a fact he had paid out of his own earnings about £150 to creditors of the firm of Charles Geddes since the second dissolution above mentioned.

In a replying affidavit, William Frost, the plaintiff, said that the promissory notes now sued upon were signed by him solely for the accommodation of the defendant under the following circumstances: On June 30, 1897, he entered into partnership with the defendant. The partnership was to last for two years, and in consideration of the same he was to pay the defendant £250 in instalments and the sum of £26 to give him a half-share in the office furniture. He paid the sum of £26, and one instalment of £100. The sum of £250 represented the consideration for a two years' agreement,

and the deed specially provided that in the event of the death of either party within that period a pro rata rebate was to be allowed upon that amount. Shortly after the commencement of the agreement, plaintiff alleged, the defendant fell into dissolute habits, and his conduct was such that after sundry negotiations between them, plaintiff had to force a dissolution of the partnership, and a deed of dissolution was finally agreed upon on May 2, 1898. Owing to the conduct of the defendant plaintiff lost fourteen months of the partnership, and, in addition, during the continuance of the partnership the business deteriorated very much owing to the same cause. Proceeding, plaintiff stated that the deed of partnership provided that the defendant should open a bank account in the name of Charles Geddes No. 2, to distinguish same from his private account, and that both partners should operate on this account, but that although repeatedly called upon to do so, it was not until the 23rd February, 1898, that this new account was opened. Prior to that time money belonging to or held in trust by the partnership had been paid into the defendant's private account, upon which plaintiff had no power to operate. While the bank account was in this state the defendant negotiated the sale of landed property for Mrs. Muff, and received for her the purchase price, amounting to something above £700, but the transaction was not recorded in the books of the partnership, and the purchase price was paid into defendant's private account. It was alleged that the defendant used the purchase price for his own purposes, and upon being called upon to pay the same by Mrs. Muff, he was unable to do so, and he and not the firm was sued by her for the recovery thereof. About this time the account of Charles Geddes No. 2, being the partnership account, was opened in the bank. On March 9, 1898, having become apprehensive that the defendant had been drawing money from the bank account at such a rate as to endanger the payment to clients of moneys held in trust for them, plaintiff withdrew £300 from the partnership bank account and entered it in the account of Geddes and Frost, Simon's Town, upon which he alone had power to operate, and afterwards removed it and deposited it in trust with the secretary of the General Estate and Orphan Chamber. He paid

£140 of the said sum to Mrs. Muff and the balance of £160 to sundry parties, for whom the partnership held money in trust. Plaintiff then went on to say that in order to save the defendant from criminal proceedings with which he was threatened, at Mrs. Muff's instance, he agreed to sign with him three notes for £50 each in favour of Mrs. Muff, the defendant settling or arranging for the payment of the balance due. He contended that the transaction with Mrs. Muff was a private one of the defendant's, the partnership receiving no consideration for the sum, no entries having been made in the books, and prior to his signing the promissory notes, no claim having been made on him by Mrs. Muff, and the defendant having further himself used, either partially or entirely, the proceeds of the sale. As regards the second partnership with defendant, he said that that was entered into on June 1, 1898, at the urgent request of the defendant, who made the most solemn promises of reform, and that no money was stipulated for between the parties as a consideration of the said agreement. That, notwithstanding these promises, the defendant immediately afterwards returned to his former habits, and was totally incapacitated from attending to business, so that, on June 21, 1898, plaintiff availed himself of a clause in the deed providing for such an eventuality, and cancelled the partnership. Owing to the condition of the defendant, it was impossible to come to any satisfactory arrangement regarding liquidation, and plaintiff paid the debts due by the partnership, as far as they appeared from the books, having to employ his own money for the most part in liquidating the same. He stated that if the defendant had discharged £150 of debts after the dissolution, they must have been a private transaction of his own, as they did not appear in the partnership books. He had frequently to remonstrate with defendant for doing work on his own account, and not giving the partnership the benefit of the same. As regards the defendant's statement regarding plaintiff drawing from the partnership bank account, plaintiff stated that from the time a partnership bank account was open, until the end of the partnership, he only drew £25. Prior to that he drew from £10 to £15 per

month, for which the defendant drew cheques, as the account was solely in his name.

Maasdorp, J., asked what there was upon the face of these documents to show that the notes were accommodation notes, or that the one party had the right to sue the other.

Mr. Upington said that plaintiff was now the legal holder of the notes.

Maasdorp, J. asked if there was any authority to show that provisional sentence had ever been given upon a bill alleged to be an accommodation bill.

Mr. Upington said he was not prepared with authorities.

Mr. Buchanan (for defendant): This is a purely partnership transaction, and is not a case for provisional sentence. The parties in this case are joint makers of a promissory note. They are jointly and severally liable to Mrs. Muff, unless it was an accommodation note. To prove that it is this, evidence must be led *aliunde*, to show it is not a liquid document. It was not indorsed by E. Muff to Frost, and there is nothing on the face of the document to show that the partners were not equally liable. The allegations as to the liquidation of the Simon's Town business not having been finally settled, are not denied by plaintiff.

Mr. Upington (for plaintiff): The document is sufficient to render defendant liable to plaintiff for half the amount of the bill at all events. It is not disputed that plaintiff paid the note.

[Maasdorp, J.: If there is any question as to the amount defendant has to pay, you cannot get provisional sentence on the note.]

The note shows that it was made by plaintiff and defendant jointly and severally, and as we paid it, we are entitled to a refund of half from the defendant.

[Maasdorp, J.: And yet you ask for the whole amount. What is there to show that it is an accommodation note? Have you any authority for granting provisional sentence on the allegation that a note is an accommodation note?]

I have no authorities at hand, but plaintiff is the present legal holder of the note, and can sue on it, as against defendant, even though he is one of the parties liable. *Ex facie*, the document shows a liquid liability.

The Court refused provisional sentence.

Maasdorp, J. : The documents upon which this action is brought are promissory notes signed by plaintiff and defendant in favour of Mrs. Emily Muff. There is no evidence on the face of these notes as to Geddes being indebted to Frost. They are only evidence that Frost and Geddes are jointly indebted to Mrs. Muff, and it was therefore necessary for plaintiff to depend upon an agreement by which it was agreed that the one party should accommodate the other—which would place it outside this agreement—It would be necessary to prove that there was an agreement between Geddes and Frost by which Geddes had promised to hold Frost harmless or indemnify him in case he should not pay the amount to Mrs. Muff. It is quite necessary to lead evidence to prove that, and consequently that shows the necessity of having evidence beyond that contained in the documents. On that ground alone no provisional sentence can be granted.

[Plaintiff's Attorneys: Godlonton and Low; Defendant's Attorneys: W. E. Moore and Son.]

MOSTERT V. WOODSTOCK { 1903.
MUNICIPALITY. { May 1st.

Town Council — Debentures—
Interdict.

A Municipal Council had issued certain debentures in order to provide funds for the carrying out of a certain water scheme. As this scheme had not been undertaken under statutory powers, and as the provisions of neither the General Municipal Act nor of the Public Health Act had been complied with, the Supreme Court had, at the instance of certain ratepayers, interdicted the said Council from paying interest on these debentures until the provisions of one or other of these Acts aforesaid had been observed. One of the

debenture holders now asked for provisional sentence against the Council for interest due on certain of the said debentures held by him.

Held, that until the said interdict was removed the Court could make no order inconsistent therewith.

This was an application for provisional sentence for £400, being interest due on certain debentures issued by the Municipal Council of Woodstock in connection with a scheme for supplying water to the Municipality from certain streams at Oliphant's Hoek.

The affidavit of the Mayor of Woodstock (Mr. W. E. Moore) was as follows:

1. The defendant Council has been sued by plaintiff for the interest due upon certain debentures issued by the Council to him.

2. The Council is willing to pay the said interest, but is interdicted under a rule nisi granted by this Hon. Court from doing so until the sanction of the Government has been obtained to the issue of the said debentures.

3. The Colonial Secretary, in reply to a deputation of the ratepayers of Woodstock, who waited upon him, stated that in view of the fact that a Commission was sitting to deal with the whole question of the water supply to the Peninsula, he could not at the present time consent to the whole scheme proposed by the Municipal Council for the supply of water to Woodstock, but that he was willing to sanction the purchase of the water rights (in respect of which the said debentures were issued) if he might lawfully do so without committing himself to the whole scheme. He was, however, advised by the Law Department that he could not sanction the purchase without thereby committing himself to the whole scheme.

4. Upon the issue of summons in this suit the defendant Council convened a meeting of the ratepayers at Woodstock, and at that meeting, which was very largely attended, the Council was authorised and empowered to appear to the said summons and to submit to the judgment of the Court.

Maasdorp, J., asked on what grounds the Court had granted the interdict referred to.

Mr. Searle, K.C. (for defendants): The interdict was granted at the instance of a ratepayer, who said that the whole proceedings in regard to the debentures were illegal. We are quite willing to pay the interest on these debentures, but the Court has interdicted us from doing so.

[Maasdorp, J.: The Court has said that it is not a legal debt; are you prepared to pay an illegal debt?]

It was legal when we contracted it. The interdict was continued until the scheme should have been approved of by the ratepayers, and the Court intimated that when this had been done, application might be made again. This interdict was granted originally in November, 1901, till February 1, 1902. The matter was before the Court on the 17th of February, and the interdict was then continued until the consent of the Governor under the Public Health Act had been obtained.

[Maasdorp, J.: You have not observed all the provisions of the Act.]

We did so subsequently. We obtained the approval of the ratepayers. I admit that the consent of the Minister has not yet been obtained, but we have acted under section 70.

Sir H. Juta, K.C. (for plaintiff): We are suing on an acknowledgment of debt, and the debt is not denied; we are therefore entitled to provisional sentence. The question, how are we to get the debt paid, is of course, a different matter. We were no parties to the interdict.

[Maasdorp, J.: Here a third person is interested, and we cannot grant judgment until that third person is heard.]

Surely provisional judgment must be given on an acknowledgment of debt, unless the defendant denies his signature.

Maasdorp, J.: It appears that there is at present an interdict in existence which prohibits the Municipality from paying any of the debenture-holders. That interdict was granted at the instance of one ratepayer, and at the time the interdict was applied for, an opportunity was given the debenture-holders to join in the action, and they must be regarded as parties to the proceedings, and this interdict must stand good as against

them also. Anyway, it is perfectly clear that, whatever procedure the debenture-holders may take, the interdict stands, and this Court cannot give an order for the payment of the debenture-holders' interest, as that would be inconsistent with the previous order of the Court. It would conflict with the order now in force. Some steps may be taken by the debenture-holders, if they wish to do so, to have that interdict discharged, but as matters now stand, the application must be refused.

Sir Henry Juta asked that no costs be given.

Maasdorp, J., said that the debenture-holders must have known that the interdict would be binding upon them.

Sir Henry Juta pointed out that the Council were willing to pay the interest, if the Court could allow them to do so.

Mr. Searle said that on the question of costs he would leave himself in the hands of the Court.

Maasdorp, J.: The application will be refused, but no order will be made as to costs.

[Plaintiff's Attorneys: Van Zyl and Buissinne; Defendant's: W. E. Moore and Son.]

LABAN V. SALODIEN.

Mr. Gardiner moved for provisional sentence for the sum of £2,000, less £100 paid on account, due on account of the purchase price of a certain house, and costs of suit. The plaintiff tendered transfer of the house.

Granted.

PRINCE, VINTCENT AND CO. { 1902.
V. THE GRAND JUNCTION { May 1st.
RAILWAYS.

Bills of Exchange—Acceptance.

Mr. Upington moved for provisional sentence on certain bills of exchange. Last provisional day sentence was given on five of these bills against the Grand Junction Railways (Limited), but it now appeared that the acceptors of the bills were the Grand Junction Railways—not a corporation but a partnership, the partners being John Walker, sen., John Walker, jun., R. M. Frank Hill, and Thomas Cameron Walker.

Maasdorp, J., pointed out that notarial certificates of protest were not put in,

Mr. Uington: In this case a certificate of protest is not necessary. If a bill is accepted at a certain place, and the words "and not elsewhere" are omitted, that is only a general acceptance (Act 19 of 1893, section 17, sub-section 2), and in such case neither presentment nor protest is necessary in order to render the acceptor liable (section 50, sub-section 1).

The Court granted provisional sentence as prayed.

PHILLIP BROS. V. THE GRAND JUNCTION RAILWAYS.

Mr. Alexander moved for provisional sentence on two bills of exchange. In this case also provisional sentence had at first been obtained against the Grand Junction Railways (Limited) instead of against the above partnership.

Provisional sentence granted as prayed.

HEINAMANN V. JAMES SCOTT.

Mr. Alexander moved for provisional sentence on an acknowledgment of debt.

Provisional sentence granted as prayed.

BEAUMONT V. I. MANSCHESSTER.

Mr. Alexander moved for provisional sentence for £100, due on a promissory note.

Provisional sentence granted as prayed.

HADLEY V. WASSERMAN.

Mr. Langenhoven moved for provisional sentence on a mortgage bond for £400, with interest from the 1st July, 1901. The bond had become due by reason of the non-payment of interest. He also asked that the property specially hypothecated be declared executable. Counsel said that a clerical mistake had been made in the summons, and instead of the interest being due from July 1, 1901, it was due from July 1, 1900. He asked that the summons be amended.

Mr. Justice Maasdorp pointed out that to do that the whole proceedings would have to be withdrawn.

Counsel said that in that case he would ask for provisional sentence for the amount set forth in the summons.

Provisional sentence was then granted as prayed, and the property specially hypothecated declared executable.

HADLEY V. WASSERMAN.

Mr. Langenhoven moved for provisional sentence for £100, due upon a mortgage bond, with interest from September 10, 1900. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed.

PAARL BOARD OF EXECUTORS V. ALBERTYN.

Mr. De Villiers moved for provisional sentence upon a mortgage bond for £1,500, with interest from March 1, 1900. The bond had become due by reason of the non-payment of interest. He also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property specially hypothecated declared executable.

MICKDAL V. BALLE.

Mr. Howel Jones moved for a decree of civil imprisonment against the defendant, on an unsatisfied judgment for £95.

Defendant was in default, and a decree of civil imprisonment was granted.

ILLIQUID ROLL.

**WIENER V. ISAACS. { 1903.
May 1st.**

Mr. Gardiner moved for judgment, under Rule 319, in default of plea. Three amounts were claimed, one being for £184 9s. 10d. for goods sold and delivered, another for £45, the price of a certain bedstead, delivery of which the plaintiff now tendered, and a third for £78 8s. 7d., being value of goods supplied to another party, for whom defendant agreed to stand security.

Judgment as prayed.

O'SHEA V. THOMPSON.

Mr. De Villiers moved for provisional judgment, under Rule 329d, for £44 rent due.

Granted.

LOGAN V. GLASS.

Mr. Alexander moved for judgment, under Rule 329d, for £30 14s. 3d., being balance due on account for work and labour done.

Judgment granted as prayed.

MACAULAY V. THE GRAND JUNCTION RAILWAY.

Mr. Russell moved for judgment, under Rule 329d, for £90, for work done and goods supplied.

Judgment granted as prayed.

MOSSEL BAY BOATING CO. V. GRAND JUNCTION RAILWAY.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £1,088 5s. 5d., being expenses incurred in the landing and delivery of certain material.

Judgment granted as prayed.

PFEIFFER V. BUIRSKI.

Mr. De Waal moved for judgment, under Rule 329d, for £274 7s. 9d., balance due of cash advanced in connection with certain share transactions.

Judgment granted as prayed.

LIEBENBERG V. LIEBENBERG.

Mr. De Villiers moved, under Rule 329d, for the delivery of certain 100 merino ewes or the payment of their value, £75, and also for the sum of £10, being one year's rent of the use of the said ewes.

Judgment granted as prayed.

EVANS V. ELLIOTT.

Mr. Buchanan moved for judgment, under Rule 329d, for the sum of £50, being money lent.

Judgment granted as prayed.

EPSTEIN V. CARTER.

Mr. De Villiers moved for judgment, under Rule 329d, for £30, rent due.

Judgment granted as prayed.

JOHNSTON V. BUIRSKI.

Mr. Buchanan moved for judgment, under Rule 329d, for £125 19s. 6d., less a sum of £5 paid on account, being money due to plaintiff by defendant in connection with a share transaction.

Judgment granted as prayed.

REHABILITATION.

Mr. Russell moved for the rehabilitation of Robert Lea, whose estate was sequestrated on August 28, 1899, with estimated liabilities £5,551 and assets £4,921, leaving an estimated deficiency of £630. The debts proved amounted to £4,538, and the sum distributed was £2,531, leaving a deficiency of £2,007.

The application for rehabilitation was made under the 117th section of the Insolvent Ordinance, and the necessary consent of three-fifths of the creditors had been obtained.

Order granted.

GENERAL MOTIONS.

BOYCE V. BOYCE. { 1902.
May 1st.

Mr. Buchanan moved that the rule *nisi* granted in this case be made absolute. The rule called upon the defendant to restore to plaintiff his conjugal rights, failing which to show cause why a decree of divorce should not be granted, and defendant declared to have forfeited the benefits of the marriage in community of property. The necessary affidavits were put in, showing that the defendant had not returned to the plaintiff.

Decree of divorce was granted, defendant to forfeit all benefits arising from the marriage in community of property.

***Ex parte* THE EXECUTORS OF THE ESTATE LATE FAURE.**

Mr. Gardiner moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute.

***Ex parte* BELL.**

Mr. Langenhoven moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute.

***Ex parte* MCNAMARA.**

Mr. McGregor moved that a rule *nisi* granted under the Derelict Lands Act be made absolute. The return day was April 12 last, and Mr. Sheil then appeared on behalf of the Government. By consent the matter was allowed to

stand over for inquiries, which had been made, and counsel now understood there was now no difficulty in the matter.

The rule was made absolute.

Ex parte BRINKMAN, IN HIS CAPACITY AS CHAIRMAN FOR THE TIME BEING OF THE MUNICIPALITY OF VICTORIA WEST.

Mr. Langenhoven moved that a rule nisi granted with regard to the confirmation of a certain sale be made absolute.

Rule made absolute.

JARDINE V. JARDINE.

Mr. Buchanan moved for an order calling upon the defendant, Maggie Carnick Jardine (born Makin), to restore to the plaintiff, Gilbert Rudolph Jardine, his conjugal rights, failing which, to show cause why a decree of divorce should not be granted.

There was no appearance for the defendant.

Gilbert Rudolph Jardine stated that he was married to defendant on July 6, 1900. He was then carrying on a business at Molteno, and his wife was at King William's Town, residing with her parents. After marriage, she returned to Molteno with him. She remained there about three months, and then her mother came to Molteno, and practically insisted on her returning to her. To this he had to consent, much against his will. After defendant had been away two months, he went to fetch her from King William's Town. Out of the eighteen months of their married life, she had only lived with him eight months. In August, 1901, she again went to King William's Town with his consent, and had never returned, although he had asked her repeatedly. On one occasion he went to King William's Town to see his wife, but her mother refused to allow him to enter the house. He wrote a long letter of appeal to her and sent a cheque, and in reply received a letter from a firm of attorneys in King William's Town, returning the cheque, and demanding the delivery of his wife's clothing and movable property. Witness then instructed his attorneys to write expressing how shocked he was at his wife's action. He denied that he had ever been harsh to his wife. The whole

trouble was caused by his mother-in-law. There was one child of the marriage—a girl of eleven months old. He understood that his wife and her mother had now left for Scotland, taking the child with them. His wife's father was, however, at King William's Town.

The Court granted an order calling upon the defendant to make restitution of conjugal rights by August 1, failing which, to show cause on August 14 why a decree of divorce should not be granted, with the right reserved to the plaintiff to make further application in regard to the custody of the child should he wish to do so.

Postea (August 14): The Court granted a decree of divorce.

Ex parte GUSH.

Mr. Gardiner moved for leave to sue *in forma pauperis*. Respondent was in England, and personal service had been effected.

A rule nisi was granted, calling upon defendant to show cause why leave to sue *in forma pauperis* should not be granted, the rule being returnable on the 12th July.

Postea (July 14): The rule was made absolute.

THE SOUTH AFRICAN BREW-
ERIES V. BARRITT. { 1902.
May 1st.
„ 2nd.

Landlord and Tenant—Assignment of Premises—Liquor Licence—Ejectment on Motion.

Respondent had purchased the good-will of a certain hotel from one Martienssen. The agreement provided that respondent's tenancy should be terminable on a month's notice given in writing by the landlord, and that he should then be bound to transfer his licence to the landlord or to the nominee of the landlord. Subsequently Martienssen assigned all his rights over the said premises and all his interests therein to the present applicants, and respondent thereafter paid

rent to them and discussed with them the terms of his lease. Applicants had given him a month's notice in writing, but he refused to quit the premises, and contended that even if ejected he was not bound to transfer his licence to the applicants. Applicants now asked for an order of ejectment.

Held, that as Martienssen had assigned all his rights in respect of the said premises to applicants, and as respondent but by his acts accepted them as his landlords, he was bound to accept a month's notice from them, and that he was under the same obligation of thereupon transferring to them his licence by which he had been previously bound to Martienssen.

Semble, that though the Court will not ordinarily grant ejectment upon motion, it will do so (1) in cases of urgency and (2) where no facts are in dispute.

This was an application set down for the 12th April. The petition was for an order on the respondent, Walter B. Barritt, to give up possession of certain licensed premises known as the Roma Hotel, Waterkant-street, and for authority to transfer the licence to James Wallace, or other nominee of the applicant company. The hotel in question is the property of the South African Breweries (Limited), who purchased the hotel, together with all leases, goodwill, and rights from one Martienssen. The respondent is the tenant of the hotel. The lease, which was in writing, contained the right to terminate the tenancy by one month's notice, and it appointed the landlord as agent for the tenant to make application for the licence. The tenant had by this lease undertaken to give up the licence on a month's notice, and to transfer the same. This was by written contract, which the applicants held from

Martienssen, from whom they purchased. Applicants had given the respondent notice to quit. On his declining to quit the applicants brought him before the Magistrate, under Act 44 of 1885, one section of which gave the Magistrate and two other members of the Licensing Court, under such circumstances power to order a transfer. Mr. Barritt, however, appeared before the Magistrate, and opposed the application, and the Magistrate made no order. This was done at the end of March, or early in April, and the applicants now came to the Supreme Court for an order. The applicants contended that Mr. Barritt was a person whom they could not leave safely in the place. The licence was jeopardised, and having given him a month's notice, they had made arrangements with Mr. Wallace to put him (Mr. Wallace) in. The applicants were not willing to prejudice their position by selling him beer and other articles, which he obtained from elsewhere, and for the same reason they could not take the rent. These circumstances made the matter urgent, and therefore it was sought to be dealt with by motion instead of by action.

Mr. Schreiner, K.C. (with him Mr. Upington), for applicant; Sir H. Juta, K.C., for respondent.

[Maasdorp, J.: What position does respondent take up?]

Mr. Schreiner said he did not quite know. It seemed that Barritt had agreed to pay Martienssen £700 for the goodwill. The applicants had an action pending against Martienssen for money received by Martienssen from Barritt after he (Martienssen) sold to applicants. That might be a good action or it might not be, but how it could affect Barritt was difficult to see. Another point was that by the concluding portion of the lease, Barritt was given by Martienssen the option of purchasing. Barritt might have an action against Martienssen for damages on the ground that he had an option of purchasing before Martienssen sold to anyone else, but the property had become the applicant's, and that question did not affect the position as between Barritt and the South African Breweries.

A number of affidavits and certain material clauses of the lease were read. Respondent said, on affidavit, that he had been offered £1,000 for the goodwill of

the hotel by Mr. Orpen, the breweries manager, provided he gave up possession by a certain date. He (respondent) refused this offer, having received offers of £4,000 and £3,500 for the goodwill. He had also received an offer of £3,000 from Wallace. In the affidavits filed on applicants' behalf reference was made to the respondent being intoxicated. The manager of the breweries deposed that the £1,000 was offered in respect of the furniture, billiard-table, etc. Wallace denied that he ever made an offer of £3,000 to respondent. Wallace, in a further affidavit, alleged that the applicants were attempting to expropriate the goodwill without paying him therefor. He denied the allegation as to his being intoxicated.

Mr. Schreiner (for applicant): The point in this case is very simple. Under the lease the lessee is bound to go out on one month's notice, and this notice he has received. Our law is very unfavourable to tenants who hold on, and though ejectment is usually decided on action; it is sometimes done, in urgent cases on motion. This case is urgent, because our licence is in danger. Then, again, we have lost a tenant, and we have lost the sale of the beer we should have sold had the tenant we selected obtained possession of the premises, because we cannot supply respondent, and moreover we are losing our rent, since to accept rent from the respondent would be equivalent to a relocation. It can hardly be supposed that the Court will allow a man to hold on for months until an action can be tried.

[Maasdorp, J.: As to the one month's notice, what did he pay £700 for?]

These people cannot get a licensed house without submitting to some such clause. Nearly all of them are monthly tenants, but they are not usually disturbed as long as they conduct their business properly. Should, however, the landlord insist on his rights, the tenant must give up both the premises and the licence. In this case the £700 was paid merely for the right to get into the premises. On the pleadings it is admitted that not only the premises but the licence and all interests in the business were sold by Martienssen. When the S.A. Breweries bought the Roma Hotel, Barrett still owed a balance on the £700, and we say that he paid some of

that to Martienssen after Martienssen had sold the property to the S.A. Breweries, but that question has nothing to do with the present case, and it has nothing to do with Barrett or with his position. We are not suing him for rent, for that we are suing Martienssen. As to "goodwill," Barrett has none to sell. He is only a monthly tenant, and he can only sell the certainty of one month's occupation, and the hope of a longer tenure. It is true that we cannot re-enter without an order of Court, but where there is such a clear right of re-entry as we have under this lease, surely we need not bring an action to get ejectment. We showed all the indulgence we could to Barrett under Section 8 of Act 44, 1885.

Sir H. Juta (for respondent): There are two prayers embodied in this application, and the first is practically for a *mandamus* to the Resident Magistrate. I submit that in the absence of *mala fides* your lordship has no power to compel the Magistrate to do what is within his own discretion. This discretion he has already exercised by refusing to authorise the transfer of this licence to the nominee of the S.A. Breweries. As to the tenant's agreement to hand over his licence, the Court refused ejectment on motion in *Parson's* case (11, Sheil, 233), though they ordered Parsons to hand over the licence. But this is a very different case. Barrett has never attorned to the S.A. Breweries. His contract was with Martienssen, and to Martienssen he paid £700 for his lease. In a transfer of a lease, the assignment of the lease must be clear beyond dispute, and so must also the acceptance of the new landlord by the tenant. This case is different from all the other cases in which hotels have been sold to the S.A. Breweries, for this is the only case in which they have claimed money due to the vendor from a lessee of the vendor. There is no evidence that Barrett had ever recognised the S.A. Breweries as his landlords.

[Maasdorp, J.: But they say that you have recognised them.]

It is true that they are owners of the premises, but we have no agreement to hand over the licence to them.

[Maasdorp, J.: Does not Section 8 of Act 44 of 1885 oblige the tenant to hand over the licence on the expiration of his tenancy?]

No, a licence is a personal thing, and no man can claim a licence from another

save in virtue of some lease or agreement. It is not the premises which are licensed, but the man. A man cannot carry on a licensed business simply because he is a landlord of licensed premises, and he turns out a man who has a licence, and procures that that licence should be handed over to him. He must go to the magistrate and get permission to carry on the business. Should the Court now decide that the S.A. Breweries have stepped into Martienssen's shoes in all respects as far as this property is concerned, it might prejudice questions which are now pending between the S.A. Breweries and Martienssen.

[Maasdorp, J.: They say that you have quitted the premises on certain conditions.]

Yes, but we never admitted their right to eject us.

[Maasdorp, J.: Did you not ask them to show you certain consideration?]

They say so, but we deny that. (See affidavits of Orpen and of Barrett.) At first Orpen offered to treat for our goodwill, and in an affidavit treats this communication of January 20th as a notice to quit. If after this Orpen extended the time, Van Zyl and Buissinne could not confirm a notice to quit.

My points, then, are (1) That no mandamus can issue to the Magistrate to compel him to do a thing which is within his own jurisdiction. (2) No assignment of a lease can be valid unless the tenant accepts his new landlord. In this case, there has been no such acceptance. Whatever may have passed between the S.A. Breweries and Martienssen, Barratt certainly never made over his rights to the Breweries. Facts here are in dispute, and therefore the Court will not decide this matter on affidavit. (3) Will the Court under these circumstances grant ejectment on motion? It is true that it has done so in cases of extreme urgency, and applicant is trying to show that this is such a case. Respondent was accused of having given way to intemperate habits in October, December, January, and February, and yet in the following March the licence was renewed without opposition. Then was the danger to the licence, not now; and as there is no danger now, there can be no urgency. What, then, is the use of this ejectment? The Magistrate would not be compelled to grant a licence to a

new tenant. I submit, therefore, that the first prayer of the petition cannot be granted, and that the Court will not grant the second prayer until an action has been brought and decided.

[Maasdorp, J.: Of course, the Licensing Court must determine whether the nominee of the applicant is a fit and proper person. We cannot decide that.]

[Mr. Schreiner: All we ask is that applicant should be declared entitled to the licence.]

Maasdorp, J.: In this case the applicants ask for an ejectment against the respondent from the premises in question, and also for an order declaring that the applicants are entitled to the licence and to carry on business under the licence which now stands in the name of the respondent. This matter is brought before the Court on a motion, and Sir Henry Juta was quite right in saying that as a rule questions of ejectment ought to be brought before the Court by action, but we have precedents in which the Court has decided upon motion on questions of this nature. Now, it is not only upon a point of urgency that these questions have been entertained by the Court, but it may also be upon other grounds. It may be a case where there are no facts in dispute between parties, and need not form the subject of an action, and also when a case could be decided upon motion with less cost. Now, I do not deal so much here with the question of urgency, and I may say this, that any decision I may come to in this matter will be based upon facts that are undisputed. If it had been necessary to go into disputed facts then I think the matter should properly have been ordered to have been decided upon action. Now, I may mention one circumstance brought up in this case upon which I make no finding, and that is as to the misconduct of the respondent. If it had been necessary to decide in this case whether the defendant had been guilty of misconduct, then I think the matter ought to have been tried by action, but it is unnecessary to make any finding on that point. It is a disputed point, and it is a very serious matter, so far as the respondent is concerned, and the Court would not have decided it on affidavit. But I think the whole matter can be decided upon the documents, and agree-

ment, and certain undisputed facts now before the Court, and admissions made in his affidavit by the respondent himself. There was a contract entered into between one Martienssen as the landlord, and respondent as the tenant, under which Barritt carried on the business of licensed victualler in the premises in question, and one of the conditions of that agreement was that "the tenancy shall commence on June 1, 1897, and be determined at any time in any year, either by the landlord or the tenant, by one month's previous notice in writing, the leaving or affixing such notice to any part of such house to be sufficient service of such notice." If we take that paragraph of the agreement in connection with the 3rd paragraph of the agreement, it seems at first hard to come to the conclusion that the parties really intended that the tenancy should be determined at one month's notice, because it seems that under that 3rd paragraph the tenant gives as much as £700 for the goodwill. Now that seems a very large sum to give for such a precarious holding, which may be determined upon one month's notice without any consideration being given the tenant, but the wording of the first section is so clear that no doubt can be cast on its meaning that the tenancy can be determined by one month's notice. However, that circumstance is somewhat explained by the fact that when tenancies of this nature are terminated, the landlords as a rule show very great consideration to the tenant in passing over the goodwill and any rights or property he may have to the incoming tenant. Such consideration has been shown, and I think in a contract of this kind the tenant might fairly expect, not as a legal right but as a concession—I think a very proper concession—on the part of the landlord that he should show him every consideration. I think it may even be possible now for the parties, after all this litigation, to come to some sort of reasonable arrangement as to the terms on which the tenant should hand over property now on the premises, and which must be of some value, and whether some consideration should be shown to him when the new tenant takes over the goodwill. There is no doubt the goodwill belonged to

him when the property was bought by the Breweries; that lease and goodwill was vested in the tenant, and under these circumstances if the Breweries now get the goodwill by giving a month's notice they certainly gain something, and they might show the tenant some consideration. But that matter I merely refer to as explaining why tenants in such cases are so willing to enter upon such a precarious holding and pay such a very heavy price. Under these circumstances Martienssen would have had a perfect right to give Barritt a month's notice, who would then have been obliged to give up his tenancy, and so under the 6th paragraph of the agreement, Martienssen would have been entitled to force from Barritt transfer of the licence. The question arises as to whether the Breweries in all respects stand in the same position as Martienssen. Now there has been a complete assignment of all the rights in those premises and under the lease by Martienssen to the Breweries. It appears from the broker's note that the buildings as they stand were sold, with all interests, leases, goodwill, etc. Under the deed of sale it appears that Martienssen sold the plant, stock-in-trade, and goodwill, including all outstanding debts and rights belonging to the business carried on by the sellers of every description. Under these circumstances all the rights which belonged to Martienssen were assigned by him to the Breweries. The question then arises as to whether such assignment is binding upon the tenant. I am inclined to think, although I shall not base my decision wholly upon that point, that such an assignment could have been made, and that rights as against the tenant would have vested in the Breweries without any consent on the part of the tenant. However, it is not necessary to decide that legal question, as there is the further question as to whether the tenant by his own conduct did not become a party to this assignment and recognise the Breweries as landlord in this case. It is quite clear that in certain respects he did so. It is admitted by counsel for the respondent that he paid the rent and that he did have certain discussions with them as

to the extension of the notice for one month more. It is said that this is only a partial recognition, and does not necessarily carry with it all the rights now claimed by the Breweries. I do not consider that a partial recognition. It recognises the Breweries as the landlord for all the purposes of the agreement, and right which Martienssen had of giving respondent one month's notice to determine this lease is vested in the Breweries and they have now the right to put that condition in force. A month's notice was given in writing, and consequently the tenant has no further right to occupy these premises. Now the question arises as to whether, upon quitting these premises, he is bound to transfer this licence to the Breweries. It has been argued that this is certainly not one of the rights which the respondent could have intended should also pass to the Breweries, but as I have said, it seems to me that by his conduct he did recognise the Breweries as landlords, and they are now entitled, under the fourth clause of the agreement, to obtain transfer of this licence. There is another point which has been raised, and which it is said ought to have the effect of postponing these proceedings. This point is, that the question affecting the parties is now before the Court in an action between the Breweries and Martienssen, but it does not seem to me that that in any way affects the question as between the Breweries and Barritt. I think the question there is whether such moneys as Barritt paid to Martienssen in respect of goodwill after the sale took place between the Breweries and Martienssen belong to Martienssen or the Breweries, and that does not affect the position of the respondent with respect to the Breweries. Under these circumstances, I have come to the conclusion that the Breweries are entitled to determine the tenancy by one month's notice, and they are now entitled to the occupation of the premises, and therefore, that the respondent must give up the premises to the Breweries. An order will therefore be granted for the ejectment of the respondent, and it is further declared that, after March 31, 1902, the respondent is no longer entitled to the benefit of that licence, and that the benefit of that licence now vests in the Breweries.

That declaration is one upon which the Magistrate can go. I don't think this Court will go the length of declaring now who is the fit and proper person to hold that licence. That will be decided by the Magistrate, but he will decide it in view of the finding of this Court that the respondent is no longer entitled to the benefits of this licence, and that the applicants are entitled to the benefits of the licence from April 1. Costs will follow the results.

In reply to Mr. Schreiner, His Lordship said that ejectment would be forthwith.

Sir Henry Juta said he supposed the respondent would be allowed some little time to get his things out.

Mr. Justice Maasdorp said he was sure the Breweries would allow that.

Mr. Schreiner said that that had already been to some extent anticipated, and that, as the company had previously offered to give respondent £1,000 for those rights, although not legally claimable, he hoped they would still give him some consideration.

The order was then made ordering respondent to give up the premises forthwith, and declaring that the applicants are entitled to the benefits of the licence.

[Applicant's Attorneys, Van Zyl and Buissinne. Respondent's Attorney, D. Tennant, jun.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

PROSSER V. PROSSER. { 1902.
May 2nd.

This was an action for divorce, brought by Edward Percival Prosser against his wife, Johanna Helena Prosser, on the ground of her adultery with one Barron. The defendant was in default.

Mr. Russell appeared for the applicant, and stated that in the November term the marriage of the parties was proved, and the plaintiff gave evidence that they lived after marriage in Stellenbosch until 1899, in which year he proceeded to the front. Whilst at the front he received a letter from his wife, which was put in,

and on coming back again he found that she had left Stellenbosch and was living in Bree-street, Cape Town. He saw the defendant, who refused to return to him, and admitted that she and Barron were living in the same house. Counsel read the defendant's letter to the plaintiff, in which she said she was in partnership with a gentleman named Barron. She confessed she had not been true to plaintiff, and said she was very happy and comfortable, and could not think of parting from the man with whom she was living.

The case had been postponed for production of further evidence.

Cornelia Margaretha Easton was now called, and said that in August last she was cook at 69, Bree-street, where Barron and defendant lived together as man and wife, the defendant passing under the name of Mrs. Barron.

Decree of divorce was granted, defendant to forfeit all benefits of the marriage.

BREWER V. BREWER.

This was an action for separation *a mensa et thoro*, brought by Mrs. Sarah Jane Brewer against her husband, James Brewer, on the grounds of his intemperance and cruelty towards her.

Mr. Rowson appeared for the plaintiff, the defendant was in default.

Sarah Jane Brewer deposed that she was married to the defendant in Cape Town in March, 1891. The defendant was then working in the Salt River Railway Works. He was there three years, when he was discharged on account of his intemperate habits. After that he was not the same man. He quarrelled with her and wanted to break all the things in the house. He tore off her clothes and called her all the names he could lay his tongue to. Since he left the railway he had been doing nothing but "boozing." She had been keeping a boarding-house, and had kept the defendant. He went up to the front for 12 months, but when he came back he was worse than ever. Once he was "fairly in the rats," and she had to get two doctors for him. He threatened to put a bullet through her head on the first opportunity. There were no children of the marriage. Defendant had no property at all, and plaintiff asked for a separation and forfeiture of the benefits of the marriage simply to protect her own earnings.

In reply to the Court, it was stated that defendant was now in Mowbray, and had been personally served with the summons and notice of trial.

The Court granted a decree of separation with costs.

SEALE V. SEALE.

This was an action for divorce, brought by Lily Florence Seale, a native of St. Helena, against her husband, Henry Charles Seale, for divorce on the ground of his adultery with one Maria Julison.

Mr. De Villiers appeared for the plaintiff; the defendant was in default.

Lily Florence Seale said she was married to defendant on May 24, 1894, and they resided happily together for three years, when the defendant left her, and she had discovered that he was living with another woman, Maria Julison. There was one child of the marriage surviving, a boy aged five years. She thought £3 per month would be a reasonable sum for the maintenance of the child. Defendant was a mason, and earned about 12s. 6d. or 13s. per day.

Frederick A. Julison said he got a divorce from his wife in 1898 on the ground of her adultery with defendant. The woman Maria Julison was witness's daughter, and she also lived in the house with defendant.

The hearing of the case was postponed for further evidence.

ELLEFSSEN V. STEPHAN RROS.

This action, involving a claim for demurrage, was mentioned, and set down for trial on Monday, June 2, it being deemed desirable, in view of several important points raised, that it should be heard before the full Court.

STANFORD V. WILLIAMS AND OTHERS.

This was an application, made by the defendants in the above action, for the appointment of a commission to take evidence, and also for the postponement of the trial. The main action is one in which Stanford sues Williams and nine other defendants for £3,000 damages for assault. The action, after being postponed from last term, was on February 28 set down by the Court for trial on May 7.

Mr. Searle, K.C., appeared for the applicants (defendants in the action); and

Mr. Schreiner, K.C., with him Mr. B. Upington, appeared for the respondent (plaintiff in the action).

Mr. Searle said that the application was for a commission to take the evidence of the defendants, who were at present with moving columns, and unable to come to Cape Town, and for a postponement of the trial until the commission could be held. He read the affidavit of Mr. G. B. van Zyl, the defendants' attorney, who stated that after the previous postponement had been granted, he wrote to each of the defendants, care of their column commanders, and had received replies from some of them. One of the defendants (Mr. H. B. Williams) wrote from the Upper Tugela, Natal, under date March 28, saying that he was quite unable to say when he could obtain leave, but that unless the situation up there was clearer, it would be useless to apply for leave. He expressed the conviction that if all the defendants could attend the court and give evidence, "Stanford would gain very little." Another of the defendants (Mr. Prior) telegraphed on April 16 from Williston, that the statements made in the newspapers were absolutely false. He denied that he and another of the defendants had anything to do with the alleged assault. Another of the defendants telegraphed on April 25 that he did not see any chance of being able to get to Cape Town for the 7th, and asked whether it was necessary for everyone to attend. Mr. Searle also read a communication from the adjutant of the 3rd Dragoon Guards, stating that the G.O.C., Harrismith district, had definitely refused to give leave to two of the defendants, owing to the exigencies of the service. Mr. Van Zyl's affidavit went on to say that it was not safe to go to trial without the evidence of the defendants, and it was impossible to intimate where the different commissions could be held, as the columns were continually moving about. Mr. Searle added that yesterday a telegram came from another of the defendants, which said: "Call to see you Saturday morning."

Mr. Schreiner read the affidavit of Alfred Benjamin Lawton, the plaintiff's attorney, stating that since the service of the notice of this application he had had no time to communicate with the plaintiff. He pointed out that there was nothing in the affidavit produced for the

defendants to show that the facts of the case had been represented to the Commander-in-Chief with respect to allowing the defendants to come to Cape Town.

The affidavit was also read of Agnes Sarah Wakefield, who stated certain two of the defendants boasted to her at different times that the trial would never come off, because martial law was supreme, that Lord Kitchener would never let the matter come into the Supreme Court, that he would stop it, that the matter would be repeatedly postponed until it was dropped, or until they had an opportunity of slipping off to England, and that they could snap their fingers at the Chief Justice and the Supreme Court.

After argument by counsel, the Court refused the application with costs.

Maasdorp, J., in giving judgment, said: The applicants in this case ask in the first instance for the appointment of a commission for the purpose of taking the evidence *de bene esse* of the defendants, who are at present with moving columns, and unable to attend the trial in Cape Town on May 7. Now, when an application is made for a commission it is usually necessary to put the matter before the Court in such a form that the Court can appoint a commissioner and appoint a place where the commission is to take place, and to some extent intimate, or let the parties have some notice of, the time that this commission is to take place. There is nothing before the Court now to enable the Court to make any distinct and definite order upon these points, because, although the commission is asked for, there is no suggestion as to where it would be possible to hold such commission, or at what time the commission might conveniently be held; in fact, in the affidavit put in on behalf of the applicants it is stated that it is impossible to say where and how this commission can be held, because the witnesses who are required to give evidence are moving about in such a way that it is impossible to say where a commission could sit to take their evidence. If you take the further application it leaves the matter in a very unsatisfactory position, because the further application is for the postponement of the trial until such time as the evidence should have been taken by these commissioners, and until such time as

the evidence can be returned. Here there is no intimation on the part of the applicants as to when they have any reasonable hope of being prepared to go on with the action; there is no suggestion that they would be prepared to proceed to trial within a certain number of months, or even within the next year. Under these circumstances, the commission cannot be granted, because, on the showing of the applicants themselves, it is impossible for the Court to fix a place or time for such commission, or even to fix the commissioners. No suggestion has been made to help the Court in that respect. It appears this case was set down for trial on the 10th of March, but that date was anticipated by the defendants moving the Court, on the 28th of February, for a postponement of the trial. The applicants then gave their reasons why the Court should conclude that there were difficulties in the way of their appearing on the 10th of March, and the Court granted them certain indulgence upon the affidavits put before it, and postponed the trial to the 7th of May, but intimated at the time the order was granted that there must be a clear understanding that it must come on on that day, and that the defendants should make timeous application to this Hon. Court to have their evidence taken on commission, should they not be able to come to Cape Town for the trial. I think that clear understanding was arrived at by the Court, because even at that time the Court was not quite satisfied, although it granted this indulgence, that the defendants had made every possible effort in order to appear at the trial, or meet the claims of the plaintiff within some reasonable time, and I think the position of the defendants, upon their affidavits, has by no means improved. They have not made timeous application for a commission so as to be prepared to come to trial upon the 7th of May, but we have statements similar to those put before the Court as to the difficulties in the way of their appearing. I don't think these difficulties are sufficiently authenticated by those in whose power it is to prevent the defendants from appearing, and who, I think, would have been very willing to give the Court such information for the benefit of those who are subordinate to them, if such information had been to their advantage. No commanding officer has placed before the

Court any information which would enable the Court to decide as to whether the defendants had done their very best to appear in Court or meet the plaintiff's claims, or whether there are real obstacles in the way of such appearance. Under these circumstances I must say that I am not satisfied that the defendants have done their best to appear in Court themselves to meet the case, or to obtain the necessary commission timeously to take their evidence, which might be put before the Court on the 7th May. Under these circumstances the application must be refused, with costs.

[Applicants' Attorneys: Van Zyl and Buissinne. Respondent's Attorneys: Fairbridge-Arderne and Lawton.]

Ex parte BRIGHT. { 1902.
May 2nd.

Jurisdiction—Domicile—Divorce.

Mrs. B. applied for leave to sue her husband by edictal citation for divorce on the ground of his malicious desertion. Applicant was resident within this Colony, but her husband had never left England.

Held, that the Court had no jurisdiction in the matter.

This was an application for leave to sue by edictal citation.

Mr. Buchanan appeared for the applicant.

From the petition it appeared that the petitioner was married to the defendant in Somersetshire, England, in 1898. Shortly after marriage there were differences, and in November, 1898, she alleged that her husband deserted her, and his relatives stripped the house in which they were living of everything it contained, and turned her out into the street. In the following March a child was born. She stated that she experienced considerable difficulty in maintaining herself and her child, and was dependent on the charity of her friends. The respondent was stated to be at Bath, and had refused to contribute towards her support.

In reply to questions put by the Court, it was stated that the petitioner now resided in this country, but the husband had never left England.

The application was refused, Maasdorp, J., holding that the Court had no jurisdiction over the husband.

Maasdorp, J.: The applicant moves for leave to sue her husband by edictal citation, and the question arises as to whether the Court has jurisdiction over the husband. Jurisdiction for the purpose of the threatened action by the wife in this case could only be based upon domicile or *bona fide* and permanent residence, and if the respondent had his domicile here then the Court would have jurisdiction. Now it appears that the parties were domiciled in England, that they were married there, and that the wife left England and came to this colony after, she said, her husband had deserted her. But the husband never left England, and never changed his domicile, and it is impossible to hold that this Court in respect of either domicile or residence has any jurisdiction over the husband. Therefore no order can be made.

Re ESTATE OF LATE { 1902.
STRYDOM. May 2nd.
" 28th.

Will—Construction.

The late W. M. Strydom was twice married in community of property. His first wife died intestate leaving issue—four sons and two daughters. W. M. S. and his second wife made a joint will, containing, inter alia, the following provisions:—"The survivor shall have the full and undisturbed possession of our immoveable goods, whereby we mean that half of the farm Krakeel River, whereof at present we are the owners, while the remaining half shall go to our sons, or male children born of our first marriage, the last-mentioned shall also be heirs of the dwelling-house . . ."

After a prohibition against the alienation of the immoveable property the will continues:—

"This property shall, on the death of the survivor, go to our son or sons born of our second marriage, and in case these should die and leave no male heirs, the above-mentioned immoveable property shall go to the above-mentioned sons of our first marriage, or their lawful heirs."

Held, that under the said will, the survivor was entitled to a life interest in half the farm Krakeel River, that on the death of such survivor the said half should become the property of the sons of the second marriage, and that the heirs of the first wife were entitled to the remaining half thereof.

This was an application by the executor of the estate in question for an order declaring that his interpretation of a certain clause in the testator's will was correct. The case was before the Court on March 6 of the present year, when a similar application was made, and then the Court, without granting any order, directed that the case should stand over. (See 12 Sheil, 225) where the wills in question and the reports of the Registrar of Deeds and of the Master respectively are given *in extenso*.

Mr. Searle (for applicants): This is a mere question of the construction of a will. We say that under this will the spouses were only dealing with the property in community. The survivor was to have half of this property, and the children the other half. Thus one-sixteenth of Krakeel River was to be dealt with.

[Maasdorp, J.: Probably the husband gave the wife the usufruct of half his share. Of this half the wife has the usufruct, and half goes to the children. The question is whether this half is the half with which he had been dealing?]

That may be, but it would be very strained to say that they meant to give

that half to the children of the first marriage, which had previously been vested in them.

[Maasdorp, J.: It often happens that people do deal with property in that way.]

There should be something on the face of the will to show this. It is far more natural to suppose that the children of the first and the second marriage should share equally *per stirpes*. As regards the children of the second marriage, the bequest would, of course, be subject to the second wife's usufruct.

[Maasdorp, J.: The will speaks of the children of *our* first marriage.]

That is not an unusual expression, but the interpretation that by his testament the testator wished to cut out the children of his first marriage from all benefit under the will can hardly be sustained. Both his marriages were in community. I can only submit that the testators were dealing with such property as they had. The executors were so advised, and as our contention is in favour of the minors it would be of no advantage to have anybody to argue for them.

Cnr. Adr. Vult.

Postea (May 28th).

Maasdorp, J.: The late Wessel Strydom, who was the owner of certain land mentioned in the petition, was married to his first wife Johanna in community of property. She died intestate on the 28th of November, 1858, leaving children of the marriage, four sons and two daughters surviving her. He married again, and on the 14th day of May, 1876, he made a joint will with his second wife, in which the following appears: "And now as to appointing the heirs, the survivor shall have the full and undisturbed possession of our immovable goods, whereby we mean the half of that portion of the farm named Krakeel River, whereof we are at present the owners, while the remaining half shall go to our sons or male children born of our first marriage, the last mentioned shall also be heirs to the dwelling-house, with the exception of one room, which shall be the undisturbed property of the survivor. Further, it is our last wish that the above-mentioned immovable goods shall never be alienated, but shall, on the death of the survivor, go to our son or sons born of our second marriage, and in case these should die and leave no male heirs, the

above-mentioned immovable property shall go to the above-mentioned sons of our first marriage or their lawful heirs." Upon the death of the first wife, children by that marriage became entitled to half the joint estate, but no division of the estate was made by the survivor, so far as the land was concerned, of which he remained the registered owner, but occupation of half of the land was given to the children. Affairs remained in this position till the 3rd January, 1890, when Wessel Strydom died, leaving his second wife surviving him, with two sons and two daughters. She died in June, 1900, leaving these children surviving her. The executor of Wessel Strydom now proposes to divide the estate, by giving half the land to the children of the first marriage, half of the remainder to the sons of the first marriage, and the other half to the sons of the second marriage, and asks for an order to allow transfer to pass accordingly. The Registrar of Deeds has refused to pass such transfer, being of opinion that the children of the first marriage are entitled to half the land, and no more. It now becomes necessary to construe the above extract from the will, to ascertain whether the executor is right in his contention. It is contended in this behalf that the testators, when they made their joint will, were well aware that the right to half the land was already vested in the children of the first marriage, and that they proceeded to deal with the other half, which of right belonged to the testator, and of that portion they bequeathed one-half to the sons of the first marriage. The will directs that "the survivor shall have the full and undisturbed possession of our immovable goods." If nothing further was said, then this would refer, if the testators were under no misapprehension, to half the land, because the other half was vested in the children of the first marriage, as heirs of their mother, although the testator was still the registered owner. But the will proceeds to explain that by "our immovable property" the testator meant "half of that portion of the farm Krakeel River whereof we are at present the owners." It would be absurd for the testators to say that by their immovable property they meant half their immovable property. Their clear intention, in my opinion, was to dispose of the immovable property, which they had a right to dis-

pose of, that is, half the property of which the testator was the registered owner, for the reason that the other half belonged of right to the children of the first marriage. The will proceeds to direct that the other half shall go to our sons or males born of our first marriage. This seems to me to be intended to be simply declaratory of the right of the children of the first marriage, although it is not correct, because the other half passed, not to the sons of the first marriage, but to the heirs of the first wife, who also had daughters. But even if it was intended as a disposition by will, such disposition had reference to the half of the property which was already vested in the children of the first marriage, whose vested rights could not be prejudiced by it. There are other considerations which point to the same conclusion. If the executors are right, then the father reserved to himself a life interest in the half only of his own property. The testators are supposed to say that the testator, if he survives his wife, shall remain in full and undisturbed possession of half his property, and the other half shall go to the sons of the first marriage. The consequence would be that the father, by will, divests himself of half his estate before his death in favour of his sons by his first marriage. That contention is wholly untenable. I am of opinion that the survivor got a life interest in half of the land mentioned in the petition of which Wessel Strydom was the registered owner. That half the will directs, shall, upon the death of the survivor, go to the sons of the second marriage. The sons of the second marriage are therefore entitled to half the land, and the other half will go to the heirs of the first wife. It will be the duty of the executor to divide the land accordingly, and the present application must be refused. Costs to be paid out of the estate.

[Applicants' Attorneys: Friedlander and Du Toit.]

JONES V. JONES.

Mr. Russell applied on behalf of Mrs. Mary Ann Jones for leave to sue her husband for divorce by edictal citation. The applicant stated on affidavit that she was married to Thomas Jones at Walsall, Staffordshire, in 1874. In 1900 her husband came to this colony, and she and

her family subsequently followed. She alleged that the respondent had been guilty of misconduct with a woman with whom he left this colony and proceeded to Durban, Natal.

Leave was granted to sue by edictal citation for divorce, personal service to be effected, and the rule to be returnable on July 12.

CROSBIE V. LE ROUX AND OTHERS.

Mr. Currey moved for leave to sue by edictal citation in an action in which Gabriel le Roux, sen., and Gabriel le Roux, jun., were being sued for the recovery of £300 with interest, due on a mortgage bond. It was stated that both the respondents were said to be with the Boer forces in the Transvaal. It was also asked that certain property be attached to found jurisdiction.

An order was granted attaching certain property to found jurisdiction, and giving leave to sue by edictal citation, returnable on 12th July, personal service to be effected if possible, failing that, one publication to be made in the "Government Gazette," or in the Transvaal "Government Gazette," and one in the "Bechuanaland News."

Ex parte MEYBURGH AND { 1902.
WIFE. } May 2nd.

This was an application for an order calling upon the Registrar of Deeds to register a certain agreement between one Petrus J. Meyburgh and C. J. Meyburgh, as an ante-nuptial contract. Mr. C. J. Langenhoven moved; and from the petition it appeared that the bride was a minor at the time she signed the said contract. The ante-nuptial contract aforesaid was signed by her with the assistance of two certain persons, she being at the time under the impression that the two persons aforesaid were her legal guardians. On application, however, to a notary, he refused to attest this document, and pointed out that the guardians aforesaid were not legal guardians.

Thereafter the marriage between the applicants was duly solemnised, and the parties aforesaid now applied to the Court for an order authorising the execution and registration of the said document as an ante-nuptial contract, saving the rights of *ad interim* creditors.

The Court granted an order as prayed.

Ex parte VICE AND WIFE.

Mr. Buchanan moved for leave to have a certain contract, made between the above parties, registered as an ante-nuptial contract. The parties had agreed to be married by an ante-nuptial contract, but through some omission the deed was not registered.

Leave granted, with the usual order as to the rights of creditors accruing between the date of the marriage and the registration of the contract being reserved.

ESTATE OF THE LATE WM. HURST.

Mr. B. Upington moved for leave to mortgage certain property in the above estate.

Order granted in terms of the Master's report.

JOSE V. JOSE.

Mr. Buchanan moved for an extension of the return day in the above action for restitution of conjugal rights, failing which for divorce, and for substituted service, as the defendant could not be found, so that personal service could not be effected.

The return day was extended to July 12, personal service to be effected if possible, failing which publication to be made in the "Government Gazette" and the "Daily Telegraph," London.

Postea (August 5), the rule was made final, and divorce granted.

Ex parte SAIDEN.

Mr. Buchanan moved for leave to the executor dative to transfer certain property. The Master's report was to the effect that the price to be obtained was very good, and he recommended that the sale should take place, but that the share of the minor interested should be paid in to the Guardians' Fund for the benefit of the said minor.

Order granted in terms of the Master's report.

Re THE MINOR BOTHMA. } 1912.
May 2nd.

This was an application for an order (a) Authorising the Master of the Supreme Court to pay to Pieter Gerhardus Bothma (the petitioner), in his capacity of executor dative of the estate of the

late Petrus Gerhardus Bothma, the sum of £20, which had been paid in to the Master, and formed the inheritance of the minor, Petrus Gerhardus Bothma, from the estate of his father, Andries Johannes Bothma, and from the estate of Cornelia Johanna Catharina Bothma (born Botha), formerly Henning, second wife of his grandfather, the late Petrus Gerhardus Bothma, or such other sum as might be found to be due to the said minor from the Guardians' Fund in part payment of the sum of £106 13s. 4d., to be paid by the said minor in terms of the joint will of the late Maria E. Bothma and her surviving spouse, to his two sisters for a certain piece of land bequeathed to him, subject to the condition of his making the payment aforesaid.

(b) Authorising the said petitioner to appropriate the sum of £21, the value of two cows given to the said minor by his aunt, towards the payment of the aforesaid sum of £106 13s. 4d., and other costs and charges due by the said minor.

(c) Authorising the co-petitioner, Charlotta Gertruida Pretorius, mother of the said minor, and as such his natural guardian, to receive from the other petitioner, Pieter J. Bothma, transfer of the one-third share of the land, known as Bad-spruit and Landdrift, in trust for the said minor, and to raise a loan upon first mortgage of the same for a sum not exceeding £160 (less the sums of £20 and £21 aforesaid), to pay the said sum of £106 13s. 4d. to the estate of the late Petrus Gerhardus Bothma, the succession duty due by the said minor and the transfer duty, costs of transfer, and of raising and passing the said mortgage bond, and the costs of this application.

The Master's Report was as follows:

It appears that it would be for the benefit of the minor to accept on his behalf transfer of the ground, and that the mortgage be authorised; but it is not clear how the sum of £160 required to be raised is arrived at, seeing that there are the sums of £20 and £21 available.

I would respectfully recommend that such sum as may be shown to be necessary, not exceeding £160, be authorised to be raised. As, however, the mother by her remarriage has lost the right of natural guardian, application should be made to the Master for the appointment

of a tutor to whom in trust for the minor transfer can be given, and to protect the minor's interests during his minority. On the motion of Mr. Goch, the Court granted an order in terms of the Master's report, with leave to the petitioners to apply again in case they failed to make arrangements for the payment of certain £270 due as arrear interest on bonds. The appointment of a tutor was referred to the Master.

[Applicants' Attorneys: Van der Byl and Van der Horst.]

Re ESTATE OF LATE COETZEE.

This was an application for leave to mortgage certain property.

The petition of Andries Jacobus van der Walt, of Steynsburg, in his capacity as executor testamentary and tutor testamentary of the estate of the late Maria Magdalena Catharina Coetzee (born Hemming) set forth: That under the will of the late M. M. C. Coetzee, petitioner obtained letters of administration as executor testamentary on September 16, 1901, and by notice in the Gazette called upon all creditors to file their claims. These claims amounted to £207 10s., exclusive of the interest due on a certain mortgage bond.

That petitioner obtained letters of confirmation as tutor testamentary over the minors on January 4, 1902, and forthwith had all the movable property in the estate sold by public auction, and that it realised £86 6s. 3d. That there is registered in the name of the estate the farm Kalkfontein, in the division of Steynsburg, in extent 1,169 morgen, and valued by the Divisional Council at £1,169. The said property is already mortgaged, first to the minor children, in respect of their paternal inheritance, for £337 12s. 1d., and secondly to Messrs. Fairbridge, Arderne and Lawton, as agents for Ellen K. Jones for £350, but ceded to Tjaart N. Coetzee. In order to meet the claims of the creditors in full, petitioner will have to realise the immovable property, but in the present state of affairs that will result in a serious loss to the estate, and to the prejudice of the minor children. The second bondholder, T. N. Coetzee, who is prepared to advance a further sum upon security of the immovable property, has no intention of calling up the bond, and should it be called up,

petitioner has already made arrangements with one Andries Coetzee to take over the existing bond.

Wherefore petitioner prays for leave to mortgage the immovable property for the sum found insufficient to pay the creditors in full, to pay the costs of working and liquidating the estate, and the costs of the present application, in a sum not exceeding £175.

The Master's report recommended that the prayer of the petitioner be granted.

On the motion of Mr. Currey, the Court granted an order in terms of the Master's report.

Ex parte FARO.

This was an application for permission to bring the judgment of the native Appeal Court for East Griqualand in the case of Swanepoel Pakkies v. the Petitioner under the review of the Honourable the Supreme Court.

Applicant's petition set forth: That on April 23, 1901, he was sued by one S. Pakkies in the Court of the R.M. for Matatiele for £12, as and for damages caused by petitioner's alleged negligence in knee-haltering a certain mare, the property of the said Pakkies. The case was heard by the Acting R.M. of Matatiele, who, without calling upon petitioner for any evidence, gave judgment in his favour on May 14, 1901. Petitioner had at the time evidence to prove that the said mare was knee-haltered with the consent and at the request of the said S. Pakkies. Thereupon the said S. Pakkies appealed to the Native Appeal Court of East Griqualand, which Court reversed the decision of the Court below, and gave judgment in favour of the said S. Pakkies for £12 and costs in both Courts. The evidence adduced by the said S. Pakkies disclosed no negligence on petitioner's part, and even if it had, petitioner was entitled, as a matter of right, to call evidence on his own behalf. That the proceedings of the said Native Appeal Court were therefore grossly irregular, in that it reversed a decision upon fact in the lower Court, or otherwise committed a great error in law in deciding that the facts adduced disclosed negligence, and further in that, even if such evidence did disclose negligence, such Court should have remitted the case back to the Acting R.M. to

enable petitioner to adduce evidence on his own behalf, instead of by its decision barring him from so doing.

Petitioner therefore prayed that this honourable Court would grant him permission to bring the aforesaid decision of the said Native Appeal Court under its Review in terms of Rule of Court 190.

The Appeal Court stated in the course of their reasons for their judgment, that in their opinion the defendant (now appellant) had been guilty of negligence by knee-haltering a mare in a paddock where there was a water hole to which she had access, and that the fact that the mare had fallen into this water hole and been drowned, was due to such negligence.

Mr. Buchanan moved.

The matter was referred to the Registrar, in order that he might decide whether to issue summonses under Rule 190 or not.

Ex parte DU PLESSIS. } 1902.
May 2nd.

This was an application for the appointment of a curator.

The petition of the applicant, Jan Frederick du Plessis, of Ladismith, C.C., stated that he was a minor, aged 20 years and seven months, and that he was desirous of being articted to a certain attorney. Having, however, no guardian, he prayed the Court to appoint his brother, Daniel Hendrik du Plessis, of Ladismith, as curator, to assist him in signing articles of clerkship.

On the motion of Mr. Langenhoven, the Court granted an order as prayed.

[Applicant's Attorney: C. W. Herold.]

Ex parte VAN DER WALT.

This was an application for leave to the petitioner, in his capacity as executor testamentary in the estate of his father, Johannes C. van der Walt, to pass transfer to himself individually of a certain erf situate in the village of Petrusville, division of Philip's Town. The said land formed part of the joint estate of the late Johannes C. van der Walt, and of his predeceased spouse, Jacoba P. du Plessis, and was by them bequeathed to their son Petrus J. van der Walt, for the sum of £45. The legatee

refused to accept the said bequest on these terms, and on September 21, 1900, executed a formal deed of renunciation. Petitioner thereupon advertised the said erf for sale by public auction, and himself purchased it thereat for £111.

The Registrar of Deeds reported that this seemed to be a fair and reasonable price, and that he therefore saw no objection to the petitioner's prayer for the confirmation on the sale being granted.

On the motion of Mr. Russell, the Court granted an order as prayed.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton.]

Ex parte ROOS.

Mr. Benjamin moved for an amendment of a certain order of Court granted on February 1, 1902, a date having been, through a clerical error, put in as the 9th February, 1866, instead of 27th February, 1866.

Order granted.

Ex parte SCOTT.

Mr. Buchanan moved for leave to the petitioner to execute a certain mortgage bond and pass certain transfer without the assistance of her husband, from whom she was living apart under a deed of separation.

Order granted.

Ex parte GALLOWAY.

Mr. Alexander moved for leave to the petitioner to sell certain property in which minors were interested.

The report of the Master was favourable, and an order was granted, in terms of the Master's report.

Ex parte JOHNSON.

Mr. Currey moved for leave to the petitioner to have registered a certain deed as an ante-nuptial contract. Petitioner was the attorney who drew up the deed in question, and owing to some misunderstanding it was not forwarded to Cape Town for registration within the prescribed number of days.

An order was granted, subject to the consent of the parties to the deed, if they have already been married, being filed with the Registrar, and also with the usual reservation as to rights of creditors.

SUPREME COURT

[Before the Hon. Mr. Justice MAAS-DORP.]

WIENER AND CO. V. OHLS-SON'S CAPE BREWERIES. { 1902.
May 5th.

This was an action for the recovery of money due on an account.

The plaintiff's declaration was as follows:

1. The plaintiff is William Frederick Stamper, of Cape Town, who sues in his capacity as secretary for the time being of Wiener and Co. (Limited), a company trading in Cape Town, being duly authorised to sue on behalf of the said company; the defendant is Ohlsson's Cape Breweries (Limited), a company carrying on business in Cape Town and elsewhere.

2. In or about the month of October, 1901, one Algernon Ernest Watson, who was carrying on business as tenant manager of certain military canteens at Cape Town and Wynberg, was indebted in certain sums of money to both the plaintiffs and the defendants for goods supplied.

3. On or about October 14 the defendants informed plaintiffs that they were going to take over and work the business of the said Watson until further notice, and it was then agreed between plaintiffs and defendants that in consideration of plaintiffs supplying further goods for the said canteen business, all orders for such goods given by the said Watson should be countersigned by either Messrs. Etheridge or Kirsten, agents or employees of defendants, for and on behalf of defendants; that the amount due to plaintiffs for goods supplied during the month of September should be paid by defendants, and the amounts for goods supplied in October and thereafter from time to time on orders given as aforesaid should also be paid by defendants when the same became due, the cheques being signed by the said Watson and countersigned by defendants.

4. Thereafter, in accordance with the said agreement, the plaintiffs supplied goods from time to time to the said Watson on orders countersigned by or on behalf of defendants, and the cheques

therefor were signed by Watson and countersigned by defendants, and thereafter payments were made by defendants.

5. In or about the month of December, 1901, on plaintiffs requesting payment of a certain amount of £383 16s. 9d. for goods supplied by plaintiffs to the said Algernon Ernest Watson, carrying on business as aforesaid, the orders for which were countersigned by or on behalf of defendants as agreed upon, the defendants refused to pay the said sum, and repudiated all liability.

6. The plaintiffs have supplied goods amounting in all to the sum of £580 12s. 11d. under the agreement aforesaid, on orders countersigned by or on behalf of defendants, which the defendants now refuse to pay for, and all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiffs to recover the said sum for the defendants. The plaintiffs claim: (a) The sum of £580 12s. 11d., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

And for an alternative claim the plaintiffs say:

7. They crave leave to refer to paragraphs 1 and 2.

8. On or about October 1, 1901, the defendants entered into an agreement with the said Watson whereunder it was agreed *inter alia* that the defendants should take over the business of the said Watson and pay him a salary of £20 per month as manager, and under the said agreement they became liable for all debts and obligations thereafter contracted by the said Watson in and about the said business; the plaintiffs crave leave to refer to the said agreement when produced.

9. Thereafter the plaintiffs from time to time supplied goods to the said business, and the defendants became liable to pay to the plaintiffs the value thereof; but although there is now due and owing the sum of £580 12s. 11d. for goods supplied by plaintiffs to the said business, the defendants neglect and refuse to pay the same.

The plaintiffs claim: (a) The sum of £580 12s. 11d., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

The defendants' plea was as follows:

1. The defendants admit the allegations in paragraphs 1, 2, and 5 of the declaration.

2. As to paragraphs 3 and 4, they deny that they, on the 14th October, 1901, or at any time, informed the plaintiff that they were going to take over the business of the said Watson as their own, or agreed that they would themselves pay for goods supplied during September or October, or thereafter, to the said Watson, and they deny that at any time they made payments to the plaintiff for such goods.

3. All payments were made by cheques signed by the said Watson, to whom the goods were supplied and credit given, and countersigned by or for the defendants, who had the control or supervision of the business of the said Watson, and shortly after October 14 the plaintiff Stamper and Frederick K. Wiener were definitely informed that the defendants refused to accept liability for or to guarantee payments of amounts due or to become due to the plaintiff company for goods supplied to the said Watson under the arrangement.

4. The defendants admit the supply of goods to the said Watson to the amount of £580 12s. 11d. on orders countersigned by on or their behalf, and that they refuse to pay for the said goods, but otherwise they deny the allegations in paragraph 6 of the declaration.

5. As supervising and controlling the business of the said Watson, the defendants were unable to cause the said amount to be paid out of his funds, which were insufficient for the purpose, and his estate has been surrendered as insolvent.

Wherefore the defendants pray that the plaintiff's claim may be dismissed, with costs.

For a plea to the alternative claim of the plaintiff, the defendants say:

6. They crave leave to refer to the foregoing paragraphs, and say that the only arrangements between them and the plaintiff were that orders for goods given by Watson should be countersigned either by Etheridge or Kirsten, and cheques signed by Watson and countersigned by defendants should be given in payment of such goods.

7. They deny that the tenour of the agreement between themselves and the

said Watson is correctly set forth in paragraph 8 of the declaration, and say that the said agreement was not known to the plaintiff until after the supply of the goods, the price of which is claimed in this suit.

8. In so far as the agreement between themselves and the said Watson is relevant to the matters at issue between the parties to this suit, they beg to refer to the same when produced in court, and they specially deny that by the said agreement they took over the said business of Watson for their own account, or became liable for any debts or obligations thereafter contracted by the said Watson in and about the said business.

9. They admit that there is owing by the said Watson to the plaintiff the sum of £580 12s. 11d., and that they refuse to pay the same, but otherwise they deny the allegations in paragraph 9.

10. They say specially that the goods, the price of which is now sued for, were not supplied to the said Watson in the faith of credit of the defendants, or upon any guarantee by them.

Wherefore they pray that the plaintiff's claim may be dismissed, with costs.

[Mr. Searle, K.C. (with him Mr. Goch), for plaintiffs. Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), for defendants.]

Frederick K. Wiener, one of the managing directors of the business of Wiener and Co., stated that prior to October last year his firm had supplied goods to Algernon E. Watson, who had a contract for the supply of goods to the military. During October they stopped supplying goods to Watson, who was at that time owing them certain money. Watson carried on what was known as a dry canteen and also a wet canteen at Cape Town and Wynberg. Witness's firm supplied provisions, etc., and the Breweries supplied liquor for Watson's business. In the month of October, Watson came to witness with one Kirsten, the representative of Ohlsson's Cape Breweries. Kirsten told witness that Watson was indebted to Ohlsson's for a large sum, and as Watson had failed to pay the amount due, they had taken the matter in hand, that they had taken stock of the affair within the last few days, and had decided to take it over, and that they had entered into an

agreement with Watson under which the latter was to become an employee of the company, and that this arrangement was to go on until such time as Watson had paid off his liability to Ohlsson's, which was over £1,200. Kirsten told witness that this affair must be better looked after than it had been in the past, and that further orders supplied by plaintiffs must be countersigned either by Kirsten or Etheridge as representing the Brewery Company. Witness said: "That means you are to take over the whole responsibility of it?" to which Kirsten answered, "Yes, but only in so far as the countersigned orders are concerned." Witness said, "It is not likely we are going to supply anything on Watson's own initiative, as you are going to take over the business and desire us only to supply those orders so initialled and countersigned." At that time there was a sum of £437 9s. 4d. due on the September account, and Mr. Kirsten told witness that that amount would be paid by Ohlsson's Cape Breweries within the course of the next few days, as they had opened a special account, and as soon as there were sufficient funds in that account they would pay the amount due. That amount was paid on October 17 by cheque signed by Watson, and countersigned as arranged. Mr. Stamper was present at that conversation, but Mr. Etheridge was not. On October 14, witness wrote a letter to the defendants confirming the arrangement. After that the arrangement was in practice carried out, the orders executed after that being always countersigned either by Kirsten or Etheridge. Witness knew that Etheridge was a responsible clerk in the employ of Ohlsson's Cape Breweries. The September and October accounts were so paid by cheques signed by Watson, and countersigned by Kirsten or Etheridge. The cheques came from the office of Ohlsson's Cape Breweries. In some cases items were eliminated from the orders, witness thought by Mr. Etheridge, on the ground that witness's prices were too high. Witness was not definitely informed, shortly after the conversation with Kirsten, by Mr. Etheridge or anyone else, that the company would not be responsible for Watson's liabilities. In December, Kirsten and Wat-

son again came to witness, and Kirsten told him that the Field Force Canteen was going to take over Watson's business, and the result would be that as Watson could not possibly compete with the prices he would have to close his business. Witness asked what about the payment of the money for the goods witness had supplied. At that time the November account had not been paid, and there was also something due for goods supplied in December. Kirsten, on behalf of Ohlsson's, said that of course they were not going to pay, and that witness must come to some arrangement with Watson and give him time to pay. He led witness to suppose that when Watson's affairs were settled, there would be ample funds. Witness told Kirsten that they could give Watson no time at all, and that they looked to Ohlsson's Breweries for payment. At the same time Kirsten said they would cease initialling the orders, and that if witness's firm cared to supply Watson further they would do so on their own responsibility. After that they supplied a few orders, but only when they got the money before delivering the goods.

By the Court: Watson made some remarks either at that or the previous conversation, but when he did so, Kirsten said: "You be quiet; I am speaking now, and there is no necessity for you to speak." Watson, therefore, did not say anything of consequence.

Examination continued: Witness was never informed by Etheridge that the reason for countersigning was to prevent Watson buying large quantities of unsaleable goods. Neither Kirsten nor Etheridge had said anything like that to witness.

Cross-examined: Witness might have seen Etheridge about an order a few days after the letter of October 14. Etheridge did not tell witness what was afterwards embodied in a letter, viz., that Ohlsson's did not guarantee any responsibility. If he had told witness that, he would have distinctly remembered it. Witness could not recollect what he went down to Ohlsson's office for on that occasion. Witness would not say that Kirsten was a subordinate in the office of Ohlsson's Cape Breweries. He did not know that Kirsten was one of the travellers. He told witness that

he had taken stock of Watson's business, and that he was going to run the business. Witness could not possibly compete with the Field Force Canteen, seeing that the latter imported goods duty free. It was explained to witness that Ohlsson's did not take over the business in their own name, because the military might not allow them to carry it on. Therefore it was agreed that the business should still be carried on in Watson's name. At the meeting in October Kirsten had told witness that they felt sure that in a few months Watson would be able to work off his liabilities, and they would then hand him back his business, but that before they did so they would give witness a month or so notice, because then witness would have to supply goods on his own responsibility. When Kirsten tried to lead witness to suppose that after Watson's affairs were settled there would be plenty of funds witness knew that to be impossible.

[By the Court: Witness knew that before the conversation with Kirsten in October his firm had decided to stop supplying goods to Watson until they got a settlement of the September account then due.]

Counsel read the agreement entered into between Watson and Ohlsson's, from which it appeared that the former being indebted to the latter for a considerable sum, and being unable to settle it, Watson requested Ohlsson's to grant an extension of time on the following conditions: Watson to give, grant, and make over to Ohlsson the sole control and management of his military canteens, this control to continue until the whole of Watson's indebtedness was discharged. Watson was to manage the business under the supervision of Ohlsson's, acting as an employee at a salary of £20 a month. The amounts taken by Watson were to be paid into a special account, to be opened at the Standard Bank. Ohlsson's were to supply and deliver to the canteens the necessary quantities of liquor, while the profits made by the carrying on of the business were from time to time to be paid to Ohlsson's in reduction of the amount of Watson's indebtedness. The arrangement was to terminate when the full amount of Watson's indebtedness was paid off.

Harry Alexander Stamper, one of the managing directors of the plaintiff company, said he joined the firm on September 15. The firm was then carrying on business with Watson. Witness took over the management of the accounts. Watson's account was then running, and witness, noticing that it was a pretty large account, made enquiries about it. On May 7, Watson had not paid his account, and witness started worrying about it, and held back the orders, while their traveller was instructed to go and try and get the amount in. Kirsten and Watson came in one day; Watson was treated as an utter nonentity, Kirsten being the man. Kirsten said they were going to take over the whole concern, that Watson was going to be an employee of his, and that in future they would initial all orders, and Ohlsson's would be responsible. Witness asked, "What about the money already owing?" Kirsten replied, "Oh, we will see that you get that; you will get your cheque for September in a day or two." The arrangement was perfectly satisfactory, and orders were executed from time to time. Subsequently when witness went round to get payment for the cheque, Etheridge said it would be forthcoming in a few days, adding "You will get your money all right; we may lose, but you won't lose a penny." A few days after that they got a cheque. The cheques were endorsed by Ohlsson's Breweries.

Cross-examined: Watson's orders were not kept back a week, witness did not even think they were kept back a few days; the holding back of the orders and the arrangement with Ohlsson's was done jointly. The order dated October 11 was countersigned by Etheridge. Any orders not initialled were torn up.

[By the Court: He positively swore that there were orders of Watson's that were kept back which plaintiffs would not execute until some other arrangement was arrived at.]

Cross-examination continued: Etheridge told witness when he asked for the cheque that there were not sufficient funds; witness thought Ohlsson's would have to realise more of Watson's goods before they paid. He did not know what arrangement Watson had with Ohlsson's apart from what he had heard. He thought he only went twice for the cheque. Witness was under the conviction that Ohlsson's were responsible for

every penny of that account, otherwise they would not have supplied Watson's with a "tickey's" worth of goods. Ohlsson's guarantee was for future goods, and not for past goods; the first cheque for the September account was not included in the guarantee. Witness went to Etheridge for the purpose of finding out if what Kirsten had said represented the correct state of affairs. (Subsequently witness corrected himself, and said the above statement did not represent what he had meant to convey; he simply went to Etheridge to get a cheque, the obtaining of which from Ohlsson's would have corroborated Kirsten's statement immediately.) Witness was not afraid to ask for such a corroboration. Plaintiffs subsequently wrote to Ohlsson's for the purpose of ascertaining if what the clerks had informed them was correct; no reply was received to this letter.

Simon Jaffe said he was a traveller in the firm of Wiener and Co., and recollected two of the orders countersigned by Kirsten and Etheridge. He got the orders from Watson, and went with them to Ohlsson's, where Etheridge struck out two of the items, saying the price was too dear. Witness went to see Watson at his head office at the Castle early in October. He met Kirsten there, and the latter said he supposed witness was aware that Watson's business was in a hopeless condition. Witness said that he was not, and Kirsten said that if they declared the man bankrupt now, they would get nothing, and proceeding, said that they proposed to take over the control of the business, and by effecting economies they would be able to pay off the debts. With regard to orders, Kirsten said they would not hold themselves responsible for anything not countersigned by Etheridge himself. That was before witness had any orders countersigned by Etheridge or Kirsten.

Alfred Newton Foote, a clerk in Mr. Syfret's office, said that Mr. Syfret was trustee in the insolvent estate of Watson, and witness had charge of the papers in that estate. The documents produced had been the only ones handed in in the estate.

Mr. Schreiner objected to this evidence, holding that, in the first place, if they could go into the condition of the insolvent estate, the trustee should be called, so that he might be cross-examined. Mr. Schreiner

further submitted that, even if Mr. Syfret himself were to put in the books, the evidence would not be at all relevant to the case between Wiener and Ohlsson, which had nothing to do with any third party.

[Mr. Searle: The first point was a purely technical one, and I have never dreamt that such an objection would have been raised. As regards Mr. Syfret, however, his evidence can be taken on the alternative claim in the pleadings, which was that after a certain date Watson's business became Ohlsson's business, and Mr. Syfret's evidence would only refer to the business after that date.]

Maasdorp, J.: I don't hold that these books are not admissible, but they must be put in by someone who can swear that these books are from Watson's, and not by someone who has simply been told that they are. At present there is no evidence that these books are from Watson, and they cannot be put in. At present there is no relevancy to this case shown, because the only evidence is that they are produced out of the office of Mr. Syfret by his clerk, and no connection is proved between these books and any of the parties to the case.

Mr. Searle closed his case.

Mr. Schreiner called

Edwin Bernard Etheridge, clerk in the employ of Ohlsson's Breweries, who stated that he was temporarily managing the office in the absence of Mr. A. Ohlsson. Kirsten—a traveller representing the breweries outside the office—inquired into Watson's business for the firm. After the investigation, the agreement of October 1 was entered into, and Kirsten went around with Watson to Wiener's, amongst others. There were other creditors in addition to Wiener's—altogether, about £600 was owing. Ohlsson's were the largest creditors for £1,300 odd; this sum was reduced to exactly £1,300, and embodied in a promissory note. Witness had no recollection of any interview with Stamper or any other member of the plaintiff's firm before the letter of October 14. Witness opened this letter, but did not reply to it; the same morning that it was received Stamper called at the office. A conversation took place between witness and Stamper at the counter; Cooper and Bennet and several other clerks were in the office at the

time. Stamper asked witness under what arrangements they were going to work Watson's account. Witness told Stamper that certainly Ohlsson's were not going to guarantee anything. Plaintiff's reason for initialling Watson's orders was to keep his accounts for him, because he had ordered goods which were of no use to him, and he was overstocking himself, and he had also been ordering personal goods, which defendants did not think was fair to his creditors. Mr. Stamper referred to a guarantee, and witness told him that Ohlsson's certainly would not guarantee any man's account unless they were running the business for their own benefit, but that they would do their best to keep Watson's account in check. Witness further told Stamper that the September account would most likely be paid within a week. Cooper at the time was standing at witness's elbow, and Bennet was just behind. The cheque for the September account was paid on the 17th, a few days after the above interview. Witness subsequently saw Mr. Wiener on the same subject, and repeated to him what he had already told Stamper—that he (witness) was certain Ohlsson's would not guarantee anything. No special fund was ever opened at the bank, but Watson's special account was countersigned by Ohlsson's. No action was taken by Ohlsson's under the power of attorney to represent Watson. Generally Watson managed his own banking account.

Cross-examined: Wiener's were supervising Watson's account. Witness had nothing whatever to do with the agreement. Watson arranged with the bank that every cheque should be countersigned by Ohlsson's, but he could cancel this arrangement at any time. Mr. Watson had personally written to the bank, stating that in future he wished all his accounts to be countersigned by witness. Watson paid Ohlsson's by cheques countersigned by witness. With regard to the letter from Wiener's, witness did not think it was necessary to repudiate it, considering the conversation he had had with Stamper. Witness believed he had struck out two or three items from Watson's orders, but this was under Watson's instructions. Watson used to tell witness what his balance was at the bank. At this time witness was not

aware of the agreement. He never saw Watson's passbook, but he used daily to ask him what his receipts were.

Re-examined: Ohlsson's proved in Watson's insolvent estate. Witness took steps as a vigilant creditor to secure the money due to Watson from the Field Force Canteen, but defendants never put any pressure upon Watson to make him insolvent. The October account was paid in the usual way by Watson by a cheque countersigned by witness. Ohlsson's kept no books from Watson, and never bought from him. No profit from Watson's business was ever paid to Ohlsson's.

By the Court: When the agreement was made Watson was practically insolvent. They wished Wiener to go on supplying Watson in the way they had been doing, because if Ohlsson's had sent in their account Watson would have been insolvent.

[Maasdorp, J.: What inducement did you or Mr. Kirsten hold out to Wiener to continue supplying an insolvent business?]

Nothing but that they would possibly get their money if they continued to supply goods, and the business was carried on.

And it would appear from the agreement that it was for the benefit of Ohlsson's that the business was being carried on, as under the agreement they were to get the whole of the profits?—Yes.

James Forbes Cooper, a clerk in the employ of Ohlsson's, said he overheard part of the conversation between Mr. Stamper and Mr. Etheridge in October last. He heard Etheridge say that they were not responsible for Watson's orders, but were keeping a check on his stock, as they knew him to be an unsatisfactory man to manage the business. He afterwards saw Mr. Wiener there, but did not hear what he said, but it was in regard to Watson's business.

Cross-examined by Mr. Searle: You say you overheard nothing of this conversation with Mr. Wiener, but yet you say that it was in regard to Watson's business, and nothing else. You meant that you imagined it was?

Witness: Yes.

Charles Ernest Bennett, also a clerk in the employ of defendants, said that he had overheard part of the conversa-

tion between Stamper and Etheridge, and heard the latter distinctly say to Stamper that they did not guarantee any accounts of Watson's, but were merely countersigning orders for the purpose of keeping a check on his stock. As Mr. Stamper was leaving, Mr. Etheridge referred to the letter of October 14, and asked if a reply should be sent, but Mr. Stamper said it was not necessary, as the matter had been fully discussed.

Mr. Searle: When were you first asked to recollect what you knew about this matter?

Witness: It was understood all along that I was to give evidence if there was an action.

Was it an understood thing that you should listen to the conversation?—Certainly not, but these things are spoken of when a case of this kind is coming on, and the clerks would say what they knew about it. Proceeding, witness said it was first brought to his recollection about January 3 that he had heard this conversation. He only heard a portion of the conversation, because he did not pay particular attention. Witness simply wanted to see Mr. Stamper about his horse "Once More." Witness had backed it, and lost money on it, and he wanted to know the reason why the horse lost.

Hermanus Dampers Kirsten said that in October last he was a traveller in the employ of Ohlsson's Breweries, and was instructed to look into Watson's account. From what he ascertained, he was instructed to see Wiener and Co., and did so. From witness's standing in the firm he had no authority to give guarantees. He had no authority whatever when he went to Mr. Wiener or anyone else to give guarantees. When he went to Wiener's he saw Mr. Fred. Wiener and Mr. Stamper. Witness told Mr. Wiener that he had gone through the stock and found that Watson was about £1,000 to the bad, and that Ohlsson's were going to help him to carry over the business, as they knew it was a good and payable business, and that if it was looked after they would be able to pay all his creditors, and that Watson was going to be allowed to pay all his creditors except Ohlsson's, who were going to take a bill for the balance. Mr. Wiener said that it was very good of Ohlsson's to do so, and witness said it was not exactly kindness,

because they knew it was a good business. The September account was mentioned, and witness pointed out that there were several overcharges in the invoices, and said that it would be better in future if all orders Watson gave Wiener's traveller were gone through and initialled by witness or Mr. Etheridge. Witness explained that he was going to assist Watson in his business in looking through the invoices, as he had been overcharged in the past. He told Mr. Wiener that the September account would be paid in a few weeks' time, because Watson was going to pay all his creditors except Ohlsson's. Mr. Wiener said he understood Watson's contract was likely to be for two years, and expressed the hope that the orders would still be brought there, and witness said the orders would be brought there if Wiener's prices were as low as those of other merchants. He never said anything to Wiener or Stamper about Ohlsson's going to pay Watson's accounts out of their own pockets. He had nothing of that sort in his mind. He had no instructions to tell them anything of the kind. He did not tell them at all how their accounts would be paid. He never mentioned anything about the payment of any account except the September account. The letter of October 14 was shown to witness on October 15. The next witness had to do with the matter was when he went round with Mr. Watson to tell Mr. Wiener about the cash payments, in the early part of December. They went into the private office, and witness, speaking for Mr. Watson, said that Mr. Watson wanted Wiener and Co. to allow the November account to stand over, and Mr. Watson would pay them the December account, or would pay cash for all goods received after that, and would also pay them up to date. Mr. Wiener said they could pay him cash in the meantime, but he would see his father regarding the November account. They then left the office, and witness never saw Mr. Wiener again. Witness knew of the agreement between Ohlsson's and Watson, and knew the terms of it. These terms had not been carried out in respect of the banking account, which had never been opened. Witness agreed with Mr. Etheridge's evidence in regard to that agreement. Neither Wiener nor Stamper came to speak to witness after

the latter had been at their office with Watson early in October.

Cross-examined: The terms of the agreement with Watson were discussed between Mr. A. Ohlsson, Mr. Watson, and witness, so that witness knew when he went to see Mr. Wiener that all the profits in the business were going to Ohlsson's, but he had no authority to make any arrangement with Wiener.

[By the Court: Watson got his salary as set forth in the agreement. He got it by cheque.]

Witness never told Wiener about Ohlsson's taking over the business. When he was shown the letter of October 14, he said it was rot and ridiculous, and did nothing more. Witness supervised Watson's books from time to time. If it had not been for the field force canteen starting, there would have been a good thing made out of it. Witness's real object in going to Wiener in October was to get the September account rectified.

Re-examined: The £20 salary to Watson was paid on the latter's own cheque.

By the Court: The arrangement witness went to make with Wiener was with regard to the errors in the September account, and also to let Mr. Wiener know the state of Watson's business. He never told Mr. Wiener that payments would be made by cheques signed A. E. Watson, and countersigned by Ohlsson's.

Oliff Axel Ohlsson said he was the manager of Ohlsson's Breweries, and during his absence at Ceres in October last, Mr. Etheridge acted for him. The contract between Ohlsson's and Watson was arranged in the early part of October, while witness was still there. Mr. Etheridge had nothing whatever to do with the contract. Witness had no communications with either Mr. Wiener or Mr. Stamper. He had given no authority before he left for the undertaking of any such guarantee as that now alleged to have been given. He had given no authority for Ohlsson's to bind themselves. He knew the arrangement that was being made as to the payment of the September account, but he knew nothing about the company taking any responsibility for accounts.

Cross-examined: A few days after witness came back from Ceres he was

told the contents of the letter of October 14. While witness was away Mr. Etheridge had no access to the agreement between Ohlsson's and Watson. Mr. Kirsten knew the contents of the agreement. Witness knew that if that agreement had been carried out, Ohlsson's Breweries would have got all the profits from the business.

[By the Court: The agreement was never enforced. It was true that all orders were countersigned, but that was under an arrangement with Watson. The cheques for Watson's salary were also countersigned.]

Re-examined: Mr. Etheridge told witness the contents of the letter of October 14, and also what had been done in regard to it.

[Mr. Searle objected to witness repeating a conversation, and saying what he had been told by Mr. Etheridge, but the Court, after hearing Mr. Schreiner on the point, held that a part of the conversation having been given in cross-examination, and an imputation made, the rest of the conversation could also be given.]

On being told the contents of the letter, he asked Mr. Etheridge what he had done, and the latter said that Mr. Stamper and Mr. Wiener had come down to the office, and he had assured them that under no circumstances could Ohlsson's guarantee any accounts. As to Watson's salary, none of that came out of the funds of Ohlsson's Breweries, and not a penny of Watson's obligations to outside creditors had come from Ohlsson's. Watson's own account was only operated upon in a restricted way. The agreement was not carried out as a whole.

[By the Court: The agreement was acted upon in a way in this respect, that they supervised Watson's business affairs. They had a modified form of control of Watson's account at the bank. The agreement was only drawn up so that in the event of Watson mismanaging his affairs they could supervise the business more effectually.]

Mr. Schreiner closed his case.

After argument by counsel on the facts, the Court gave judgment for the plaintiffs for the amount sued for, with costs.

Massdorp, J.: The plaintiffs in this case sued the defendants upon a contract whereby it was alleged that the defend-

ants promised to pay plaintiffs for certain goods supplied by the latter to the business of Watson. To put the alleged agreement more precisely, it is said that the defendants were to pay for such goods as were supplied on orders signed by Watson himself, and countersigned by some representative of the defendant company. Now this agreement must be gathered from certain conversations which took place between the parties. It is a verbal agreement, and it is only in a certain indirect manner that light can be thrown upon it by any documents which may be produced. It appears that when the conversations took place which constituted the alleged agreement, if there was any, there were present on behalf of the plaintiffs two of the partners of the firm, viz., Messrs. Wiener and Stamper, and there was on the other side Mr. Kirsten, who is connected with the business of the defendant company, and Mr. Watson, whose business comes into question here. Now, the two partners of the plaintiff firm have been called and have given their evidence, and have stated pretty fully their conversations and the purport of those conversations, while on the other hand Mr. Kirsten has been called, but Mr. Watson has not been called. Now, I will point out before referring further to the alleged conversations, that at this time, according to Mr. Etheridge, there was some idea that some arrangement should be made between Ohlsson's Breweries and the other creditors for the purpose of enabling Watson to carry on his business, and to prevent it being closed. It was thought that it was necessary to come to some arrangement for such a purpose, and Mr. Etheridge says that he left the matter in the hands of Kirsten, and he further said that he told another witness that he was glad the business had been arranged by Kirsten. Now, it does appear that there was some idea that some agreement should be made by these parties. We have on the one part, therefore, the statement made by Mr. Wiener and Mr. Stamper that some agreement was made, and before referring further to that I would say that when we come to Kirsten's evidence it would amount to the making of no agreement at all. The two partners have stated that Kirsten agreed that Ohlsson's Breweries would become responsible for goods supplied upon orders which were countersigned

on behalf of the business, and we find that Mr. Jaffe says that when he met Mr. Kirsten the latter said that none of the orders would be recognised, and that they would not be responsible upon any orders except such as were countersigned on behalf of the Breweries Company. So here we have three witnesses who state positively that some arrangement was made, and in substance their statements of the conversations are identical. Mr. Kirsten says that he made no arrangement at all; that he entered into no agreement, and that he merely went to Wiener and Co. to inform them that Watson was in difficulties, to tell them that they must send in their bill; that bill would be paid for September, and that for the future they should not supply any orders but such as were countersigned. That constitutes no agreement or contract by either party, while Mr. Etheridge says that the idea of going to Wiener and Co. was to see if an arrangement could be come to so as to enable Watson to carry on longer and prevent the business being closed up. The statement made by Mr. Wiener would have such effect, because it would have the effect of an inducement to them to supply further goods upon some promise made by Ohlsson's Breweries, while Kirsten's allegations would have no such effect, because he says that he merely went to tell them to make out their account for September, and it would be paid, but that was no agreement for further supplies or inducement to Wiener and Co. to hold their hands and not to press Watson. Under these circumstances I think that the contract is supported by the surrounding circumstances, such as those alleged by Etheridge himself. There are other circumstances, but before I go to that point I wish to refer to the position of Kirsten as agent of Ohlsson's Breweries, because there is another defence on the part of Ohlsson's Breweries, not only that no agreement was entered into, but that even if an agreement was entered into it was made by a person who had no authority to make it. It appears pretty clear that during the absence of Mr. Ohlsson, Mr. Etheridge conducted such business as Mr. Ohlsson himself would have had the power to carry on were he present, and Mr. Etheridge says that he left the

making of any arrangement in the hands of Kirsten. It appears quite clear, therefore, that Etheridge, who had stepped into the shoes of Mr. Ohlsson, had full powers to instruct Kirsten to make the necessary arrangements for the purpose of this particular transaction. Consequently Kirsten had full power from Etheridge to conduct the business of Ohlsson's in this matter. Mr. Ohlsson says this is such an important matter that it would never have been left in the hands of Kirsten, but the question is whether it would appear to be such an important matter after all. Watson was in difficulties in the beginning of October, but the business he was carrying on was considered a very good business, if he could only tide over his difficulties. He owed Ohlsson and Co.'s Breweries £1,300, which that company was very anxious to save, and the only way they could do it was by getting the other creditors to give this business further time. Ohlsson's then entered into a written arrangement with Watson himself, and according to that arrangement, Ohlsson's Breweries were to take all the net profits made by the business. Not only that, but they had the power to order all the goods required in the business, and what hardship therefore was there to Ohlsson's in making themselves liable for the payment of the goods which were supplied to the business, of which they were to have all the benefit. The one object they had in view was to obtain the continuance of the business, and to do that, they had to get other creditors, such as Wiener and Co., to go on supplying goods, otherwise this dry canteen could not have been carried on. Consequently it seems to me that it was only a very natural agreement they should enter into with Wiener and Stamper, that the latter should go on supplying goods for that business, and that, for the payment of goods so supplied on countersigned orders, Ohlsson's should be liable. It was a natural arrangement, and not only supports the statements of Mr. Wiener and Mr. Stamper as to the probabilities of the contract, to which they have borne evidence, but it also throws some light on the position of Mr. Kirsten, who was simply carrying out the wishes of Ohlsson's Breweries, as evidenced by their own contract. Kirsten had to make some arrangement to induce

Wiener and Co. to continue sending the goods, and consequently he made a promise that the goods should be paid for by Ohlsson's Breweries, who would have the full benefit of the business, and who would take possession of the goods, and derive the full benefit from the goods which they so paid for. I think that, under the circumstances, we have a set of circumstances which largely corroborates the evidence given by the plaintiffs. Even when we go to the documents, I think the evidence becomes quite conclusive. We have here a letter of October 14 from the plaintiffs to the defendants, in which the terms of the agreement made between Kirsten and the plaintiffs are set forth, and the conversations referred to were alleged to have taken place a few days before that. It is impossible to read this letter without coming to the conclusion that the information contained in it must have been obtained from Kirsten himself as to the manner in which the orders were to be made out, and the manner in which the cheques were to be drawn. This information could only have been obtained from Kirsten himself, and the question therefore arises whether this formed the subject of an agreement. Kirsten says that so far from that being the case, he never even referred to the manner in which the cheques were to be signed and countersigned. In the face of this document, I must come to the conclusion that the evidence given by Messrs. Wiener and Stamper is correct, and that that of Kirsten is incorrect. Then we have got other documents which support the statements of Wiener and Stamper, and when we refer to these other documents—which embrace the orders and cheques—we find that they prove that the business was carried on exactly in the way in which Wiener and Stamper say Kirsten had promised it should be carried on, and in the absence of such an agreement as that alleged by the plaintiffs, it is impossible to account for the form of these documents. I have therefore come to the conclusion that the evidence put before the Court by Wiener and Stamper regarding the conversations is correct, and that if it is necessary to look further for evidence to support those statements it is to be found in the documents. Judgment will therefore be for the amount claimed by the plaintiffs, £580 12s. 11d., with costs.

[Plaintiffs' Attorneys: Sauer and Standen. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Jury.]

ALIWE V. HARDIE. { 1902.
May 6th.

Libel and slander—Balance of account.

This was an action for damages for alleged libel and slander, and also for the recovery of a certain sum, being the balance of an account. There was a counter-claim for damages for alleged malicious and illegal arrest of the defendant, and for the recovery of the sum of £100 due by plaintiff to defendant.

The plaintiff was Said Abdullah Aliwe and the defendant was Hadje Abdol Hardie. The plaintiff sued the defendant on three counts, two being for libel and slander, and one for the balance of an account of money due to plaintiff. The plaintiff was, as his name of Said betokened, of the highest noble class of the Mohammedan world. He had been for very many years, until the dismissal, one of the two pilgrim guides at Mecca, to whom went the devout Moslems who made many pious journeys to the shrine of the Prophet. Said Abdullah was the pilgrim guide at Mecca, and had a very great following, particularly among the Cape Mohammedans. He had held this position altogether for 27 years. Nine years ago the defendant came over to Mecca, and stayed there with one of his wives named Hadeje, and he left her in the charge and care of the plaintiff, who had an establishment at which a great many of the Moslems stayed, and Hadeje stayed there till 1901, when she returned, and was still living with Hardie. The plaintiff now claimed £61, for the balance of account for Hadeje's board, lodging, rent, clothing supplied, and money paid for her various trips. Four years ago the defendant Hardie sent

another wife of his named Amina on a pilgrimage to Mecca, and she was placed with the plaintiff in his establishment. She had with her sums of money provided by her husband, and she deposited £100 with the plaintiff, to be drawn against her said husband from time to time as might be required. She received the whole of that £100, according to the evidence for the plaintiff. Amina remained there two years, and then she came back to this colony. When she came here her husband discovered that all was not with her as it should be. Said Abdullah, the plaintiff, had looked after her to the best of his ability throughout the whole of the time she was at his establishment. She had come there with a friend of the defendant—a man named Abdoola. Nothing was alleged at all against Abdoola in connection with the matter. But a man named Mohamet, who also lived at the establishment, appeared to have come with her on the same steamer back to the Cape, and it was suggested that was how the woman went wrong. Thereupon Hardie, the defendant, wrote letters from Cape Town to the Governor of Mecca, or Shereef, in which he impugned the character of Said Abdullah, and said that he was responsible for the seduction of his wife, and thus he caused the dismissal of the plaintiff from a position worth to him at least £600 per annum in the direct emoluments and indirect gifts associated with the high position he held. Many of the Moslems who were there at the time took this very much to heart, and made strong appeals to get the plaintiff replaced, but without success. Plaintiff had not been able to procure the letter actually written by the defendant to the Shereef. He was able to produce secondary evidence as to its contents, and defendant boasted in Cape Town of having sent a letter or letters to Mecca which would secure the dismissal of the plaintiff. The Moslem world of Cape Town was very much affected by this case. They had made a protest to His Majesty's Government through their representative at Constantinople for the reinstatement of the plaintiff. The plaintiff claimed £3,000 damages, measured by the injury which had been done to him. The defendant denied altogether having

slandered the plaintiff. He admitted responsibility in regard to Hadeje, but said that the balance due to the plaintiff was only £49. The defendant claimed in reconvention £250 as damages in consequence of the plaintiff having caused his arrest, and he also claimed £100, which the said Amina had deposited for him with plaintiff, and of which no account had been rendered.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), for plaintiff. Mr. Searle, K.C. (with him Mr. Benjamin) for defendant.

Hadije A. Soeker, a cab proprietor, said he had lived a long time in Cape Colony, and was formerly in Cape Town. He had known defendant for many years. Witness had been at Mecca, but had had Omar as a guide, not plaintiff. The last Malay fast time was between December 13 and January 12, and during that month witness was standing at the corner of Wale and Adderley-streets with another man named Lani, when defendant came up and asked witness if he was keeping any meeting. Witness asked, "What for?" and defendant said, "About the Said." At that time a petition was being prepared in regard to the plaintiff's reinstatement for sending through the Government of this colony to the Turkish Government. Witness said to defendant, "What about the Said?" and defendant replied, "Well, I hear all the Cape Town people want to sign a petition to send him away; I would like to see the whole community of Malays put that man away. I was the man who wrote many letters to the Shereef, and I was the man who took him (meaning plaintiff) out of Mecca." Witness asked defendant why he did that, and defendant said plaintiff was a bad man, and both he and his son had had improper relations with his (defendant's) wife. Witness told defendant that he ought to be ashamed of himself for saying such words as those. The other man, Lani, then pulled witness away, as he was getting angry.

The point as to whether secondary evidence as to the letter alleged to have been written by defendant to the Shereef could be taken was raised.

Mr. Schreiner submitted that evidence of the defendant's admission that he had written such a letter could be

taken. As regarded the non-production of the letter, it was hopeless for them to attempt to get it, as the Shereef who received it was in a foreign jurisdiction.

Mr. Searle said the defendant admitted writing a letter, but they had got witnesses who actually saw the letter, and who would say that it was not a letter of the nature alleged at all, and did not in the least accuse plaintiff of immorality.

[The Chief Justice: Mr. Schreiner contends that the production of the letter would be dispensed with upon evidence being given to the effect that defendant himself admitted to divers witnesses that he had written such a letter.]

Mr. Searle said he was not aware of any authority which went to that extent.

[The Chief Justice: The point is whether we can accept any secondary evidence.]

Mr. Schreiner quoted *R. v. Watson* (2 Stark, 129), and *Judson v. Hudson and Morgan* (7 A. and E., 233 n), to show that where a defendant had admitted that he was the author of a book containing a libel, it was held that that was sufficient to entitle the prosecutor to put in the book. That showed that the defendant's admission was admissible as evidence. Then, if once they admitted his evidence, they had the defendant stating that he was the man who drove plaintiff out of Mecca, and counsel submitted that the fact that it was in consequence of the letters that he wrote, was more than was necessary for the purposes of this declaration.

[The Chief Justice said that it did not cease to become secondary evidence because the defendant stated the contents of the letter.]

Mr. Schreiner said it did not cease to be secondary evidence, but it was the very best they could produce. As to the non-production of the letter, counsel submitted that proof of the refusal to produce was really not necessary under the circumstances of the case. The Governor of Mecca, in whose possession the letter was, was beyond the jurisdiction of the Court, and it was quite impossible for plaintiff to go to Mecca and ask the Governor for the letter.

[The Chief Justice: It would have been quite possible to ask the Governor for the letter, and get his refusal.]

Mr. Schreiner said they had the defendant's own admission, and he submitted that they could have nothing better.

[The Chief Justice: But it remains secondary evidence.]

Mr. Schreiner said he did not deny that it was secondary evidence, but he submitted that, in the nature of the case, it was the best evidence they could produce.

[The Chief Justice: The best evidence is the production of the document, and we cannot allow secondary evidence unless you can show that the document cannot be found, or that the person in whose possession it is will not give it up.]

Mr. Schreiner said he could not take the matter further than that.

[The Chief Justice: Then I am afraid we cannot take this secondary evidence, even by way of admission.]

In reply to a question, Mr. Schreiner said that the witness was not one of the persons alleged in the declaration to have heard the slanders, and therefore he did not put forward that witness's evidence as evidence upon which they could claim damages, but only as corroborative of the mental attitude of the defendant, and that he had considerable evidence of very respectable Citizens of Cape Town, who, after the dismissal of the plaintiff from his position of Pilgrims' Guide, waited upon the Shereef, and asked the reason why he was dismissed, and received in reply a certain admission.

[The Chief Justice said he was afraid that point could not now be raised.]

Mr. Searle said he was just about to raise the point that after the decision of the Court in regard to evidence as to the letter, no evidence could now be given to show that plaintiff was dismissed through anything that the defendant had done. Then the case would be reduced to the allegations of slander and the question of account, and it would shorten the evidence.

[The Chief Justice said that what the Shereef said to these people who went to see him could not be taken as evidence.]

The hearing of the case was then proceeded with, and Hadje Lani was called and corroborated Soeker's evidence as to defendant using the words

mentioned by that witness. Lani had been in Mecca, and plaintiff had been his guide, and witness knew him thoroughly as a good and virtuous man.

Hadje Aragmat said that last fast-time he met defendant on the Parade, and defendant asked him what he did going to the house of a dirty or bad fellow like the plaintiff, and on witness asking what he complained about, defendant said that plaintiff and his son had had improper relations with his (defendant's) wife Amina. Witness said he did not believe that.

Cross-examined: Witness had heard that defendant had divorced his wife Amina on the ground of her adultery with one Izak.

Hadje Abdul Rajiet said he had a conversation with defendant in Hanover-street during fast-time. Defendant asked witness if it was long since he had been to the Said, and witness said, "You are speaking of the Said; why don't you go?" to which defendant answered that he could not go to a man who had had improper relations with his wife. Witness had himself been to Mecca, and knew the Said there as a man who was much honoured and respected.

Hadje Joseph corroborated the evidence of the last witness.

Imaum Jamodien said he was in Mecca at the time of plaintiff's dismissal. There were then a considerable number of Cape Malays there who were very dissatisfied with plaintiff's dismissal, and they got up a petition to have him reinstated.

Said Abdullah Aliwe said he was the plaintiff in this case. With two short breaks he was for 27 years pilgrims' guide at Mecca. He was called Said by right of birth, and was descended from the Prophet. He was also a priest of the Temple of Abraham at Mecca. His father had been chief guide. Witness had kept a large establishment where pilgrims came to rest. Witness's means of livelihood were his positions as pilgrims' guide and priest, principally as pilgrims' guide. He was no longer a guide, having been dismissed from that position about a year and a half ago in consequence of a letter.

[The Chief Justice ruled that the letter could not be read.]

After his dismissal he came to the Cape for the purpose

of bringing an action against defendant owing to the letters he had written. Since his arrival here witness had been to various places. He was staying at Hendricks's home in Cape Town. Nine years ago defendant came to Mecca, and placed his wife Hadija with him. From that time onwards for eight years she was in witness's house, and then she came back to the Cape and joined her husband. The latter had from time to time paid witness money, but there was still an amount owing. Witness charged £15 a year for board, lodging, clothing, and some other expenses of the woman. The balance still due by defendant was £61. Defendant's wife Amina came to witness's place about four or five years ago. She did not come with defendant. She brought £100, which she put into witness's hands. He paid that £100 back to her from time to time as she wanted it, and when she returned to the Cape about two years ago there was about £40 remaining, which he gave to her, so that now witness owed defendant nothing of that £100. Before she went away witness knew nothing of any misconduct on her part. Abdullah, who came to witness's place as defendant's agent, made some complaint while he was there as to a man Mahomet Izak, who now resided at Wynberg. Abdullah alleged misconduct on the part of Izak and Amina. That same night witness made inquiries, and Amina, in the presence of Izak and Abdullah, denied any misconduct. Witness absolutely denied having had any improper relations with Amina.

[By the Court: No one ever charged witness's son, before Amina left, with having miscondacted himself with Amina.]

Witness's income from his position as pilgrims' guide was £600 a year, and living at Mecca was much cheaper than in Cape Town. Witness had nothing he could turn his hand to other than being a guide and a priest.

Cross-examined: Witness came here about seven months ago. He was still a priest in Mecca, but did not get much money from that. He had two houses in Mecca, the one he lived in and the other had been used for the accommodation of the pilgrims. They were large houses. With regard to the account for

Hadija, witness had only sent the one account, and that showed a balance of £49.

[The Chief Justice pointed out eight years' maintenance, etc., was sued for, and the account was for seven years.]

Mr. Searle said then the point was how long she was there, and he would lead evidence to show that she was only there seven years.

The Chief Justice said that the difference of one year at £15 was very small.

Mr. Searle said that of course if she had the year they were ready to pay for it.

Continuing, witness said that Amina came there with £150 and a letter from defendant, which simply asked witness to receive Amina with £150. Amina gave witness £100 only, and retained £50 in her own possession, and that £100 had been repaid to Amina in different sums from time to time.

[The Chief Justice: I don't understand. Hadija in eight years did only spend £123, and Amina in two years spent £150.]

Amina had a child with her, and they were rich, and had to have a doctor and one thing and another.

He never received another £40 before Amina went away.

Mr. Searle read a letter from witness, in which he acknowledged receiving from defendant, through another man, a sum of £35, and having a balance of £27 of that money still in his hands.

Witness said that the money that man brought Amina took, but he wrote the letter acknowledging receipt. Witness got none of the money. That was about the end of 1899. Witness admitted that after the statement made by Abdullah regarding the conduct of Amina and Izak, he wrote to defendant as follows: "Should you hear anything against the character of your wife Amina, you must disbelieve it, as people intend to cast reflection on the character of your wife. It is back-biters from Cape Town. As God says, back-biters are worse than murderers. Therefore disbelieve them."

Re-examined: Witness was still a priest, but did not hold the same position of honour that he previously held. In regard to Amina and Abdullah, witness at the time believed the allegations made were merely back-bitings.

Mr. Schreiner closed the case for the plaintiff.

Mr. Searle called

Abdul Hardie, the defendant in the case, who said that he never said to the persons who had been called by the plaintiff that the plaintiff had had improper relations with his (defendant's) wife Amina. Witness never spoke to Soeker about the plaintiff. Soeker just wanted to ruin witness. Witness could not speak Dutch at all, but spoke a little English. He came here from Kimberley in 1883, and eight years ago went to Mecca, where he stayed six months. He took Hadija with him, and left her there, where she remained for eight years. The account showing a balance of £49 still due to the plaintiff was brought back from Mecca by Hadija. Witness had received no other account from the plaintiff. Witness sent with Amina £150, and afterwards sent another £40. He had had no account of the £100 from plaintiff. He was willing that the £49 or £61 should be deducted from that £100. Witness had never spoken to Abdol Aragmat about the plaintiff. He had not spoken to that man for over three years. Two years ago Abdol Lani had beaten him, and he had never spoken to him since. He was on bad terms with them. He had never spoken to Joseph or Lani about the plaintiff. Witness had never made a charge to anyone that the plaintiff had had improper relations with his wife. The day after his wife Amina arrived from Mecca witness divorced her before the priest. Five months after her arrival she gave birth to a child. When witness was summoned for £61, he never told anyone that he was about to leave the country, nor did he take any steps to do so. Witness owned a number of valuable houses in Cape Town, and was worth about £1,500, after deducting his liabilities. He was arrested at plaintiff's instance, and taken to gaol, where he was kept five days. He had to give security to the amount of £3,500, and after five days he made some arrangements with friends, and found the necessary security. Three persons accompanied him to the gates of the gaol. They were not friends of his, but his enemies. Witness was arrested in the office of his attorney.

Cross-examined by Sir Henry Juta: The women witness married in Cape

Town were Cape Malay women. Witness spoke English to them.

Witness could not speak English very well. Witness had two wives, both of whom knew English when he married them. Witness had no servants. He had been in Cape Town for about eight years. Previous to that he was in Kimberley for about 8 years. Witness used to converse with Malay friends. He spoke to them in English. Witness remembered seeing a report in the newspaper about a petition being got up. He had talked about it with friends. He did not speak to three Malays (named by Sir Henry Juta) about this. Witness heard Soeker give evidence. There was no truth in what Soeker said. He never told any of the witnesses that his wife had been misled in plaintiff's house. When the Malays were getting up the petition, witness did not believe that his wife had had improper relations with the plaintiff. Since he sent the demand for £100 to an agent in Mecca, twenty-one months ago, witness had made no further demand. Plaintiff never gave witness an acknowledgment in writing that he owed witness money. Witness had made an affidavit in the case of his arrest, and he had stated that he had a claim against plaintiff for £100 on an acknowledgment of debt signed by him. His agent used to write witness that plaintiff owed him £100. Witness had not told anyone that he was going to leave for Mecca, and that in regard to the case plaintiff could do what he liked. At the time he got the summons he spoke with certain people mentioned, but he never said he wanted to go to Mecca. Before the plaintiff summoned him, it was always in his mind to go to Mecca.

Re-examined: It was not in his mind to go to Mecca when he was summoned. He never had the acknowledgment of debt from plaintiff; he had only heard from his agent in Mecca that plaintiff had given one.

[By the Court: Witness was born at a place near Mecca.]

Hadje Abdullah Jamat said he knew plaintiff and defendant. Witness was in Mecca, and occupied a room in plaintiff's house there while Amina was in the house. Witness had witnessed improper relations between Amina and Mahomat Izak. After witness had told plaintiff that, Amina and Izak re-

mained four months in plaintiff's house, and continued to misconduct themselves. Witness, Amina, and Izak returned by the same steamer.

Cross-examined: After witness reported Amina's misconduct to plaintiff, the latter called them all together in one room to make inquiries. None of the men then present said that it was just that witness was jealous. He had never witnessed any misconduct, except on the one occasion. The plaintiff did not believe what witness said. A week or two after the first occasion Amina removed to another room in the plaintiff's house, and lived with Izak as his wife.

Hadija, wife of the defendant, said eight years ago she went to live at Mecca. At the time of her marriage she was not a Mahomedan, but a Christian, and was sent to Mecca in order to learn the tenets of the Moslem religion. Plaintiff had charge of witness at Mecca, and she lived in his house. She had seen Amina and Izak occupying one room together in the plaintiff's house. Plaintiff knew that.

Mr. Schreiner said that all this evidence was no justification.

The Chief Justice said that was so.

Proceeding, witness deposed that when she returned to Cape Town she brought with her a letter and the account produced.

Mr. Schreiner, K.C. (for plaintiff): It would seem that all the witnesses we have put into the box are unfriendly to the defendant. It may be possible that mistakes may have arisen as to what was said months ago. But that is not defendant's case. He implies that this is a question of deliberate lying. Is it likely that the Said would come from Mecca unless he had a good case? Is it going too far for Abdol to say that he never made any statements against the Said? The plaintiff said that he did not understand Dutch, his wife does not understand Arabic, and clearly does not understand English. Plaintiff's story is clearly correct, the charges against the Said are false, and I ask for exemplary damages, and not merely for damages commensurate with the mere loss sustained. The defendant admits that he did not take the initiative, and sue the Said for what he claims in reconvention. Why not? Because he knew perfectly well that he could not sustain such a case. As to the arrest of the defendant,

the question is whether he intended to leave the country. Surely, it could not be said that defendant was free, thus to evade an order of Court. In point of fact, the Court confirmed the arrest, though they subsequently reduced the bail.

Mr. Searle, K.C. (for defendant): In the first place we have to deal with the question of defamation. What then was said by defendant in December, and what damage has resulted to plaintiff therefrom. The Said was here in August, and in December, and we have only to do with what was said then. The scandal was well known amongst the whole Mohammedan community. Amina was divorced in August, 1900, and it seems clear that the misconduct which led to that divorce occurred in the Said's house at Mecca, and that the Said knew that Mahomet (the Said's son) and Amina lived together in the Said's house for some months. The accusing of the Said must have been a mistake, as to accuse him would be absurd. It was not till after this that the Said issued summons. That summons might have supplied a motive for making the charge against the Said, but no such motive existed in December, when the charge was, in point of fact, made. Defendant does not speak Dutch well, and he may have said that "Amina was defiled by the Said," meaning, "in the Said's house." The Said still stands as high in the estimation of the Mohammedan community as ever. Plaintiff had withdrawn his summons, and had arrested defendant on the ground that he was *in meditatione fugae*, and he was bailed for £3,500. This was reduced by the Court to £500. It is true that the law allows a man to obtain civil imprisonment in a civil matter, but if a man has property in this country he should not be called upon for security. Here, indeed, there was malice, but not on our part. As to the damages, damages for £3,000 have seldom or never been granted in this Court. As to the claim in reconvention, Amina took £150 to plaintiff, and there is a further sum of £35 (Hadije said £40), and this Amina never received. Nor has he accounted for the balance of £85, which was given to Amina. As to the slander, plaintiff has received no damage. As to the malicious arrest, defendant had property here, and should not have been

arrested. I quite admit that the words used were slanderous. As to the question of damages, it is for the jury on taking a broad view, and to consider who was the injured party.

Mr. Schreiner (in reply): We do not plead justification. The evidence of Amina could not carry the case any further. The Said did all he could do. He called his people together and made inquiries. The whole question in issue is, more or less, one of damages. Amina had been left by defendant under plaintiff's roof. Would she have stayed there had she found the place to be an improper house. Surely, if she were living with a man in the same room in a place dedicated to religious uses the Mohamadan community would have taken cognisance of the fact. As to the arrest, it is said that we should have arrested defendant's property, but this property is bonded.

De Villiers C.J. summed up, saying that the jury must dismiss the first claim for libel altogether from their minds, in view of the Court's decision in regard to the letter. As to the other claims, His Lordship reviewed the evidence, and pointed out that it was mainly a question of the credibility of the witnesses.

After retiring for a few minutes, the jury returned with a verdict for the plaintiff of £200 on the second claim, that in connection with the slanders uttered by the defendant in Cape Town, and on the third claim (balance of account for Hadeje's board) for the amount asked, viz., £61. On the claim in re-convention for illegal and malicious arrest, the jury found for Hardie for £200, and for the full amount of the other claim, viz., £100.

Mr. Schreiner moved that judgment be entered accordingly.

After hearing counsel on the question of costs, the Court entered judgment as follows: Judgment for the plaintiff for the sum of £261 with costs in convention, one-half of counsel's fees to be taken in these costs, and in the claim in re-convention, judgment for the defendant (now plaintiff), for £200 with costs in re-convention, the other half of counsel's fees to be taken in such costs.

Plaintiff's Attorneys: Van Zyl and Buissinne. Defendant's Attorneys: Sauer and Standen. Standen.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAAS-DORP.]

KENNEDY V. GLUTSON { 1902.
BROTHERS. } May 6th.

Mr. Close applied for a commission to take the evidence of plaintiff at Bulawayo.

Granted, Mr. Sheppard being appointed commissioner.

SCHIFFMAN V. CARELSE.

Lease — Specific Performance —
Damages — Ignorance.

Where the defendant had failed to fulfil a certain contract of lease entered into with the plaintiff, and had in violation thereof let the premises which were the subject of the said contract to another tenant; damages were awarded to plaintiff, and defendant was ordered to give plaintiff possession of the premises within twenty-five days.

Semble, The Court will set aside a written lease on the ground of fraud, if it can be clearly shown that one of the parties thereto being a man of defective education was deceived as to the contents of the lease he had signed, even though he might be able to read it.

This was an action brought by Morris Schiffman against Carel Carelse, for an order on defendant to carry out a certain contract, and to give possession of certain premises, and for damages and costs. The declaration stated that plaintiff was a shopkeeper at Wynberg, and the defendant a landed proprietor. An agreement (annexed) was entered into between the parties on the 29th May, 1901, whereby plaintiff agreed to rent a shop in Ottery-road, Wynberg, for two years (with option of renewal for a

period of years) commencing 1st November, 1901. By this lease plaintiff had the right to sub-let, and to renew for a term of years, subject to three months' notice being given. Since the agreement was entered into, defendant had repudiated the agreement, and refused to give possession. Plaintiff had always been ready and willing to carry out his part of the contract. In his plea, the defendant said that on some date previous to the lease being entered into, there was a verbal contract of lease whereby defendant agreed to let the property subject to a special condition that the lease should be determined forthwith in the event of defendant selling the property. Before affixing his mark to the written agreement, he was informed by one De Beer, a law agent, that it contained this condition. He was unable to read or write. He claimed an order declaring the agreement null and void. In his replication the plaintiff denied that there was any such agreement as stated in the plea, and said that defendant fully understood the terms of the written agreement which was read over to him before he signed.

Mr. Close, for plaintiff; Mr. Benjamin, for defendant.

Morris Schiffman said he was the plaintiff. He carried on business as a tailor in Hall-road, Wynberg. Defendant owned a house and shop in Ottery-road. Before May of last year defendant, who was a customer, told him he had a shop to let in Ottery-road. Witness asked what the rent would be, and defendant said he would charge £4 10s., the same as the old tenant paid. Witness offered to take the premises for a grocery business for five years. Defendant said he would take time to consider whether he would let the place for five years. Subsequently Carelse told him he could have the shop for two years, and that he could have good terms for five years afterwards. Witness asked him for a written agreement. Defendant told him to write one, and witness said he would see Mr. De Beer, a law agent of Wynberg. Witness went to see the latter, who said he would require to see Carelse and witness together. This was at the beginning of May. Afterwards witness and defendant went to the office of Mr. De Beer,

and saw the proposed agreement. Carelse said he would show the agreement to his wife. Witness believed he took a copy of the document away. Some time afterwards Carelse and witness went again to the office, and Mr. De Beer read the document over, both in English and Dutch. Witness did not understand Dutch. Mr. De Beer explained the terms of the agreement as he read. On the first occasion when Carelse went to the office, witness believed De Beer read the agreement. Before the agreement was signed, there was a discussion as to the clause giving witness power to renew. Witness wanted the right to renew for four years; defendant wanted the period to be two years. He said he would give a good further term. The following clause was inserted: The lessee shall have the right to continue this lease for another period of years, provided that three months' notice in writing be given to the lessor.

[His Lordship said that it might be that this clause for an indefinite term would be void. That, however, would not arise in the present case. It could be argued if plaintiff sought to enforce the clause.]

Witness, continuing, said that in August he saw defendant, who told him that the old tenant had offered him £5 10s. a month. Witness refused to pay an increased amount of £5 10s. Defendant's son was present. Witness said he would stick to the writing. Correspondence ensued between the attorneys. On the 22nd August defendant, through his attorney, repudiated the written agreement, saying that his mark had been improperly obtained. He denied that the document was drawn in accordance with his instructions. In December defendant wrote stating that one of the conditions upon which the lease was entered into was that plaintiff should give up possession if defendant sold the shop. Witness offered in December to take the shop for two years, with the right to renew for two years. Witness claimed £200 damages. Witness arranged for his wife to take charge of the business. Witness had been put to a considerable amount of trouble and inconvenience. Witness's assistant, Abramowitz, was present at the interview between witness, the defendant, and the defendant's son.

Cross-examined by Mr. Benjamin: Witness did not tell defendant that he wanted to buy the place. Before the lease was signed witness did not have a conversation with Mrs. Carelse. The latter spoke to him when he went to see the premises. She said she was pleased that witness was going to have the place. She did not say to witness, "You can have the lease, but if my husband wants to sell the place at any time, he must be able to break the lease." Witness could not read. Defendant would not agree to a right of renewal for four years. He said that when the first two years expired, and if witness was a good tenant, he would, on three months' notice, "surely give him another two years." Defendant signed the agreement at the same time as witness did. Witness believed they both used the same pen and the same ink.

Mr. Benjamin (handing the document to witness): You see it is different ink, and it seems to have been signed at different times.

Witness never offered Mr. Brady to cancel the lease. Witness went to Mr. Brady's office with Carelse. He (witness) told Mr. Brady that Carelse had told him he wanted to settle the case, and that he (Carelse) was prepared to let him have the premises. Carelse, however, wanted witness to pay the costs, but witness refused, and left the office. Witness did not say he was willing to cancel the agreement and pay costs, and Mr. Brady did not say, "I cannot consider this matter because you must have your own lawyer."

Mr. De Beer, law agent, Wynberg, gave evidence corroborating the plaintiff's statements in certain particulars. Witness understood that there should be a renewal for a reasonable number of years.

Cross-examined by Mr. Benjamin: Witness carefully read over the agreement to the parties, and explained it clause by clause.

By the Court: Witness never heard of any condition as to the lease being determined if defendant sold the shop. There could not have been any misunderstanding.

Wm. B. Wheatly, clerk to Mr. De Beer, said he was in the room adjoining that in which the parties discussed the

agreement before signing. Witness heard the agreement read and explained. He heard nothing about a condition as to determining the lease if defendant sold the premises. It was understood that the term of renewal would be similar to the period of the original lease.

Louis Abramowitz, an assistant employed by plaintiff, deposed to the conversation between plaintiff and defendant in August. Defendant wanted plaintiff to pay £1 a month more than agreed, saying the old tenant—a Chinaman—had offered £5 10s. a month. Carelse, his son, and plaintiff were present.

Mr. Close closed his case.

Mr. Benjamin called

Carel Carelse, the defendant, a coloured man, who said that plaintiff had asked him what he wanted for the place. Witness told him he wanted £1,000. Afterwards he offered witness £900. Witness refused. He asked witness if he could hire the shop. He kept on asking witness this. Witness told him that if the place was sold the lease would have to be broken. He said this because there were so many offers for the place. Witness told plaintiff that before he could have a lease he (witness) would have to get instructions from his wife. Witness subsequently agreed to give plaintiff a lease for two years, stipulating that if he sold in the meantime the lease should be broken. Witness signed the lease produced. He did not hear it read. He only saw it on the occasion he signed. Witness asked Mr. De Beer if it was all right. Witness was only at De Beers office once. Witness gave the Chinaman (his former tenant) notice to leave in August. Afterwards witness showed a copy of the agreement to Mr. Brady, who wrote the letters put in. After the case was commenced, plaintiff came to him and said he wanted to settle the case. He did not want to go into court, but Mr. De Beer said he would not. Subsequently to this witness and plaintiff came to the office of Mr. Brady, and that gentleman said plaintiff said he wanted to "cancel the case," and Mr. Brady said he would have to pay costs. Mr. Brady said that plaintiff should see his lawyer.

Cross-examined by Mr. Close: Mr. De Beer did not read the paper to witness; he never explained it.

Elizabeth Carelse, wife of the defendant, said that she told plaintiff that her

husband must be able to break the lease if he sold the property. Afterwards plaintiff said he would settle the case, as he did not want to bring it before the Court.

After hearing Mr. Benjamin in argument, the Court gave judgment for plaintiff for £35 damages and costs, and ordered possession of the premises to be given to plaintiff on or before the 31st May.

Mr. Close was not called on.

Maasdorp, J.: The plaintiff in this case claims the specific performance of a contract of lease, and also claims damages for the delay on the part of the defendant in putting him in possession. It is alleged that according to the agreement of lease, the plaintiff should have received possession of the premises on the 1st November, but he has not received possession up to the present. In respect of that delay, he claims damages. Now the written lease has been put in, which seems to be properly executed, and signed by the two parties in proper form; and, under ordinary circumstances, if nothing further appeared this written lease would be binding upon the defendant, and he would have to conform to the conditions which it contains. Defendant, however, sets up the defence that he was never a consenting party to this written lease, for the reasons that he never properly understood the conditions of this document, and really signed it without knowing what it contained. Now, such a defence would only avail a person who is unable to read a written document placed before him for signature, or a man of such little education that he might be deceived as to the contents of a document, even though he might be able to read it. Under such circumstances the Court might give some redress to a person entering into an agreement under such conditions. The defendant says he entered into this contract upon the assurance of the plaintiff's agent that this document was "all right"; that is to say, upon the assurance that it contained all the conditions that he (defendant) had said should form part of the agreement, and consequently he sets up this statement on the part of the plaintiff's agent as an allegation of a falsehood, and a fraud on the part of the agent. It really amounts to this: That the plaintiff's agent led the defendant to believe that the document which was placed before him contained all the con-

ditions that he had agreed upon; whereas the plaintiff's agent very well knew it did not contain these conditions. In short, it amounts to an allegation of fraud, and if he succeeded in proving that, I think the Court would have relieved him from the performance of this condition. I may state briefly that I have no doubt that the evidence given by the plaintiff's witnesses is in every respect correct, and that I am quite prepared to accept their credibility and the veracity of their statements, and when I do that, I find that it was proved that this document was not only read over once to the defendant, but that he, on an occasion before the actual execution of that document, had received a copy of it, which is produced in court to-day, and which he had taken home with him, and discussed with his wife; that the contents of that document were explained to him, and that when the parties met again to sign the document, the terms were perfectly clear to him. The defendant says that this document ought to have contained a condition that the lease should be cancelled upon the sale of the property by him to another person. Well, it appears quite clear from what has been said that it never was intended that there should be such a condition, and that such a condition was never mentioned by defendant himself, or any other person. Reference has been made to the last part of the agreement, from which it appears that an option is given to plaintiff for the renewal of the lease. I may state that I only find now that that clause, as it stands, was fully understood by the parties, and that they agreed that it should be one of the conditions of this contract. What the effect of it may hereafter be found to be, it is not for me now to say. I will not construe the meaning of that clause now. If at any future time notice is served by plaintiff upon defendant that he claims the renewal of the lease under that section, then the parties will have to consider what action they will take in the matter, if they cannot come to some agreement. When that time arrives, then it may be necessary to construe that clause; but at present it is not necessary to do so. I merely find that it was agreed by the parties that it should form part of the lease. Under this lease defendant should have given possession on the 1st November. He

has kept plaintiff out of possession for something over six months. He was very well aware at the time that the premises were required for the purpose of carrying on a business similar to that which is now carried on by the present lessee, and it must therefore be taken that it was in his contemplation that, if he did not give possession, then damages should be assessed upon the value of the premises to the plaintiff, as premises in which such business was to be carried on.

At this point His Lordship asked Mr. Close if he wished to argue as to the amount of damages. He (the learned Judge) thought that the plaintiff's claim of £15 a month was excessive. He thought that if judgment were given on the basis of a loss of £5 a month, it would be fair.

Mr. Close said he was prepared to accept this.

His Lordship (continuing) said: The plaintiff is entitled to damages for having been kept out of this place from the 1st November, and so been prevented from making a profit out of the business which he intended carrying on there, and which defendant knew he intended to carry on. Plaintiff himself has stated that on this he might have made a profit of £15 a month. It is quite possible he might, but I am not quite satisfied that he would have made such a profit. Under the circumstances, I think he should receive some damages, and I am quite sure he would have made some profit, and if I fix that at £5 a month, I think it would be a fair valuation of the damages.

Mr. Benjamin, in answer to the Court, said that defendant would prefer not to give possession forthwith, but to be able to give a month's notice to the present tenant.

His Lordship thereupon made an order on defendant to give up possession of the premises to the plaintiff on the 31st May, and to pay plaintiff £35 damages and costs.

Plaintiff's Attorney: Brady.

Defendant's Attorney: D. Tennant, jun.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Jury.]

STANFORD V. WILLIAMS { 1902.
AND OTHERS. { May 7th.

This was an action brought by Mr. H. F. Stanford against eight commissioned officers in His Majesty's Army, in which the plaintiff claimed damages measured at £3,000, for which he alleged the defendants were jointly and severally liable, for an assault committed upon him as alleged in his declaration. The occasion was a dance on the 24th December last at Mount Nelson Hotel, at which the plaintiff was present, and at which it was acknowledged he took a great part. It was really a military dance.

Mr. Schreiner, K.C. (with him Mr. Upington), for the plaintiff; Mr. Searle, for the defendants.

Mr. Searle said that in view of an understanding which had been arrived at, the details, which might introduce controversial matter, should not be gone into.

Mr. Schreiner said he did not wish to go into such details, and he was anxious to abide by the spirit of the understanding which had been arrived at. Proceeding, Mr. Schreiner said that after the dance the circumstances took place on the night of the 24th and morning of the 25th December which were complained of in this action, and for which £3,000 damages were claimed. Upon the pleadings as filed there was an admission of legal tort, and a tender of £25 damages, with costs, and there was an allegation of extenuating circumstances, but that also he did not wish to go into. The case was originally set down for trial on March 10, but owing to military exigencies a postponement was obtained until to-day (Wednesday). A further application for postponement had been made, but his lordship having intimated that the case must come on to-day, the Court declined to grant the further postponement. These were the circumstances under which the jury would have been asked to try the case, but at the last moment an arrangement

had been made by which the case could be settled, and by which he understood it was to be settled. It had not yet been drawn up, but the basis of the consent paper had been absolutely settled, and he would ask his lordship either to direct the jury to return a verdict in accordance with that arrangement or to withdraw a juror and enter judgment in accordance with the terms of the arrangement. Counsel further stated that three of the defendants were here, but the other five could not be present. The three who were here would sign the consent paper, and it would be signed by the defendants' attorneys on their behalf, and would also be signed by the attorneys for the plaintiff. The terms of the consent paper were as follows: "The defendants hereby express their sincere regret at their conduct towards plaintiff on the 24th and 25th December, and acknowledge that their said conduct was wrong and unjustifiable, and consent to judgment for the plaintiff for the sum of £1,500 and costs."

Mr. Searle, on behalf of defendants, consented to judgment being entered in terms of the above consent paper.

De Villiers, C.J., said it was not necessary to trouble the jury, and he would withdraw a juror. His lordship then entered judgment by consent for £1,500 and costs against the defendants jointly and severally, in terms of the consent paper produced to the Registrar.

Plaintiff's Attorneys: Fairbridge, Arderne, and Lawton; Defendants' Attorneys: Van Zyl and Buissinné.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAAS-DORP.]

GRANT V. GRANT. } 1902.
May 7th

This was an action for restitution of conjugal rights, failing which, for divorce. The parties were married in community of property at Cape Town, and there were three children of the marriage, of whom two were still living—a boy of eleven and a girl of six. Plaintiff claimed an order for restitution, with forfeiture by defendant of benefits, and custody of

the two children. She also claimed £5 per month as maintenance.

Mr. Close, for plaintiff; defendant in default.

Mr. Close called the plaintiff, who said that she was married to the defendant in community of property in December, 1881, at the Presbyterian Church, Cape Town. Since 1892 the defendant had failed to support her, and they both went to live with her mother, who supplied the defendant with money, food, and clothing. In 1896 he had to leave Cape Town, and he went to Port Elizabeth. She had seen him since then, but not to speak to. He had been lodging at the Salvation Army Home.

His Lordship made an order calling upon the defendant to make restitution on or before May 31, failing which to show cause on June 12 why a decree of divorce should not be granted, with custody to plaintiff of the children and forfeiture by defendant of benefits of marriage in community.

Postea, June 19th, the rule was made absolute.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAAS-DORP and a Jury.]

DAVIES V. THE MUNICIPALITY OF WOODSTOCK. } 1902.
May 9th.

Municipality - Negligence -
Damages.

This was an action for damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant Municipality or its servants.

The plaintiff (Mrs. Davies), a widow, living at Woodstock, sued the Woodstock Municipality for £500 damages for injuries which she sustained while walking down a road within the Municipality. She was walking along the pavement, when she tripped over an iron surface box, which had been let in to the pavement, but which protruded about 2½ inches above the surface of the pavement. Through her fall plaintiff sustained severe injuries. While she was

in robust health before the accident, since then, through the injuries she had sustained, she was in very poor health. The surface box in question was placed in that roadway or footpath by the servants of the defendant Municipality.

Mr. C. W. de Villiers, for plaintiff; Sir H. Juta, K.C. (with him Mr. Alexander), for the defendant Municipality.

Sir Henry Juta said that he did not know whether it would shorten the evidence, but he was quite willing to admit that both the footpath and the surface box were under the control of the Municipality. It appeared that before the Woodstock Municipality or any other municipality took over these waterworks there was a waterworks company which ran mains through Woodstock, and there were connections from the mains to the houses. This place where the accident occurred was one of those ordinary places where they turned off the stopcock. In broad language, they took the responsibility for that surface box, and if there was any negligence in connection with it they took the responsibility.

Mr. De Villiers called

Mrs. Dinah Ann Davies, the plaintiff, who said that on October 14 last, about 10 a.m., she was walking down Albert-road, Woodstock, on her way to the station, when she fell. After she fell she looked back and saw this surface box. It was a dreadful fall, and she sustained severe injuries. There was a shop in the neighbourhood, and she went into it, and remained for some time. Afterwards she went to Sloan, the chemist, at whose shop her head was bandaged. She felt very ill, and could not go home at once. After dark, about seven or eight o'clock, her son helped her home. There she remained eight or nine days in bed. She was not well after that, and was not well yet. Before the accident she was in robust health, and could do lots of work. She had, before that accident, kept three boarders, and did all the work in the house herself. She was attended on the night of the accident by Dr. Hewat's assistant. He attended her twice, and then a fortnight or three weeks after the accident she saw Dr. Hewat. She found there had been certain internal injuries, and it was about that that she saw Dr. Hewat, who told

her to go home and go to bed. She could not say how much the doctors' bills came to, but she thought about £3 or £4 altogether. Her leg was still bad, and she was suffering in other respects as well. She had paid £4 or £5 for medicines. Acting under medical advice, she spent three weeks in the country, and that cost £10 or £20. She went to Diep River, where she put up at a boarding-house. She had not been able to attend to her housekeeping since her accident, and that had cost her £5 or £6 a month extra. She had also to give up keeping boarders, and she reckoned her loss on that at £6 a month. She had also done millinery and dyeing and curling feathers before the accident, and through being unable to carry on that, she had lost £3 or £4 a month. Besides that, before the accident her business was growing, and she believed she could have eventually made £20 a month. All that she had been compelled to give up; in fact, her health was completely shattered.

Cross-examined: She had lived in Woodstock over a year before the accident, and had often been down Albert-road, but always walked on the other side of the road. That morning she was walking on the side the surface box was on, because it was shady. She had never, to her knowledge, walked on that side before, but that morning she had been to see her son, who was employed at Sloan's, on the same side of the road. She did not notice other surface boxes sticking up in the footpath, and did not know that it was a common thing to see such boxes in Woodstock. The surface box in question could be seen from the other side of the road. If she had been looking for this box, she could have seen it. She did not walk in a tearing hurry, but she wanted to catch a train.

Re-examined: On her way to the station she would reach Sloan's before this spot where the accident happened.

Dr. John Hewat said he practised at Woodstock, and saw plaintiff at the end of October. He believed it was about a fortnight after the accident, but could not say of his own knowledge, as he was away from the Cape at the time of the accident. The plaintiff when he saw her had a black eye and a scratch on the side of the head. She also had an internal trouble, and suf-

fered from nervousness. The internal trouble and the nervousness might have been caused by the fall.

Cross-examined: Witness had seen the surface box on Sunday. It was a pretty prominent object in the pavement. Any person looking where he was going must have seen the box. There were other boxes of the kind in Woodstock.

Alfred H. Wells deposed that on the morning of October 10 he was walking behind plaintiff, when she tripped over the surface box and fell heavily. He went to her assistance, and found that her eye was swollen. The surface box was about 2½ inches above the level of the pavement.

Cross-examined: There were several other surface boxes in the neighbourhood. It was a general condition in Woodstock for surface boxes to be sticking up above the level of the pavement. When witness went about, he looked out for that sort of thing.

By the Court: The other boxes in the neighbourhood did not project so much above the level of the ground as this one did. Nearly all the surface boxes in Woodstock were in bad condition.

John Robert Rutter deposed that he was a plumber and sanitary engineer, and at one time he was in the employ of the Woodstock Municipality. He had put in the surface box in question. He placed it, in accordance with the Municipal instructions, level with the pavement. The surface box now projected above the pavement, through the ground being worn away. It was in a dangerous condition.

By the Court: When witness put in the box the ground round about was level. After a time the gravel had worn away, and the box being the harder remained.

Examination continued: If a person was looking for the box he would see it, but a person was not supposed to go about looking for these boxes, which ought to be level with the ground.

Edward Jonathan Davies, a son of the plaintiff, put in photographs of the box in question, showing the projection above the ground.

Cross-examined: Witness had never noticed the box before the accident, but naturally, since then, he had looked at

it every time he passed. The photographs were not taken at the same hour of the day as the accident happened.

Re-examined: The Sunday morning after the accident he saw the box about half-past ten, and it was then, in the shade.

Henry Kirby, a staff quartermaster-sergeant in the Army Pay Corps, deposed that at the time of the accident he boarded at Mrs. Davies's house. After the accident Mrs. Davies was confined to bed for some time, and after she got up she still had two black eyes. The same day witness examined the box in question. He found that it projected above the pavement. It was situated 6 feet from the kerb and 2 feet from the walls on the other side of the path. The box was that day covered with dust, and was not easily seen.

Cross-examined: The box was a pretty prominent object. In Woodstock it was a pretty common thing to see such things, but a person did not always go about looking for such things, so as to avoid falling over them. Even with ordinary care a person might have fallen over the box on that day, because it was covered with dust.

William Davies, another son of the plaintiff, deposed that he was a partner with Mr. Sloan, chemist, at Woodstock. He saw his mother about an hour after the accident, and found she was suffering from injuries to the eyes, about the worst he had ever seen. She also complained of other injuries. Before the accident his mother was a very strong and active person, but since the accident she was a different woman altogether, very nervous, and could only walk with difficulty.

Cross-examined: Witness did not call in a doctor at once.

Re-examined: He took his mother to her own house that evening and immediately sent for a doctor.

This closed the case for the plaintiff.

Sir Henry Juta called

Frederick Barling, a baker, carrying on business in Albert-road, who deposed that he knew the surface box in question. It could be seen from a distance of about 100 feet each way, and in an ordinary way a person could see it.

William Henry Bond said he had noticed this particular box, which was one of the best there was in Woodstock, because it was on a footpath 8 feet wide,

while there were many on footpaths 4 feet 9 inches wide. The box was of a dark colour, set in red brick, while the road was a different colour. He had gone along the road at half-past ten in the morning, when the box was in the shade, and it could be seen 80 or 90 yards away.

[Maasdorp, J.: Do I understand you to say that there are many boxes worse than this in Woodstock?]

Witness: There are a great many boxes in Woodstock which project, which is due to the south-east wind coming on before the ground was perfectly consolidated. That made an obstacle in the way, but I do not think that with ordinary care a person would trip over it.

But why should you avoid it?—The same as you would avoid a piece of orange peel.

Now if it was properly laid, why should you avoid it?—There would not be any cause to avoid it then.

But these things are not meant to be avoided, but to be trodden on if necessary?—Yes.

Thomas Calmeyer, a builder, living at Salt River, said he knew the box in question. It could be seen a long way off, and there were worse places than that. No person walking along the street could possibly avoid seeing it. Witness had made experiments, and tried to trip over this box, but could not do so.

Cross-examined: He did not consider the box dangerous at all. No person taking ordinary care would trip over it.

Robert William Menmuir said that he had been Town Engineer of Woodstock for about nine months. He was well acquainted with the side-walks of Woodstock and the other Municipalities, including Cape Town, and everywhere there were the surface boxes. In Cape Town, between Castle Bridge and the Municipal stables, in Sir Lowry-road, he had counted sixteen such boxes projecting from 1 inch to 4½ inches above the level of the ground. It was one of the features known to the people living in Cape Town and the suburbs. The surface boxes were for turning on or shutting off the supply of water to houses, and there were usually one box to each block of houses. The south-east wind had a good deal to do with the condi-

tion of these boxes, blowing away the stuff from around them. If they had always to keep the paths level at these spots during the south-easter season, they would have to keep on always repairing them. The south-easters blew away the stuff as soon as it was put down. The box in question was a prominent object. There were other boxes in the locality which projected above the ground pretty well. If a person came down the road and did not look where he was going, he might go over the box. Witness did not think a person would do so if ordinary care was exercised.

Cross-examined by Mr. De Villiers: When you walk along the pavement, you are always looking where you are going?

Witness: Yes, or I should have suffered from a broken neck before this.

You have suffered?—No, I have not been here long enough.

Further cross-examined, witness said the box was in good and safe condition, although it stuck up above the level of the ground. If witness were putting in such a box he would undoubtedly put it in level with the ground.

Mr. De Villiers: Then how can you say this box is in proper condition?

Witness: You lose sight of the fact that it is the footpath that is worn away.

Then you say the box is all right, but the footpath is the delinquent in this case?—Yes.

[Maasdorp, J.: If the box is all right, what do you think of the footpath?]

Witness: It is wrong undoubtedly.

Mr. De Villiers: Is that box in a dangerous condition?

Witness: No, I don't say it is.

This is a public footpath, where people are supposed to pass along, and yet you would say that a box striking up beyond the level of the road is in a proper condition?—Yes. Continuing, witness said other boxes were in an even worse condition. They had not done anything to the box since the accident. The big surface box a little further along the road was in about the same condition.

Re-examined: The box was left in the same condition on purpose, so that it could not be said they had to repair it owing to its dangerous condition. There had been no other complaints in

regard to this surface box. This was the only one he had heard of since he came here.

John Evans Jones, building inspector, Woodstock, also put in some photographs. He had taken these one morning, about half-past ten o'clock. The box in question was a prominent object. In his opinion any person exercising ordinary care in broad daylight could not avoid seeing the box.

Cross-examined: The photographs showed the shadow. They were only amateur's photographs.

John Carver said he had examined the surface box. It was a prominent object, and he did not think any person exercising ordinary care could avoid seeing it. Such boxes were common all over Woodstock. Some of the surface boxes in Cape Town were far worse than this one, which was one of the best in Woodstock.

After addresses by counsel and his lordship's direction to the jury, the latter retired, returning after an absence of twenty minutes, with a verdict for the plaintiff for £80.

Judgment for £80 with costs was then entered.

[Plaintiff's Attorney: J. J. Michau; Defendant's Attorney: W. E. Moore and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. HILLS. 1902. { May 9th.

This was an application for an order authorising the Government to take over certain railway lines, in terms of the provisions of a certain contract.

Mr. Schreiner, K.C., appeared for the Government; Mr. Searle, K.C., for the respondent.

Mr. Searle applied for a postponement, in order to allow respondents to file an affidavit.

Mr. Schreiner, K.C. (for applicants): Unless strong ground is shown for a post-

ponement, none should be granted. Mr. Walker has full power to act. For Hill's employees are in a turbulent condition and the military have been called out. We only ask for an order to enable us to take possession of the lines. They are Government lines and not concession lines.

Mr. Searle, K.C. (for respondent): There is no necessity for the Colonial Government to come to the Court. If there is such excessive urgency they can take possession of the lines in the meantime.

The Court granted a postponement until Monday, and ordered respondent to file an affidavit before noon on Saturday; all engines, rolling-stock, and other railway materials belonging to the Government to be handed over to the Government Engineer in the meantime.

COLEY V. CLEWS. 1902. { May 9th.

Commission—Raising Money on Loan.

There is no fixed rule that an agent who obtains a loan on mortgage is entitled to a commission of two and a-half per cent. from his principal.

The plaintiff, a commission agent, having been employed by the defendant to keep his books at a salary, obtained a loan for the defendant, at his request, of £6,000 on mortgage of landed property.

Held, that one per cent. was a sufficient commission.

This was an action in which plaintiff claimed a sum of money as balance of wages due for services rendered to the defendant, and also another sum as commission earned on raising a loan for defendant. Plaintiff alleged in his declaration that he agreed to keep the defendant's books for £10 per month, and that he had performed this service from the 1st July, 1900, to the 31st October, 1901—a period of sixteen months. Defendant had from time to time paid sums of money,

amounting to £101 9s. 6d., in respect of these services, and he now claimed the balance of £58 10s. 6d. Plaintiff further alleged that, in or about the month of September, 1901, defendant desired to raise a loan for £6,000 and employed plaintiff as his agent to raise the loan, and agreed to pay plaintiff £150, being the usual 2½ per cent. commission. Plaintiff raised the loan from the South African Association, and claimed £150. In his plea, defendant stated that he never agreed to pay £10 a month, or any other definite sum, but was willing to pay £3 a month. He had advanced plaintiff sums amounting to £101 9s. 6d., as loans. He never agreed to pay £150 for plaintiff's services in raising the loan, but agreed to pay a small amount. He was willing to pay £60. Defendant annexed to his plea an account showing the sums of £48 (for plaintiff's services for sixteen months at £3 a month) and £60 (for commission), and deductions of £101 9s. 6d., leaving a balance due to plaintiff of £11 10s. 6d., which amount he offered to pay.

Mr. Russell, for plaintiff. Defendant in default.

The plaintiff, Osborne Richard Coley, said that in or about June, 1900, he made an agreement in terms stated in the declaration. Witness did not only look after the defendant's books, but business matters generally as well. In January defendant gave witness a bill for £65 for services. He had received sums since, which made the total £101 9s. 6d. Witness understood that this was for services rendered. Witness acted for defendant in May last in obtaining a loan. He succeeded in September in raising a loan for £6,000 from the South African Association. Both witness and defendant understood that witness's commission should be 2½ per cent.

Defendant stated that he had understood that there would be a postponement. His attorneys had not withdrawn from the case.

The case was ordered to stand over until defendant could communicate with his attorney.

Subsequently defendant agreed to go on with the case.

The plaintiff, in cross-examination by defendant, said that the latter did not agree to pay a small commission.

By the Court: Witness was a commission agent.

Cross-examined by Mr. Russell: Witness had applied to defendant for the amount of the commission. Witness had written a letter signed by defendant, in which the latter authorised the payment of £150 commission. Witness did not get the money.

Defendant said this letter was in the possession of the attorneys to whom he had written it.

Mr. Russell put in a copy of the letter, which instructed the attorneys to pay agents' commission £150, and expenses of bond.

Defendant said that this £150 was not in the letter when he signed it. Mr. Barker was, so far as witness was aware, present when the commission was agreed upon.

Witness said the letter bore the figures £150 when defendant signed the letter.

Mr. Rosenthal, a broker, said that the usual commission on raising money on loan was 2½ per cent.

Defendant stated that the salary was not agreed upon at £10. Plaintiff suggested that he could get the books done for £2 a month, and that the business would not run to £10. Witness saw Mr. Gibson, of the South African Association, about the loan in May or June, and he told plaintiff so.

Cross-examined by Mr. Russell: Witness had not his books in court. Witness lent plaintiff £65 (a bill) in January. It was to get plaintiff out of difficulties. It was for Coley's own accommodation, and was a loan.

Geo. Barker said that he was in Coley's office when a conversation took place between Coley and Clews in September, 1900, regarding the keeping of the books. Coley said he would require £10 a month and 2½ per cent. on the turnover. Clews said he could get his books kept by a competent book-keeper for £2 a month. Nothing more was said concerning the remuneration at that interview.

Cross-examined by Mr. Russell: Witness made a note of the conversation at the time in the pocketbook produced.

Mr. Standen (of the firm of Sauer and Standen) gave evidence, and produced the original of the letter written by defendant. Immediately after he had this letter defendant said that it contained

no reference to £150 when he signed it. Plaintiff, who brought the letter to the office, said nothing when witness challenged him about the £150 in the letter.

Cross-examined by Mr. Russell: There was no usual commission on raising loans. Witness considered that agents would get 1 per cent.

Mr. Russell: The first point to be considered is the contract of serving which was entered into on July 1. Plaintiff was content to drop the 2½ per cent., but he offered to keep the books for a certain amount. Mr. Barker seems to be very indefinite. His notes do not correspond with those of other witnesses. Then as to the contract. About £60 was paid by plaintiff to defendant. Defendant says that he got this £60 and various other sums for £100, defendant was not in good circumstances at the time, and I submit that these sums were not advanced as loans, but as partial payment of wages. There was no hint up to the time of the proceedings in issue that money advanced should not be part of the loan. As to the commission, 2½ per cent. is a very ordinary commission. It is no part of a book-keeper's duty to raise loans. Plaintiff goes to defendant and writes a letter, including *inter alia* a demand for £150. Doubt has been thrown on this letter, but I submit it is genuine. There is an innuendo as to a small commission, but evidence shows no commission was agreed to, and I submit that 2½ per cent. was a fair amount.

De Villiers, C.J.: In regard to the claim for salary, plaintiff claims £10 a month for keeping defendant's books and doing other work for defendant, but defendant denies that £10 was agreed upon, and he calls Mr. Barker to support his statement. Well, it is quite possible Mr. Barker may not have heard the whole conversation, but even if he did, I think Mr. Barker's evidence is not conclusive that the plaintiff's account is wrong. What the defendant should have done would have been not to have employed plaintiff at all until plaintiff had withdrawn his offer to do the work for £10 a month. That was the latest offer made by plaintiff. Defendant says he said that £2 or £3 was enough, but plaintiff said nothing to that, and never withdrew his offer. Defendant made the mistake of continuing to employ him when he had not

withdrawn his offer of £10, and therefore left plaintiff under the impression that he was to do the work for £10. Under these circumstances, I think I will have to give judgment on the first count for the amount claimed by plaintiff at £10 a month. In regard to the second count of £150, I have great doubts whether any commission ought to be allowed at all, but defendant admits that a small commission should be paid for this. Some evidence has been given in regard to the amount of the commission, and I think 2½ per cent. is a most exorbitant charge. What had plaintiff done to earn £150? Defendant had previously been to the South African Association, and if he had not offered this 1 per cent. I should have hesitated to give judgment for that amount. I consider 1 per cent. ample payment for the work done in raising the loan, and I therefore give judgment on the second count for £60, with costs. [Plaintiff's Attorney: A. W. Steer. Defendant in person.]

THOMPSON V. SMALE.

On the motion of Mr. Searle, K.C., the Court fixed the 30th May for trial by jury of this cause.

IN THE MATTER OF THE PAARL SPIBIT CO.

Mr. Searle, K.C., presented the report of the liquidator, which the Court directed should lie for inspection.

REX V. LEWIS. { 1902. May 9th.

Police Offences Act, 1882, Sect. 7,
Sub-section 6—Locomotive.

Where a vehicle has been drawn into a public street by a locomotive and left standing there without the locomotive and without any horse or animal harnessed to the vehicle, the person who so left it is guilty of a contravention of Sub-sec. 6 of Sec. 7 of the Police Offences Act of 1882.

This was an appeal against a conviction by the Assistant Resident Magis-

trate of Cape Town in a case in which appellant was charged under Act 27 of 1882 with leaving two wagons in Riebeek-street without any horse or other animal harnessed thereto.

The summons in the Court below called upon John Lewis (the present appellant) to answer to a charge of "having contravened Section 7, paragraph 6, of Act 27 of 1882, in that he did on or about January 13, 1902, wrongfully and unlawfully leave upon the public thoroughfare, to wit, Riebeek-street, Cape Town, two wagons without any horse or other animal harnessed thereto, no accident having occurred." The evidence showed that appellant was an employee of the Harbour Board, and left two trailers in the street. Objection was taken to the conviction on the ground that the previous week appellant had been acquitted of a charge of leaving trailers in Riebeek-square. A mistake had been made in the summons, but later defendant was charged with leaving trailers in Riebeek-street and convicted. A further ground of appeal was that the section did not apply to locomotives or vehicles drawn by locomotives.

Mr. Wilkinson appeared to support the appeal, and Mr. Howel Jones for the Crown.

Mr. Wilkinson: The original summons under Section 7 Act, charged with having wagons in Riebeek Square, and not in Riebeek-street. Accused might have been convicted under that summons if the summons were amended.

[The Chief Justice: He was never in jeopardy under that summons.] The exact locality of the offence was named, and accused could not be charged again. *Taylor, Ev.*, (par. 1717). Then as to the section any animal means "draught animal," and vehicle means vehicle drawn by draught animals. One horse would have been no good.

[The Chief Justice: You might have had a team attached. If the engine had been attached there might have been a difficulty, and we might have had to decide the question of the legality of the use of these engines.]

But see Cape Town Municipal Regulations (240), sub-section A. This contemplates the use of traction engines, and that the locomotive may be detached from the trucks. The sub-section of the Act

does not contemplate these large wagons drawn by traction engines. If proceedings were taken at all they should have been under some Municipal regulation relating to the use of these trucks.

Mr. Jones was not called upon.

De Villiers, C.J.: If these regulations are inconsistent with the Police Offences Act, they cannot repeal the provisions of the Police Offences Act, and the section must be construed quite independently of these municipal regulations which have been referred to. His lordship read the 7th section of the Act, and proceeded: Here we find that two trucks were left in the public street without any horse or other animal harnessed thereto. If there had been a locomotive attached to these trucks there might have been some doubt in the matter, because it might have been contended that the locomotive should stand in the place of a horse or other animal. The object of the Act apparently was that in case of an accident there should be some means of removing a vehicle from its position in the street, and if a locomotive had been attached these trucks could have been removed if necessary. But in the present case the locomotive had been detached from the vehicles, and no horse or other animal was harnessed to the vehicles. In my opinion there has been a contravention of this Ordinance. A further question has been raised as to whether the defendant had not been previously acquitted, but the offence upon which he was discharged was a different offence, and defendant was never in jeopardy in reference to the particular offence with which he is now charged. Therefore I do not think the previous acquittal can hold good. The appeal must be dismissed.

[Appellant's Attorney: J. J. Michau]

SECOND DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.].

PROVISIONAL CASES.

COLONIAL GOVERNMENT v. } 1902.
SWEIGERS. } May 9th.

Mr. Nightingale moved for provisional sentence on a mortgage bond for £330

and interest, and for specially hypothecated property to be declared executable. Granted.

COLONIAL GOVERNMENT V. SWANEPOEL.
Service of Summons.

Where summons had been served by affixing a copy thereof to the floor of a tent. Such service was held good.

Mr. Nightingale appeared for the Government, and said that before asking for provisional sentence, he would like to point out the peculiarity in the return of service. The Deputy Sheriff said that being unable to find defendant or any of his household after having made diligent search, he duly served the summons on the 21st April by leaving a copy thereof at defendant's last known place of residence, and posting the same on the platform of his tent, it being his last known place of residence. Counsel said that in April last year there was a very much stronger case than this, in which the Court held the service to be good. There the defendant appeared to have been trekking about in a wagon, and the Deputy Sheriff not being able to find him, fixed the summons on the ground on which the wagon had stood.

The Chief Justice: Do you say the wagon had gone? It must have been there still.

Mr. Nightingale: I understand from the report that the wagon was not there still.

Counsel further alluded to a case in the Gordonia district in February, 1900.

The Chief Justice said he considered the service in this case to be sufficient.

Mr. Nightingale thereupon moved for provisional sentence on a mortgage bond for £40, with costs and interest, and for specially hypothecated property to be declared executable. The service was held good, and provisional sentence was granted.

COLONIAL GOVERNMENT V. COETZEE.

Mr. Nightingale moved for provisional sentence on a mortgage bond for £241 10s., with interest and costs, and for specially hypothecated property to be declared executable.

Granted.

LIBERMAN V. GRAND JUNCTION RAILWAYS.

Mr. M. Bisset moved for provisional sentence for £496 15s. 7d.

Granted.

COOTE V. GRAND JUNCTION RAILWAYS.

Mr. Percy Jones moved for provisional sentence on a bank draft for £382 7s. 5d.

Granted.

FLETCHER'S V. BREDENKAMP.

Mr. Russell moved that a provisional order for sequestration be made final.

Granted.

HIGGENS V. GROBLER.

Mr. Russell moved for provisional sentence for £50 on a mortgage bond, with interest, and for specially hypothecated property to be declared executable.

Granted.

JAGGER V. HOWITZ.

Mr. Buchanan moved for the final adjudication of defendant's estate.

Granted.

HUGHES V. BOYES.

Mr. Benjamin moved for provisional sentence on a promissory note for £50.

Granted.

TODD V. WADNER.

Mr. Langenhoven moved for provisional sentence on a lease for the sum of £57 3s.

Granted.

ILLIQUID ROLL.

AYLWARD V. LILLIEN { 1902.
FIELD. { May 9th.

Mr. McGregor moved for judgment, by default, for £256, with interest.

Granted.

YOUNG V. LEWIS.

Mr. Hull moved for judgment, under Rule 329d, for the sum of £27 15s. 4d., money lent.

Granted.

BOSMAN V. JACKSON.

Mr. Goch moved for judgment, under Rule 329d, for £56 2s. 2d. (goods sold and delivered) and £17 (rent).

Granted.

BREAKEY V. ALEXANDER.

Mr. Langenhoven moved, under Rule 329d, for judgment for £60 for money lent.

Granted.

REHABILITATION.

Mr. Close moved for the rehabilitation of Arthur Thackeray Edwards.

Granted.

REX. V. NORMAN. { 1902.
May 9th.

Liquor Licensing Acts—Permitting drunkenness.

The appellant—holder of a liquor licence—served several soldiers, who were in an excited condition and verging on intoxication, with liquor, with the result that a quarrel and fight ensued between the soldiers and another customer.

Held, on appeal, that although the appellant endeavoured to stop the fight by removing the other customer, he was guilty of a contravention of the 1st sub-section of section 73, Act 28 of 1883, by permitting drunkenness.

This was an appeal against a conviction by the Assistant Resident Magistrate of Stellenbosch, sitting at Somerset West. Appellant is the holder of the licence of the Central Hotel, Somerset West. He was convicted and fined for permitting drunkenness or riotous behaviour. The appeal was based on the grounds that the evidence led did not show that defendant permitted drunkenness, and that irrelevant matter prejudicial to the defendant was admitted as evidence.

Mr. Schreiner, K.C., appeared for appellant; Mr. Howel Jones for the Crown.

Mr. Schreiner read the record of evidence, from which it appeared that a disturbance occurred on the defendant's premises. It commenced by some soldiers, who were said by some witnesses to be staggering, and by others to be sober, striking a man named Turner, who retaliated, the result being a general fight. Turner, in his evidence, said: "The majority of these men were drunk. Mr. Norman served them in the bar." Some of the witnesses said that Mr. and Mrs. Norman did their best to stop the disturbance, and got Turner out. The evidence objected to was a statement by a police witness that Norman had been previously warned.

Mr. Schreiner, K.C. (for appellant): On January 13 we could not appeal, because no sentence had been pronounced. The accused had been reprimanded and discharged, and the case was referred back for sentence. A fine of £3 was imposed. Thereupon notice of appeal was given.

[Counsel read the evidence taken in the Court below.]

There is nothing to support the charge on the record, save hearsay evidence; we could not appeal. *Rex v. Erfust* (12 S.C.R., C. 427), under Act 1876, and our house was in peril.

[De Villiers, C.J.: But if a drunken man comes in, surely you may not serve him?]

I would not argue that. As to Turner's evidence, it is not reliable. The Court will draw their own conclusions from the evidence, *Queen v. Bisset*. Turner's presence and conduct caused the disturbance. My client must be proved to have permitted something, either drunkenness or riotous conduct. As to the latter see *Queen v. Robertson* (9 Juta, 299), and also sub-section 7, 8, Licensing Act). Norman did exactly what he was required to do; he tried to turn out disorderly people, but *lex non cogit ad impossibilia*. He turned Turner out and he sent for the police. Sergeant Bishton went with the Town Guard. How, then, could he alone turn these people out? Then, did he permit drunkenness. The men could demand lunch and something to drink with it. There is a great difference between being in a state of alcoholic excitement and drunkenness. If a case like this could come before this Court, would it convict? In *Bisset's* case, where the evidence was believed in the Court

below, the decision was reversed on appeal. Even if one or more of these men were drunk, is there any evidence to show that the landlord permitted it. Permission involves something positive (*Robertson's case*).

Mr. H. Jones, for the Crown, was not called upon.

De Villiers, C.J.: I think there is sufficient evidence to justify the Magistrate in his verdict. I dismiss from my mind altogether the evidence which has been objected to as being inadmissible, and on the rest of the evidence I am of opinion that the Magistrate was right in the conclusion at which he arrived. It was said in evidence that these soldiers were intoxicated when they entered the hotel. They were, perhaps, not drunk, but at any rate, it seems clear that they were verging upon intoxication, and while they were in that condition, there is evidence that the defendant served them with liquor. Supposing even that they were not quite drunk when he served them, this liquor with which he supplied them was probably the last straw. They got into such a state of intoxication that they unnecessarily quarrelled with a man who had done them no harm, and when things came to such a pitch that something had to be done, the defendant turned against the man who was not the cause of the quarrel, removed him from the premises, and did nothing in regard to those who actually caused the disturbance. It is said that these men could not be removed, because there were so many of them, and it was useless to try to remove them, but no attempt was made to get them to leave the place. One might have imagined that defendant would have tried to persuade them—would have tried to use his influence to get them to leave the premises. Instead of that, he removed the man who was not the cause of the disturbance, and did nothing in regard to the others. To my mind, the evidence shows that in what he did he permitted drunkenness. It is said that mere acquiescence is not enough, but he actually served these people with drink. I do not know of any stronger proof of permitting drunkenness than serving further liquor to excited soldiers who came to the place. The appeal must be dismissed.

[Appellant's Attorneys: Walker and Jacobsen.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REX V. ARNOLDS. { 1902.
May 12th.

Previous Conviction—Act 39 of 1885.

A conviction under sec. 27 of Act 37 of 1885 cannot be regarded as a previous conviction in the case of a woman convicted under sec. 17.

Maasdoorp, J.: A case came before me as judge of the week from the Resident Magistrate of Simon's Town, in which the accused was charged with contravening section 17 of Act 39 of 1885, in not submitting herself to periodical examination. She was found guilty, and sentenced to three months' imprisonment with hard labour. It appears that a sentence of three months, or a sentence exceeding one month, can only be inflicted in the case of a second or further conviction under this particular section, and in this case no previous conviction under this particular section has been proved. There is proof of certain previous convictions for offences of a different nature—for instance, there is proof of a conviction for leaving the hospital without leave, and again on another occasion she refused to take a bath when ordered to do so by the matron—but none of these convictions fell under this section, and consequently the sentence is excessive, and must be reduced to such sentence as can be passed for a first offence. The sentence will therefore be reduced to one month's imprisonment with hard labour.

ADMISSION.

Robert Greening was admitted to practice as an attorney, the oaths being administered by the Registrar.

MICKALA V. BALLE.

This was an application for the execution of a decree of civil imprisonment, granted on May 1. When the case first came on the defendant was in default, but it now appeared that he had been waiting in the Supreme Court, while the case was heard in the Record Room, and accordingly permission was given to reopen it.

Mr. Howel Jones appeared for the applicant.

The defendant appeared in person, and offered to pay £1 a month. He said he was a carpenter by trade, and received 13s. a day. He lost all his carpenter's tools in a fire in August last.

In reply to the Chief Justice, defendant said he was already paying £1 a month to Messrs. Findlay and Co. in liquidation of a debt.

After defendant had been cross-examined by Mr. Jones, the Court suspended execution of the decree of civil imprisonment pending payment of the debt by instalments of £1 per month, the first instalment to be paid on May 15, with leave renewed to the plaintiff to apply for the payment of larger instalments in case it could be proved that the defendant had means to pay.

COLONIAL GOVERNMENT V. (1902.
HILLS. (May 12th.
Interdict—Contract.

Respondent had contracted with the Colonial Government to construct certain railways under conditions which bound him, inter alia, to employ competent employes and to use suitable plant, and gave power to the Government engineer, in the event of the incompetency of any employes or unsuitability of the plant used, to give notice to the contractors requiring them to remove such incompetent persons or such unsuitable plant, and replace them or it. Should the contractors disregard such notice, the engineer was to have power to remove such persons or plant, and to engage or hire others at the cost

of the said contractors. The contractors being unable to continue the work, the Government now applied for an order authorizing them to resume or take possession of these lines under construction, and to call upon the respondent to show cause why he should not be interdicted from obstructing the Government in the prosecution of the said works.

The Court granted an order authorizing the Government engineer to remove the persons and plant complained of at the cost of the contractors, and to employ such other engineers, &c., as he might deem necessary.

This was a motion on notice calling upon the respondent to show cause, if any, why an order should not be granted authorizing the Colonial Government to take all such steps and to do all such acts, including the resuming or taking possession of the whole or any portion of the lines mentioned below, or either of them, and of any work connected therewith, as might be necessary for the purpose of enforcing the provisions of clauses 23 and 24 of the general conditions of the contract entered into on July 4, 1900, between the Colonial Government and the Thames Ironworks and Shipbuilding Company (Limited), for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town lines of railway, and further to show cause why he should not be interdicted from in any way interfering with or obstructing the Colonial Government in the execution of such work.

Mr. Schreiner, K.C., appeared for the Government; Mr. Searle, K.C., appeared for the respondent.

Sir H. Juta, K.C., appeared to watch the interests of a Port Elizabeth firm who had claims against the respondent, and had in their possession certain goods ordered for the railways in question, over which goods they had a lien.

Mr. Schreiner said that as far as he could see this action between the Gov-

ernment and the contractor would not really affect the rights of any third party.

The Chief Justice said that any judgment given would not prejudice the rights of any such third party.

In an affidavit, Mr. Thomas Rees Price, G.M.G., General Manager of the Cape Government Railways, said:

1. That on the 4th day of July, 1900, two contracts for the construction of railways were entered into between the Colonial Government and the Thames Ironworks and Shipbuilding Company (Limited), viz.: (a) for the construction of a line of railway from Oudtshoorn to Klipplaat via Willowmore; (b) for the construction of a line of railway from Somerset East to King William's Town; the said two contracts were confirmed by Act No. 19 of 1900.

2. That thereafter, to wit, on or about the 20th day of March, 1901, the Thames Ironworks and Shipbuilding Co. (Ltd.), with the consent of the Colonial Government, ceded its rights under the said contract to Arnold Frank Hills, who took over all the obligations of the said contracts.

3. Clauses 23 and 24 of the said contracts are as follows: Clause 23—If the engineer shall at any time consider any engineer, agent, inspector, foreman, or workman employed by the contractors for the purpose of the contract to be inefficient, incompetent, or should they misconduct themselves, or the number of the workmen or beasts of labour, or the amount or character of the plant or materials then employed or provided by the contractors in or upon or for the purposes of the works, to be insufficient or improper, or that the works, or any of them, are not being executed with due diligence and despatch, then and in every or any such case it shall be lawful for the engineer to give notice in writing to the contractors requiring them to dismiss any such inefficient or incompetent engineer, agent, inspector, foreman, or workman, and to remove any unsuitable men, beasts, plant, or materials, and to appoint in lieu of such persons respectively other fit and proper engineers, agents, inspectors, or foremen, and to employ other workmen, and to provide other beasts, plant, or materials, and also to make such additions to the engineers, agents, inspectors, foremen, or workmen employed, or to the number or amount of the beasts, plant,

and materials, or such change in their character, either until the completion of all or any of the works, or for a limited period, as the engineer may think necessary, and shall by any such notice require. Clause 24—If the contractors shall not, upon the receipt of any such notice, or within a time to be specified therein, comply with such notice, it shall be lawful for the engineer, on the account and at the cost of the contractors, to remove the engineers, agents, inspectors, foremen, workmen, beasts, plant, or materials complained of, and at like cost to provide and employ such other and additional engineers, agents, inspectors, foremen, and workmen for such time, and to purchase and provide such additional or other beasts, engines, plant, and materials respectively as he may think necessary, and to pay such other or additional engineers, agents, inspectors, foremen, or workmen such salaries, wages, and to pay for such additional beasts, plant, and materials respectively such prices as the engineer may think proper, all which salaries, wages, and prices respectively, if paid by the Government, and any extra expense the Government may incur in relation thereto, shall on demand be repaid to them by the contractors, or the Government may retain or deduct the same out of the moneys then due, or thereafter to become due, from the Government to the contractors under this contract.

4. The progress of the work on the said lines has been most unsatisfactory, only about one-half of the work on the Oudtshoorn-Klipplaat line, and about one-third of the work on the Somerset East-King William's Town line having been done, and no single section of 20 miles has been completed.

5. The work that has been done is not kept in proper order or repair, and is deteriorating steadily, through natural causes, as I can testify, not only from reports received from time to time from the engineer, but also from a personal inspection of the works on or about November 29, 1901, to December 7, 1901.

The respondent has been repeatedly requested to proceed with the work, in terms of this contract, but without success, and he has recently on several occasions intimated that without further advances from the Colonial Government he cannot proceed with the work.

6. On the 28th April I notified to the respondent, who is in London, by cable, through the Agent-General for the Colony, that if the work was not proceeded with with due diligence the Colonial Government would avail itself of the provisions of clauses 23 and 24 of the conditions of the contract, and I gave a similar notice to his accredited agent in Cape Town, Mr. T. M. C. Walker, at the same time. No reply has been received from the respondent.

7. I am informed and believe that for a considerable time past the wages of the natives and other men employed on the works have not been paid, and on the 2nd inst. I received the following telegram from the Acting Resident Engineer at Willowmore to the Engineer-in-Chief, Cape Town: "May 1.—Position of affairs here most serious; 1,000 contractor's native employees threaten lives of all engineers. Many refuse food and demand money for support of families. Military have been called out."

8. That on the 2nd inst. a notice under the said clause 23 was addressed by the Engineer-in-Chief to the said respondent, which notice was served on the said T. M. C. Walker, the agent in this colony of the respondent.

9. Taking as a basis the average rate or progress since the respondent commenced work, it would, as I conclude after careful deliberation with the engineers, take about three years to complete the lines.

10. It has become and is urgently necessary that without delay the Government should be in a position to intervene, and proceed with the work, which the contractor's default has left in such an unsatisfactory condition.

11. The time fixed for the completion of the said contracts was in the case of the Oudtshoorn-Klipplaat line twelve months, and in the case of the Somerset East-King William's Town line fifteen months, from the 19th October, 1900; an extension of time as provided for in clause 30 of the contracts was granted by the Engineer, but has long since expired.

In an affidavit Mr. John Brown, Engineer-in-Chief of the Cape Government Railways, confirmed the allegations made in the General Manager's affidavit, and further stated in regard to the notice

given by him on the 2nd inst. to the respondent that he had received a reply stating that the contents had been noted, but nothing had been done.

Mr. Thomas Mouat Cameron Walker, in an affidavit, stated

1. That I am the respondent's representative in Cape Town.

2. That I beg to refer this Hon. Court to the affidavit sworn by me on the 9th inst., having reference to the service of the notice of motion and annexures herein. (This affidavit had reference to an application for the postponement of the hearing of the motion on Friday, May 10, which was granted).

3. That I admit paragraphs 1, 2, and 3 of the affidavit of Thomas Rees Price, General Manager of Cape Government Railways, but I say that the action at present taken under clauses 23 and 24 of the said agreements, if taken at all, should be under clause 52 of the said agreements, that clause being provided for such a case as is now set forth by the applicants, the same having been inserted in the contract for the protection of the public interests, and I further say that clauses 23 and 24 do not empower the applicants to take over the lines.

4. With regard to paragraph 4 of the said affidavit, I say that the distance of the Oudtshoorn-Klipplaat line is 156 miles, and of this 102 miles of rails have been laid and earthworks are completed for 125 miles; and I further say that on the section between Klipplaat and Willowmore (63 miles) passenger traffic has been carried on for two years, the train running three times a week, thus showing the section to be in good working order. On the Somerset East-King William's Town line of 149 miles, rails have been laid for a distance of 76 miles and earthworks for 103 miles. The completed portion of this line has on very many occasions been used by the military authorities for the conveyance of stores and troops, and as construction trucks have been used the work has necessarily thereby been greatly retarded.

5. That sufficient men have always been kept on the works, and more would have been employed if the respondent had been supplied with material necessary for the due carrying on of the construction, but the applicants have continually failed to deliver material through, as alleged by them, shortage

of rolling-stock, and on very many occasions have used respondent's construction trucks for carriage of material, thus considerably hindering the construction works.

6. That the war occasioned a complete stoppage of construction during the months of January, February, and March, 1901, and at various times since different sections have had to stop work for the same reason.

7. That owing to the war, applicants have been prevented from conveying, as bound by clause 31 of the agreement, and giving delivery of material at Klipplaat and Cookhouse, and this material has been accumulating at Port Elizabeth since 1900, there being at present at that place 21,283 rails and 106,974 sleepers, which, together with fastenings, etc., represents some 11,842 tons awaiting delivery, upon portion of which the contractor has been paying rent.

8. That the Government has failed to comply with the terms of clause 7 of the Somerset East-King William's Town contract, in that no payment was made within the time provided, and in that £13,000 due to the contractor under that clause has not been paid by the Government.

9. With regard to paragraph 6 of the said affidavit, I say that I have been advised by cable that the respondent, on the 25th April, and again on the 2nd inst., communicated with applicants by cable through the Agent-General of the Colony in London.

10. That there are good and sufficient grounds for the non-completion of the lines within contract time, and that respondent is reasonably within his time for completion, on account of breach of contract by Government, the war, and the disturbed state of the country.

11. That the estimate made by Mr. Price (based on the progress made by the contractor) of time required to complete the lines is under-estimated, as it will take more than three years, at the rate material has been forwarded by the Colonial Government during the past six months, to clear the accumulation of material at Port Elizabeth, which is absolutely necessary for the completion of the lines.

12. That the contractor has suffered very heavy financial loss on account of the war, as will be seen from the report

of the applicant's acting resident engineer at Bedford, which shows an expenditure of £250 per month on his section alone, that amount being wholly direct loss, and as a matter of fact, this section has suffered less than any other, with one exception.

13. That on the Oudtshoorn-Klipplaat section, in January, 1901, actual damage to the extent of £14,633 was done by the Boers, for which no compensation has been received.

14. That the respondent has done everything in his power, not only to comply with his contracts, but also to meet the military and applicant's requirements and the public's interests by carrying on the work throughout the war, until lately, and has thereby incurred an expenditure greatly in excess of his estimated financial requirements, thereby necessitating applications for advances from applicants. Had the respondent consulted his own interests solely, he would have closed down all works in January, 1901.

15. That clause 56 of the contracts provides for the submission to arbitration of any dispute between the parties thereto, and the applicants have never suggested the settlement by such means, which should, under the contract, have been done before the submission of the matter to this Hon. Court.

16. That the notice of the engineer of the 2nd inst. demanded an impossibility, even under the most favourable circumstances, the time stated not being in any way sufficient to allow for the due fulfilment of his requirements, and it therefore cannot be considered as due notice, under clause 24 of the contract.

17. That the respondent is anxious and willing to complete the work, and would be enabled to do so if the applicant will grant him such considerations as is only due to him in view of the adverse and abnormal condition of the country and of affairs generally, with which he has had to contend.

The letter from the Acting Resident Engineer of Bedford (referred to in the above affidavit), with regard to the extra expenditure caused by the war, contained the following: "From the information you have sent me from time to time, and my own observation, I have compiled an estimate, and herewith enclose my rough copy, which I shall be glad if you would examine and return

to me without delay, the estimate now being considerably overdue. Roughly, it averages about £250 per month—no small proportion of our certificates. Any comments I shall be pleased to receive, for it is desirable we should be fairly in accord on the matter."

The 52nd section referred to in the above affidavit is as follows: If the contractors or their permitted assignees (in case of assignment) become insolvent, or compound with their creditors, or if from any cause whatsoever, other than the act of God, war, insurrection, rebellion, the execution of additional works, strikes, lock-outs, combinations of workmen, or any extraordinary or unforeseen circumstance, which in the opinion of the Commissioner are beyond the control of the contractors, they shall fail to complete and deliver over the said railway and works to the Government in the manner and by the time in that behalf fixed by Article 27 hereof, or any extension of such time as provided by Article 30 hereof, the 10 per cent. retention money shall be retained and dealt with as provided in Articles 47 and 49 hereof, and thereupon this agreement shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such incomplete line in so far as it has been constructed by the contractors, and the Government shall thereafter so soon as the amounts of the actual cost shall have been ascertained pay to the contractors the amount so ascertained less such amount as shall have been paid on account, and less the amount of detention money hereinbefore referred to.

An answering affidavit by Mr. Thomas Smith McEwen, Assistant General Manager of Railways, was as follows:

1. That previously to holding my present appointment I was Chief Resident Engineer on the construction of the Oudtshoorn-Klipplaat and Somerset East-King William's Town lines of railway, and occupied that position up to March, 1901, and since then I have frequently had to deal with matters in connection therewith.

2. I have perused the affidavit of Thomas Mouat Cameron Walker.

3. With regard to paragraph 4, the lengths of earthwork constructed and rails laid, as stated by the said Walker, are approximately correct, but earth-

works and laying rails represent the simplest and easiest part of the contract work. A very large part of the more expensive work on both lines, viz., bridges and culverts, superstruction of bridges, ballasting, station buildings, houses, station yards, and such like still remain to be done. That although by special permission and at passengers' own risk it is true that passenger traffic has been carried on between Klipplaat and Willowmore, yet no section of 20 miles between these points has actually been completed in accordance with the terms of the contract. The line, though incomplete has been used to a certain extent by the military authorities, but the progress of the work has not been greatly retarded thereby.

4. With regard to paragraph 5, I deny that sufficient men have always been kept on the works. There have been some delays in delivering material, but not sufficient to account for the extraordinary delay in proceeding with the construction works. That the extension of time allowed beyond the stipulated time has been more than ample to cover any delays, whether caused by the inevitable shortage of trucks, the circumstances of the country, war, or otherwise. The construction trucks referred to in the said paragraph are not the property of the respondent, but were hired to him under clause 38 of the contract; the number so hired would be equal to about 212 short trucks, and owing to the military demands in connection with transport service, some of these trucks, not more than sixteen, I believe, were by arrangement with the respondent withdrawn for the purpose of carrying construction material from the port to the junctions where the contractor's work commenced. The respondent was not hindered to any considerable extent thereby.

5. With regard to paragraphs 7, 11, and 12, I say that there has been no undue delay in forwarding material, and respondent has been delayed, if at all, only in a minor degree, amply covered by the extended times which have been allowed, but from frequent communications received from him his delay would appear rather to have been occasioned by financial straits, in which he has received every reasonable consideration, even beyond the strict tenour of his contracts.

6. With regard to paragraph 8, I deny that Government has failed to comply with clause 7 of the Somerset East-King William's Town contract, save that a portion of the amount due, to wit. £5,757 5s. 10d., was not paid within the fourteen days, and that the sufficiency of the total amount paid, viz., £97,676 8s. 10d., was upon the respondent's reading of that clause disputed by him to the extent of £13,000.

7. This dispute remains unsettled, but the Government has, in consideration of his position, made advances to the respondent of sums far exceeding the amount in dispute, over and above such advances as he was by contract entitled to.

8. With regard to paragraph 9, I attach hereto a copy of a cablegram of the 2nd inst., forwarded by respondent through the Agent-General. I am not aware of any cablegram sent by respondent on the 25th of April, but in any case such a cablegram could not be a reply to a message sent on the 28th of April.

9. I deny the allegations in paragraph 10.

10. With regard to paragraph 13, I admit that some damage was done by the Boers, for which Government is not liable, but to what extent I am not aware.

11. With regard to paragraph 14, I deny that the respondent has done everything in his power to complete the contracts.

12. As to paragraph 15, I say that throughout the recent negotiations occasioned by the critical position in which the contractor is placed, no suggestion has been made that any matter in dispute should be referred to arbitration. Under the circumstances as they stand the delay which would be occasioned by any arbitration would be extremely dangerous to public interests, and in no way assist the contractor to fulfil his obligations under contracts which he has already broken, and the full time for completing which has expired.

13. The urgency of the matter may be further illustrated from the annexed telegrams from the Civil Commissioner of Willowmore and the Acting Magistrate of Willowmore, dated respectively 2nd and 3rd of May.

14. As regards paragraphs 16 and 17, I would respectfully beg to remind this Hon. Court of the many judgments recently obtained against the respondent, with others, in this Hon. Court, under some of which judgments materials actually delivered for the construction of these lines have been attached for execution, and I submit that an extension of further consideration and time is impossible, having regard to the public interests.

15. I attach a copy of a telegram dated 7th inst. received by the Chief Resident Engineer on Construction.

The following is the cablegram referred to in above affidavit: From Agent-General to Commissioner.—In reply to your cable, April 28, Hills writes to-day; begins with reference to my letter, April 29, cabled Wednesday. Am advised Grand Junction creditors' rights not affected by clauses 23 and 24 construction contracts. Such clauses being inapplicable in existing state affairs, and incapable of being put in operation by Government at present, therefore in any arrangement with Government provision must be made for paying all Grand Junction creditors, and as creditors' rights extend also to our interest in Mossel Bay line, it is necessary for Government to decide, and inform us its attitude regarding that line; partners and I recently decided revert our undertaking in Grand Junction Railways (Limited). I suggest, without prejudice, solution present troubles would be found if the contract we have signed for sale to Grand Junctions be completed with Government assent, and Government take up akalkali* debentures of that company, meantime advancing sums necessary avert present crisis. By this means Government would have satisfactory security for the money, and we be able pay our creditors and proceed completion of all lines. Sale contract was sent our Cape Town agent on April 19. (Ends.) In my opinion, all further negotiation with Hills at this end are hopeless.

The following are the telegrams referred to in the above affidavit: Civil Commissioner, Willowmore, to Secretary, Law Department, Cape Town.—93. May 2, 1902. At a meeting of the Mayor and leading inhabitants of Willowmore to-day, it was brought to the notice of

* This word was unintelligible.

the authorities that, owing to a general strike of the Grand Junction employees, all communication with Klipplaat has been stopped, and the food supply cut off. It was resolved that the Civil Commissioner be requested to lay the matter before the Government, with the request that steps be immediately taken to give relief. Besides the ordinary population of the town and a large district, there are at present 1,500 railway natives here without food or work. The food supply here will be exhausted within a week. (Ends.) I have been requested by the community to send this to General Manager of Railways, as well as to Secretary Law Department.

Roux, Acting Magistrate, Willowmore, to Secretary, Law Department, Cape Town.—94. May 3, 1902. Yours 1457, May 2, 1902. Please refer to my wire to you, 73, yesterday. Present state of affairs critical. The day before yesterday I had to collect the D.M.T. as additional police, the whole village being overrun with natives, who were becoming very boisterous, and as an extra precaution I closed both the hotel bars. They have been temporarily pacified. Mr. Currie, the Grand Junction Railway representative here, who has not been paid his own salary for the last six months, obtained some meal, but this will only last for a few days. Have a very large district to supply with food-stuffs. In addition, several farmers from Uniondale and Aberdeen, under martial law, get their supplies from here, and if matters do not mend within the next few days, there will be a serious trouble. The natives are all demanding their pay, and nothing else. I have arranged with the Administrator, No. 4 Area, Uitenhage, to give them immediate employment as general labourers, mule drivers, or for blockhouse work, at £3 per month and rations, but this apparently does not satisfy them. The farmers along the line of railway must also be considered.

Tippett, Port Elizabeth, to Railways, Cape Town.—May 7, re obtaining possession of Government engines and rolling-stock, Somerset East-Bedford portion of the line. (Stop.) A.R.E., Bedford, wires that contractors' agent (Hirst) refuses to give up possession, and has removed all engines and stock out of the Government yard on to the new lines, and has erected fences across the

new lines outside yard at Cookhouse. (Stop.) I have wired Popkiss that he should not take forcible action until further advised by me, but should serve notice on Hirst, holding him personally responsible for such damage or loss that may be incurred by the department. Await your instructions on the subject.

Mr. Schreiner, K.C. (for applicants) read notice served, Hills and Price's affidavit, and cited the Railway Act (19 of 1900, scheduled 2,324). Mr. Searle, K.C. (for defendant) read an answering affidavit, and cited section 31 and clause 7 of the King William's Town Railway Act, also clause 56, which provides for arbitration.

Mr. Schreiner: The Act of 1900 took the place of the Acts of 1895 and 1898. By the latter the Thames Iron Works was to take over two of these lines, and the King William's Town line was to remain a concession line. Payment was to be made for every 20 miles constructed. Clause 30 of the contract provided for delay arising from act of God or of the King's enemies, but left the engineer the judge as to the necessity of extension. Six months' extension was given. They were only entitled to three months. The contractor wants the Government to advance more money, but they are not bound to do so by the contract. The Thames Iron Works assigned their contract to Hills, and he does not seem to be able to go on, and so wants to fall back on the old Grand Junction Railways, but the Thames Iron Works assigned to Hills, and not to anybody else. Labourers and engines were there, but they were not working. Hence the short notice given on the 2nd to go on by the 5th. Clauses 23 and 24 are the very clauses we should proceed on in a question of urgency. We are now fenced out from the line by respondents. We will be quite content with an interdict forbidding respondents from excluding us from our line. Respondent has never said he wishes to throw up the whole thing, so we cannot proceed under section 52, so sections 23 and 24 are the sections we wish to proceed under.

[De Villiers, C. J.: Do you wish to remove the engineer?]

Technically yes; we may re-engage a good many of the men. We do not want absolutely to take over the work, but only to see that it is gone on with.

[Buchanan, J.: The question is, have they exceeded the time allowed them?]

They have, but we cannot proceed under section 52 unless Hills becomes insolvent.

[Buchanan, J.: But do you say that you can break off the contract on the ground of failure?]

Section 52 says "as the commissioner shall determine," not "as the contractor." Hills may insist under this clause on arbitration. Meanwhile the line will be going to destruction.

[De Villiers, C.J.: If we grant an order, whose servants will the work-people be?]

Those of the Government (see sections 24 and 38). If Hills were shown to be on the verge of insolvency surely the Court would have no hesitation in stepping in to enable us to take charge of the line. No portion of the line has really been completed.

Mr. Searle, K.C.: I don't understand counsel's argument. There is only one section which justifies taking over the line.

[De Villiers, C. J.: Any order made will be in terms of section 24.]

We hold that not sections 23 and 24, but 52, applies. (Mr. Searle read 23 and 24.) Under section 23 applicants can only ask for the dismissal of employees on the ground of incompetence. The expiry of the contract time does not come in under this clause. If Government may provide other men that does not imply that they can take possession of the line or control of the work. Section 24 does not apply, because the notice asks us to provide 4,000 skilled and unskilled persons between Saturday and Monday.

[De Villiers, C. J.: What time should you have had?]

I cannot say, but clearly the time given was too short. They are not taking over the works on the ground that we cannot pay our men. The notice was insufficient; what if they had only given us an hour's notice?

[De Villiers, C.J.: It may be that the notice would have been too short if you could have gone on with the work. Will you consult your client as to whether he will engage to employ the number of men asked for within a fortnight?]

He cannot do that, because he is not instructed. The case the applicants

make is under section 53. They do not say that our engineers are incompetent, but that they are too few. They cannot therefore dismiss them. Sections 23 and 24 do not contemplate any resumption of the lines by Government: and it is difficult to say whether these sections justify the applicants in coming to Court. The fact that the engineer had seized certain locomotives did not justify applicants in applying under these sections. As to arbitration, the matters referred to in sections 23 and 24 are not left to the judgment of the engineer, like those mentioned in section 30. The Government can employ persons and pay them without coming to the Court, and hence the Court cannot now decide this whole question on motion. The parties are not agreed as to facts; and the applicants have not made out a clear right under sections 23 and 24, because they have not offered to provide men. Had they done so, and we had refused to let them come on the line, the applicants might have had a case.

[Buchanan, J.: Can you justify your obstruction of the line?]

That is quite extraneous matter imported into the case in connection with an answering affidavit: it has nothing to do with sections 23 and 24.

Sir H. Juta was not called upon in reply.

De Villiers, C. J.: If, even now, at the eleventh hour, the respondent would undertake within a reasonable time, say, two or three weeks, to supply the number of men whom the engineer considers to be necessary for the purpose of completing this work, I should not make any order, but I should give the respondent time within which to do it, because undoubtedly the notice was short, and in ordinary circumstances I think the Court would hold that the notice was far too short for calling on the respondent to do what he is asked to do. But it is perfectly clear from the facts which have been disclosed in this case that respondent is unable to undertake this work, and even if he were given two or three weeks or a month, the work would not be done. His men are unpaid—at all events, the greater part of them—and it is a serious question for the Government to consider whether they will allow the present state of things to

continue. Now, under the 23rd section of the contract between the parties, if the engineer should at any time consider that the works, or any of them, are not being executed with due diligence and despatch, then he may call upon the contractors to make additions to the engineers, agents, inspectors, foremen, or workmen employed, or to the amount of plant or material, or such change in their character, either until the completion of all or any of the works, or for a limited period, as the engineer may think necessary, and shall by notice require. It is clear from the evidence that the works have not been executed with due diligence and despatch, and that notice has been given to the respondent in terms of the 23rd section. That notice has not been complied with. The time, no doubt, was short, but any longer time, I am satisfied, would not have induced the respondent to do the work, and I think therefore an order should be made. But the order should not be made in terms of the notice of motion. The order made should strictly follow the terms of the 24th section, of whatever value it may be. I think the Government may seriously consider whether it would not be better to proceed under the 52nd section. But they are entitled to proceed under the 23rd or 24th sections if they chose, and the Court will therefore make an order authorising the engineer employed by the applicant to remove the engineers, agents, inspectors, foremen, workmen, beasts, plant, or materials complained of, and at the cost of the contractors to employ such other engineers, etc., as he may think necessary. I think the respondent must pay the costs.

Mr. Schreiner asked if the Court would not grant the interdict asked for in the concluding portion of the motion.

The Chief Justice: Is there any danger that they might interfere? The Court will not grant an interdict unless there is some reason for thinking they will interfere. We cannot suppose that they will disobey the order of the Court.

Mr. Schreiner said he would be satisfied with the expression of opinion from the Court.

Buchanan, J.: I fully concur in what His Lordship the Chief Justice has said, and I strongly endorse the suggestion that has been thrown out for the

further consideration of the Government as to whether this is the best course for them to pursue. However, that is a matter of policy for them to consider; but probably they would be in a very much better position if they acted upon the suggestion thrown out.

Maasdorp, J., concurred.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

SEALE V. SEALE. { 1902.
May 12th.

This was an action for divorce instituted by the wife. The case originally came before the Court on the 2nd May, when it was adjourned, in order that there should be further evidence as to the misconduct of the husband.

Mr. C. de Villiers for plaintiff; defendant was in default.

Christine Isabel Seale, wife of the defendant's brother, was called, and gave evidence as to the misconduct of the defendant.

A decree of divorce was granted, with custody of the minor child. Defendant was ordered to contribute £3 a month towards the maintenance of the child, with costs.

CARTER V. HOWES BROTHERS AND CO.

On the motion of Mr. Searle, K.C., leave was granted plaintiff to attach 200 cases of butter to found jurisdiction subject to any rights which a third party might have. Leave was also granted to sue by edictal citation, the same being returnable on the 1st August.

RAYNER V. MUTZENBACH. { 1902.
May 12th.

Contract—Ejectment—Claim in Reconviction.

This was an action to recover rent due and for an order of ejectment of the defaulting tenant. The plaintiff was the owner of certain premises situated in Hanover-street, and leased at £6 10s. a month to the defendant. The plaintiff alleged that the defendant owed four months' rent, and he sued to recover £26, and also asked for an order of ejectment against the defendant. The defendant in his plea admitted that he was a tenant of the house, but said that he was a tenant not of the plaintiff, but

of a partnership in which he and the plaintiff were partners. The defendant also said that the rent was £6, and not £6 10s. He admitted liability to the partnership—a partnership which the plaintiff denied to exist. That being so, the defendant refused to pay the plaintiff because he set up a claim against the plaintiff in reconvention. He contended that he and the defendant entered into a partnership for various building ventures, and in reconvention he claimed an order that the plaintiff should be called upon to give him a full account of the partnership transactions, and he also demanded £1,000 damages. The plaintiff admitted a partnership in regard to the building of a house at the corner of Hanover and Rutger streets for one Sass, but said that a settlement had been arrived at in regard to this, and the defendant was paid. He denied any partnership in regard to any other transactions as alleged by the defendant, which, he said, were carried out on his own account.

Mr. Schreiner, K.C. (with him Mr. Currey), for defendant; Sir H. Juta, K.C. (with him Mr. Benjamin), for defendant.

Nathan Rayner, builder, said he knew defendant at Johannesburg. Witness saw him in March, 1900, in Cape Town. He asked witness to give him a chance if he had any plans to draw. He drew witness a plan for certain property. There was a contract dated 18th September, 1900, between witness and defendant on one side and Sass on the other side to build a house in Hanover-street. There was no written agreement between witness and defendant in respect of that contract. Defendant agreed to put in £80 or £90, but on the contract being signed he declined to pay any money. Witness advanced all the money for the job. Witness gave defendant certain sums while the work was proceeding. They both supervised the work, and witness received the money from Sass. There was a contract for a second house for Sass, but that was abandoned. Witness paid defendant £141 18s. 3d. (by cheque) for his share of the profits under the Sass contract, and for drawing four sets of plans. Meanwhile witness had purchased a property in Eckardt, Cowling and Combrinck streets for the

purpose of carrying on building operations. Defendant had nothing to do with that property. Defendant drew up plans for the buildings which witness put up in Eckardt-street. Witness paid defendant £18 for this, and engaged him as foreman. He continued in witness's employ as foreman of this and Hanover-street property work until the 20th October, 1901. Witness paid him £18 a month. There was never any statement on his part that he was interested as a partner in the matters. Witness bought property in Hanover-street in December, 1900. There was no contract of partnership in respect of this. Witness put up buildings on this Hanover-street property on plans prepared by defendant, and paid for by witness. These buildings were called "York Buildings." In one of the houses there defendant was now living. He agreed to pay witness rent at the rate of £6 10s. a month. Witness had entries in books (produced) for rent received from defendant, who came into the house on the 1st September. Witness dismissed the defendant on the 12th October. Up to that time he had been working as witness's foreman. Witness paid him wages weekly. When witness dismissed defendant the latter assaulted him, and said he could not turn him out, as there was iron there from Sass's building. Witness had given defendant a cheque for £20 for iron which had been brought from Sass's building. Witness had sold the Eckardt-street property, but still had the Hanover-street buildings. The transaction had been a profitable one. Witness sued defendant in the Magistrate's Court for rent, and an ejectment order, but defendant took the exception that he had a right, and witness had to come to this Court.

Cross-examined: Mutzenbach kept all the books connected with the Sass building. Witness returned from England on October 10, 1899, and began business about six or nine months after that. He had done work before January, 1900, but he kept no books in regard to that work. He did not propose to go into a partnership with Mutzenbach in the matter of some land at Salt River. All he did was to ask Mutzenbach to survey the ground and draw up plans. Witness did not know if the plans were prepared, and he knew nothing about their being shown

in Messrs. Fairbridge and Arderne's office with the object of raising money to purchase the land. As to Mr. Miller's property, defendant said he had bought the ground, but could not get it owing to some condition, and witness only went with him to Mr. Van der Byl to explain matters. Witness did not remember saying anything about the land being transferred into their joint names. Witness ordered the goods both for the Sass and Eckhardt buildings. The goods were on the same invoice, but Mutzenbach kept a separate account of everything that went into the Sass building. Mrs. Mutzenbach never spoke to witness about the partnership. Witness did not remember Mutzenbach warning him, at the time they had the row, not to do away with the books of the partnership. The old material from Sass's building witness used in the Eckhardt-street building, and perhaps he had used some of it in the Hanover-street building. He had bought all the old material, paying for it by the £20 cheque. Defendant himself had valued that old material. The cheque was not given by witness to defendant in connection with the various building transactions.

Re-examined: The Salt River land was never bought. He met the owner there, but they could not come to terms.

By the Court: Sass's building was just opposite the property witness first put up for himself. It was not on an adjoining piece of ground.

Mr. Schreiner said that was all the evidence he had on the claim in convention, and he submitted that defendant should now proceed with his claim in reconvention after which he (Mr. Schreiner) could call his witness on that claim.

Sir Henry Juta said that except in a case of libel, where justification was pleaded, he had never heard of the procedure Mr. Schreiner proposed being adopted.

Buchanan, J., said that the onus of proof of the partnership was now on defendant, the plaintiff having denied the partnership.

Gustav Mutzenbach, the defendant, said that in 1900 he had business relations with plaintiff, whom he had known before. They had negotiations

in regard to some land at Salt River, which they proposed to buy, build upon, and then sell. Witness prepared the plans, and he and plaintiff together with the owner of the land, went to Mr. Arderne to try to raise the necessary money. They were not successful, and that transaction dropped. The next transaction they had together was in regard to some land in Hanover-street. Witness prepared the plans for plaintiff's own house, but he had no interest in that. Then witness took on the contract to build for Sass. As to the Eckhardt-street property, that was a partnership undertaking, he and plaintiff having agreed together to buy the land, and witness drew up the plans and submitted them to plaintiff. The buildings in Eckhardt-street were begun about six weeks later than Sass's buildings, which were begun in October, and which were finished in the beginning of January. Witness looked after both buildings all day, and kept the wages book. He kept the book produced. Witness started keeping a "proper" book, which was afterwards taken over to plaintiff's place, where witness used to go on Sundays and write the books up. Week by week witness drew the same money as plaintiff. Witness and Rayner used to meet at the latter's house at night to make up the accounts of Sass's and Eckhardt-street buildings. The Hanover-street buildings commenced in about May or June. Witness made the same agreement with Rayner in regard to that. After a bond had been raised on this property, there was about £250 for each of them to find. Witness left his profits on the Sass building to pay his part of this £500. On the 12th October last (when plaintiff alleged he gave witness notice), there was a row, and plaintiff said, "I am the boss." Witness said, "I say in the presence of these men (there were several persons there), do not destroy the books. They are my only proof." Witness had a lot of materials on Sass's building, and these were used in the Hanover-street buildings. Some old material, worth about £30, was bought from Sass and used in the Eckhardt-street premises.

Cross-examined by Mr. Schreiner: The Sass contract witness signed. Two other contracts were in Rayner's name. Witness did not agree to contribute any money towards the Sass contract. Wit-

ness's contribution to the contracts was represented by the value of his experience. Plaintiff did not have much experience.

Henry Sass, called by Mr. Benjamin, said that while he and plaintiff were negotiating in respect of some materials, Raner told him that he and Mutzenbach were partners in the buildings, but not in the ground, which he said was his own property.

Hannah Mutzenbach, wife of the defendant, said she remembered a particular day in May last year, when her husband and Raner came to the house together. Witness heard them talking together, and in her presence her husband told Raner that the thing must be brought to a settlement. The Sass contract and the Combrinck-street building were then finished. Raner asked defendant whether he could not trust him, and said he would sign any of the papers in "our business." Mutzenbach said that what he wanted was to work in both their names. Raner would not agree to that, stating as a reason that Mutzenbach had debts. Raner had told witness that Mutzenbach was his partner, and witness had introduced him to people as her husband's partner.

Cross-examined by Mr. Schreiner: Mutzenbach was also a partner in the William-street property. Witness was quite as sure of this as that he was a partner in the Eckardt-street buildings.

Daniel Bresler said he remembered a row between plaintiff and defendant in October. Witness was working on the Hanover-street building at the time. He had been working for Raner and Mutzenbach for 2½ years. After the row was over, witness heard Mutzenbach say to Raner, "Don't destroy my books."

Cross-examined by Mr. Schreiner: Rayner told Mutzenbach to go, and the latter said, "You can't chuck me out; I am a partner." Before the row Rayner said to witness and other men that he had told Mutzenbach to go, and that he did not like him any more as foreman. That caused the row.

Re-examined: When Mutzenbach said he was a partner, Raner said he was not. Mutzenbach replied that he would show that he was, and told Raner not to destroy the books.

Nathan Raner, the plaintiff, was recalled by Mr. Schreiner, and denied the allegation of Sass that he said he was in

partnership with Mutzenbach. He might have made reference to the partnership in regard to the contract with Sass. The witness also denied the evidence of Mrs. Mutzenbach as to his saying defendant was a partner. No such conversation as that stated by Mrs. Mutzenbach to have taken place ever occurred.

Cross-examined by Mr. Benjamin: He did not remember having spoken to Mrs. Mutzenbach about partnership, but he might have referred to the partnership in the Sass contract.

Mr. Benjamin was then heard in argument on the facts of the case.

Buchanan, J.: The plaintiff in this action sues to recover rent from the 1st October to the 31st January last, at the rate of £6 10s. a month, a sum of £26 in all. The plaintiff is the registered owner of the property in which the defendant lives, and the defendant admits that he owes the rent for this period, but at the rate of £6, and not £6 10s. a month. The defendant's objection to pay to the plaintiff the rent sued for and to give up possession is based on his claim in reconvention. If his claim in reconvention is substantial, then the plaintiff is not entitled to judgment in convention; if his claim in reconvention is not substantiated, then the claim in convention must be allowed. In reconvention the defendant alleges that the plaintiff and he were in partnership, to share equally any profits or loss arising from certain specific ventures. In the first place, it may be remarked that it was not a general partnership, but a partnership which is set up, only in certain specific ventures. The defendant admits that while these ventures were going on he was earning other money from other work. It is therefore a partnership confined to specific ventures. These ventures are alleged to be three. The first is the building of a house for one Sass, the second is the profits to be derived from the purchase of the Eckardt-street property and the erection of buildings thereon, and the third is the profits to be gained by the purchase of a property known as the Hanover-street property. It appears from the documents put in that the plaintiff had employed the defendant as a contractor, and had entered into a specific contract with the defendant to erect certain buildings for

him in Horstley-street and Blythe-street. This was in May, 1900. The work was performed, and is not part of this case, but the documents are useful, as showing that it was the practice of the parties not to go and make mere verbal agreements, but to make written contracts for their transactions. When this Blythe-street work was completed a second contract in writing was entered into, by which the plaintiff and defendant, as contractors, agreed to build certain premises for Sass, as proprietor. There is no dispute as to the claim on this contract by plaintiff and defendant, for the house was built jointly by them as joint contractors. As to the profits which arose from this transaction, there is also no dispute. The evidence agrees that the profits were about £140. On Sass's contract there were certain extras added, and they caused some dispute and a delay in obtaining a settlement, and, though the building was finished in January, the final payment in settlement of the account was made only some time about the middle of the year or a little later. The plaintiff produces a cheque which he gave to the defendant on the 17th September, and says that this cheque was made up as he alleges of half of the profits from Sass's contract, and also a payment of £72 for four plans at £18 each, which he engaged the defendant to make. The defendant, as far as I can understand, while agreeing that this cheque did include the profits from Sass's business, said that at the time it was given the Combrinck-street buildings had been erected, and they had considered the profits from it and Sass's at £783, and the cheque of £141 was simply the balance left after deducting £500, each partner leaving £250 in the venture, being the estimated amount of what the other buildings would cost. A most complicated transaction, very difficult to follow and very difficult to understand. The defendant Mutzenbach admits that the cheque included Sass's profits. We may therefore take it that the building of the house for Sass is out of this question, the profits having been paid. To come to the other claims in reconvention, the Eckardt-street and the Hanover-street properties may be taken together. It is a singular thing that though before this transaction was entered into when the defendant had at-

tempted to buy some property, which he wanted plaintiff to join with him in the speculation, they told the attorney—Vander Byl—that the property was to be put in their joint names. That purchase did not go through, but when they came to the Eckardt and Hanover street properties, the plaintiff put those in his own name and received transfer, and no dispute or objection has been raised to this by the defendant at any time. Moreover the plaintiff alone became responsible for the money raised on bond for building purposes. The defendant did not enter into any liability in reference either to the purchase of the property or the loans raised thereon. In connection with the Eckardt and Hanover streets properties we have, further, certain contracts in the handwriting of the defendant, and in these very contracts without any explained reason, if the defendant was a joint partner, we find the defendant himself writing that the different contractors agreed to do carpenters' and other work for the plaintiff as owner, and no mention whatever is made of Mutzenbach as having anything to do with the property. The defendant not only wrote these contracts, but actually signed as witness to the signatures of the parties. Here, then, we have strong corroborative evidence that the property in Eckhardt and Hanover streets were bought by plaintiff on his own account, and that the buildings thereon were erected by him on his own account. In the absence of any written document to the contrary, we find it impossible to hold that the defendant has proved there was any contract between the parties that they were to buy the properties and erect buildings thereon in partnership and as a joint venture. There is not a tittle of written evidence to support the defendant's case, beyond the curious entry made by him in the small passbook put in. There are no figures or items given upon which the Court can trace any foundation for the entries therein made. It was simply a time-book. On the whole, the Court is forced to the conclusion that the defendant has failed to prove his claim in reconvention. Judgment therefore will be given for plaintiff in convention. As to the difference of £2, that is trifling, but if we have to consider this, there is a receipt, which shows that the rent was £6 10s., the plaintiff produces a counter,

foil of this, and when we look at plaintiff's private book, we find an entry of £6 10s. for the first month's rent received from defendant. Judgment will therefore be given for four months' rent at the rate of £6 10s. a month, making £26. As plaintiff is the owner of this property and has given due notice to defendant to leave, the defendant must give up possession. Judgment will be given in convention for plaintiff as prayed, with costs, and judgment on the claim in reconvention for defendant in reconvention, with costs.

The Court ordered defendant to give up possession by the end of the month, defendant agreeing to pay the rent for the month.

[Plaintiff's Attorney: J. J. Michau;
Defendant's Attorney: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY
and a Jury.]

STANDARD BANK V. THOMPSON AND OTHERS. { 1902.
May 13th.

This was an action for the recovery of an amount due on a balance of account, with a claim in reconvention by the defendant.

The action was brought by The Standard Bank against Mr. Thompson, lately a member of the firm of Thompson, Ratcliffe and Co., and now carrying on business on his own account in Cape Town as W. Thompson and Co., to recover the sum of £104 11s. 9d. as the balance of an account. The declaration stated that in August, 1899, the defendant Thompson entered into an agreement with the bank, whereunder the bank agreed to allow him banking facilities up to £4,000 on condition that he pledged to them certain rice that he was importing into this country. An ordinary bank's pledge form was entered into with regard to this transaction. The late Mr. Alex-

ander Mair, whose executors were also sued, was surety and co-principal debtor in this transaction for Thompson. Mr. Mair's executors did not enter appearance, and submitted to the judgment of the Court. The declaration went on to state that this transaction went through, and in December, 1900, the overdraft of Thompson was £1,205. The rice came to East London, being imported by Thompson, and portions were sold off, the overdraft was reduced, and £1,205 remained due in December, 1900. Thompson had been pressed by the bank for many months, time after time, to settle up the matter and sell the rice, and although the bank had the power to sell under the ordinary pledge form, it did not care to exercise that without Thompson's consent. After waiting a long time, the bank took judgment against him for £1,205. At that time there were 3,699 bags of rice at East London. These were sold with the defendant's consent. It was found that there was no good market at East London, and the rice had to be brought round to Cape Town. Thompson was quite willing that it should be brought round. The rice was sold to Messrs. Liberman and Buirski at 8s. 6d. a bag. After deduction of all expenses there remained a debit balance against Thompson of £164 15s. due to the bank. The defendant made objections to certain small charges for interest, etc., and he said that the account should stand at £104. There was, therefore, at that time a difference of £60 between the parties. The defendant also raised a further question. He drew a cheque on November 14 for £30 in favour of one Seale, and the bank dishonoured that cheque. There appeared to have been a mistake. The defendant had paid a certain bill into the bank which should have been credited to him. The matter was at once rectified. Seale paid the cheque into the African Banking Corporation, and it was presented to the Standard Bank, where it was dishonoured. Upon the same day the clerk who had made the mistake explained the matter, and the next day the matter was set right, and the cheque was paid into the bank. Many months after this Thompson claimed £500 damages for this. Then there was some correspondence on the matter, and the bank said that in order to satisfy the defendant they were willing to reduce their

claim to what he said it ought to be—£104. The plaintiffs, therefore, claimed £104 11s. 9d.

The defendant in his plea said that he did not consent to the sale of the rice in Cape Town, but only consented to it being sold at East London at the ruling market price, and he said the ruling market price there was 10s. 3d. He denied that the plaintiffs were entitled to deduct the expenses of bringing the rice round to Cape Town, and he said there remained due to him from the bank in respect of this sale, after the satisfaction of the judgment and costs, an amount of £85 14s. 9d. The defendant made another claim for damages, being the difference between what the rice was actually sold for at Cape Town, and what it might have been sold for at East London. He claimed £321 13s. in respect of this, and he further claimed £500 damages in respect of the dishonoured cheque.

The plaintiff's replication to the plea was general.

As to the claim in reconvention, the bank (defendant in reconvention) denied that the said bags of rice were wrongfully and unlawfully sold at Cape Town, instead of East London, and also that the plaintiff in reconvention sustained any damage by their being so sold. It admits that a cheque for £30 was dishonoured by the bank, when there were funds belonging to plaintiff in reconvention in the said bank available to meet the same, but says that it is willing on that account to reduce its claim from £164 15s. 10d. to the amount now claimed, in order to compensate the plaintiff in reconvention for any loss he may have sustained in connection with such dishonour, and to settle any small items of account in dispute; but it does not admit that he has sustained loss to the extent of the difference between £164 15s. 10d. and the sum now claimed, or that he has sustained any substantial loss by reason of the dishonour of the said cheque.

The rejoinder and replication in reconvention were general.

Mr. Searle, K.C. (with him Mr. Gardiner) for the plaintiffs; Mr. Upington (with him Mr. C. de Villiers) for defendants.

John Whitfield Harsant said he was at present assistant general manager

of the Standard Bank, but at the time of this transaction he was manager of the Cape Town branch of the bank. In January, 1899, a pledge form was entered into, and in July a fresh guarantee was signed. Under this pledge form the bank issued to defendant certain letters of credit against the purchase of certain rice. The amount due by defendant to the bank was reduced from time to time by the sale of the rice, which defendant had at different ports, including East London and Port Elizabeth. From time to time witness pressed defendant to settle up the transaction. There were a number of letters to that effect. Defendant had two accounts at the bank, viz., his ordinary account and a No. 2 account, which dealt with the rice transaction. As the rice was sold the proceeds were paid in to the No. 2 account. From June 30 to December 31, 1900, no reduction was made in that account, and on the latter date it stood at £1,205 9s. 9d. due by defendant to the bank. Witness had also numerous interviews with defendant, and urged him to settle as soon as possible. Witness urged defendant to sell the rice, but he objected. On December 12, 1900, the bank sued defendant in the Supreme Court for £1,205, and recovered judgment for that amount with interest against him. Witness had taken considerable trouble in trying to get offers for this rice. The object of getting judgment against Thompson and Co. was to enable them to force him to sell the rice. The offers they had received for the rice they had submitted to Thompson before they got judgment against him. The rice had, at Mr. Thompson's suggestion, been offered to the military authorities, but they refused it.

At this stage counsel put in a mass of correspondence, which had passed between the bank and defendant, and also between the attorneys in the case. Counsel read a number of extracts from these letters to show that defendant was cognisant throughout of the steps taken to sell the rice, and also to show that the bank had reason to believe that the rice was weevily, and that it was advisable to dispose of it without delay.

Examined on these letters, witness said there had been negotiations for the sale of rice in Cape Town long before it was actually sold here. Efforts had been made to sell the rice in Kimberley,

Port Elizabeth, and Cape Town. A reduction had been made in the interest, and defendant credited with the amount. All the steps taken to sell the rice were taken with the full knowledge and consent of the defendant. There was a question about the rice being affected by weevils. On February 18, 1901, defendant asked that the sale of the rice should be put in the hands of Mr. Brasch, a broker in Cape Town. As a matter of fact, Mr. Brasch eventually sold the rice. In a letter defendant intimated his willingness to accept Liberman and Buirski's offer of 8s. 6d. a bag net cash on a three months' bill at 8s. 6d., but said that he wished to have the arrangement of the freight left in his hands, as he might make something out of it. That letter was endorsed, "Approved and agreed to on behalf of Mair by his agent Riches." The terms of that letter were actually carried out, Liberman and Buirski buying the rice at 8s. 6d. a bag on a three months' bill. Proceeding, witness deposed as to the arrangements ultimately made for the delivery of the rice here. There was some question about a shortage, and the East London people allowed for this 10s. 3d. a pocket. That, however, Baker, King's people would show was not the market price of the rice at East London at the time, that having been the price at which it was insured when they received it for defendant. In the letter of March 23 defendant raised for the first time the question that the rice should have been sold at East London. Witness sent defendant an account showing a balance due by him of £117 odd, and defendant wrote back saying that that was incorrect, as there was an amount of £12 10s. 8d. for which he was not liable. This was an allowance they had made Liberman and Buirski for shortage. Defendant said that the East London people who had stored the rice had to account for that, and therefore it could not be charged against him, and that the correct account was £104 11s. 9d. The bank then sent him in an account for £104 11s. 9d. The account which should have been rendered in place of the one for £117 odd should have been for £164 15s., and the bank had forgotten to add the interest from December and certain items connected with the obtaining of judgment against defendant. Witness put in an account

showing the correct amounts. Defendant had asked witness to allow him to go to East London and sell the rice.

Cross-examined: Judgment might have been obtained on January 12, and not December 12. Witness had had a stormy interview with Thompson. Witness wished to force the sale of the rice, and he would not give his consent to Thompson going to East London to sell the rice and the silk. Mr. Thompson was most rude and insulting, and witness might have used strong language too. At that time there was a considerable amount of apprehension in witness's mind as to the condition of the rice, and he considered that it was dangerous to keep it longer, as there were weevils in it. He did not inspect the rice when it arrived here, and did not know whether or not it was weevily. He was under the impression that Liberman and Buirski told him there were a few weevils. Throughout the correspondence, they had made a considerable point of the weevils. Cross-examined as to the dishonoured cheque, witness said he did not think defendant could have suffered any damage on account of that, because it was only known to two parties—Mr. Seale and the African Banking Corporation. The bank itself would not disclose an affair of that kind.

David John Griffiths, manager in the firm of Baker, King and Co., at East London, said that a considerable quantity of the rice was stored in bond in witness's firm's stores. There were 3,999 bags stored, of which 300 were sold. The balance was shipped to Cape Town in February. From June to August the rice arrived, and it was stored in Baker, King and Co.'s stores, until shipped in February. Some of the rice the firm condemned, and would not allow it to be taken into the bonded store, for fear it would damage the other goods there. This amounted to about 2,000 bags. These were stored in duty-paid sheds. The other rice also had weevils, but was not so badly affected. Witness made reports to the Standard Bank from time to time about the condition of the rice. In February and March, 1901, there was no market in East London at all; they had no Indian community there. At a forced sale, it might have fetched from 5s. to 6s. They had to re-bag from 100 to 200 pockets. Witness

considered there would be some waste—siltage—in handling the bags in shipping to Cape Town. He thought £12 was a reasonable amount for shortage for delivery here. When handed over to witness, the rice was insured at 10s. 3d. a bag. They paid on this rate for the 23 bags short. A certain amount of shortage would be expected when the rice was kept such a time. The price realised at Cape Town at 8s. 6d. was very good.

Cross-examined by Mr. Upington: Witness saw the weevils running about outside the bags. The ship's agent refused to take the stuff after examining it. Witness did not speak to the ship's agent about there being weevils. It was not on witness's instructions that the mate's certificate was endorsed "badly damaged by weevils." There was no market for any large quantity of rice at East London at that time, even if the rice were good.

Abraham Liberman, of Liberman and Buirski, said his firm purchased the rice in February, 1901, at 8s. 6d., as per broker's note. Fifty bags were sent as samples, and the rest was up to sample. The price was a very fair one. The rice was slightly weevily. They examined a part of each shipment, and considered that there were weevils in the whole lot. The weevils could not be seen. If the rice had been kept longer in that condition and in that season witness considered it would have deteriorated.

Cross-examined by Mr. Upington: Witness sold some of the rice for 9s. 3½d. per pocket. There was 5 per cent. discount off this. Witness's firm did not handle the rice so sold. Other bags were sold at prices up to 9s. 9d. per bag. Witness would not say the rice was full of weevils.

Re-examined by Mr. Searle: Witness's firm, broadly speaking, made about 5 per cent. profit.

Cecil White Harry, bill clerk to the Standard Bank, Cape Town in November, 1900, said that shortly before the 14th November there was a bill for about £70 drawn on Thompson by a firm in India in connection with goods imported by Thompson. After acceptance the documents were retained by the bank, and then Thompson attached the bills of lading for certain drafts and drew drafts on customers of his. As these bills were paid they were retained

by the bank for a special account, and the documents sent to the purchasers of the goods. When these bills were made Thompson tendered his cheque for the original draft on the understanding that the proceeds of the three bills paid by his customers was transferred from the special account to his ordinary account. When the bills were paid witness placed two to his credit. In one case an amount of about £23 from Oliver's, of Kimberley, was not credited when it came in through an error of witness's. It might not have been credited for a week or ten days. It was placed to the special account and overlooked. On November 14 a cheque for £30 was drawn and presented, but was dishonoured. On the 15th Thompson came to witness and complained. Witness then discovered the omission to place the amount from Oliver to defendant's credit, and called on Mr. Seale and explained the matter. The cheque was in favour of Seale. Witness also called on the African Banking Corporation (Mr. Seale's bankers), and explained the matter to the accountant. Later on the same day Thompson came to the bank, and witness explained to him what he had done. Witness said that Seale and the African Banking Corporation were satisfied. Thompson appeared satisfied.

Cross-examined by Mr. Upington: The cheque came to witness's department in the course of business, and witness dishonoured it. It came in through the A.B.C. Witness had no funds, and passed it on. The action of passing the cheque on would mean that there were no funds to meet it. It may have been presented twice. At that time there were funds, and it was through an error on witness's part that it was not paid. Witness did not mark the cheque. He would not recognise the cheque. The ledger-keeper would mark the cheque.

Henry Francis Seale, jeweller, Cape Town, said that on the 14th November, 1900, Thompson paid witness a cheque for £30 for rent. Witness paid the cheque into the African Banking Corporation on the 14th, and early on the morning of the 15th it was returned through the African Banking Corporation. Witness instructed his book-keeper to advise Mr. Thompson that the cheque had been returned. A short time after that the last witness came, and

explained the circumstances to witness. On the same day Thompson came in and showed witness his bank book, saying he had funds. Witness was satisfied. The affair did not injure Thompson's credit in witness's eyes. Witness knew nothing about the cheque having been twice dishonoured. Witness put the cheque through his bankers afterwards, and it was cashed.

Cross-examined by Mr. Upington: Witness did not tell Mr. Thompson that the cheque was twice dishonoured. There was a law-suit pending between witness and Thompson. Witness had had considerable trouble with Mr. Thompson about the lease. There was not a good deal of personal feeling between witness and Thompson. Witness had had to protect himself.

Alexander Lipp, sub-manager of the African Banking Corporation, said that in November, 1900, he was an accountant in that bank. On the morning of November 15, 1900, Mr. Thompson came to witness in an excited state, and complained about some cheque of his being dishonoured. Witness told him that until he spoke of it he was not aware of the dishonouring of the cheque. Although witness signed this returned cheque, he did so as a matter of form, and took so little notice of the name that it escaped him. This incident did not affect witness's mind with regard to Thompson's credit.

Mr. Searle closed his case.

Mr. Upington called

William Thompson, the defendant in the action, who said he was a general commission agent, and at the time of this dispute carried on business as Thompson, Ratcliffe and Co. Witness had dealt with the Standard Bank since 1875. In 1898 witness entered into this rice business. The Standard Bank undertook to issue witness the necessary letters of credit, and the late Mr. Mair became guarantor for witness for £4,000. The first shipment of rice came to hand towards the end of January, 1899. Then they came in monthly, and the first three shipments were sold as they arrived. Then the market became restricted, and the rice accumulated at East London. In December, 1900, after realising shipments to Port Elizabeth and Cape Town, there was an overdraft at the bank of £1,205, against which

there was Mair's guarantee, and the rice which had accumulated at East London. From September, 1899, onwards, the bank began to press witness, and witness disposed of the Port Elizabeth stock. In regard to the pockets of rice at East London, witness did not willingly consent to the rice being brought round to Cape Town, but the threat of selling it at a sacrifice by public auction was held over his head. Then the bank told him that the rice was full of weevils, while, as a matter of fact, it was not, as witness could state from personal observation when the rice was brought round here. If witness had known that this rice was sound, and in a marketable condition, he would not have sold at 8s. 6d., had it not been for the bank holding out the threat of selling the rice by public auction, under the judgment. He wanted to go to East London to see the condition of the rice, and try to sell it, but Mr. Harsant would not allow him to go.

[Hopley, J.: But, with your business experience, you know that Mr. Harsant could not prevent you from going?]

Witness: But I understood that, under the judgment, I could not handle the rice. Continuing, witness said he thought an undue pressure had been brought to bear on him to make him consent to the rice being brought to Cape Town from East London. As to the dishonouring of the cheque, when in reality witness had a balance to his credit in the bank, that action of the Standard Bank had injured him in his business. He knew from his own knowledge that the dishonouring of the cheque had become known publicly, and that that had damaged him in his business.

Cross-examined: When witness entered into this rice speculation he never contemplated that the business would have lagged on as it had done. The war had considerably hampered witness in this speculation. Owing to these circumstances, witness was practically in the hands of the bank. Witness knew the rice had been offered to the military and others, but that no sale could be effected. Witness did not want to sell at a loss, and he knew that if he was allowed to hold on it would come out all right. Witness did not think the best price possible had been obtained in Cape Town. It was true that he him-

self had accepted Mr. Brasch as the broker, but before that the bank had offered the rice to B. Lawrence for 8s. 6d., and as that had become known no one would offer a higher price. As to the dishonouring of the cheque, witness repeated that that had injured him in his business, although it was impossible to expect a third party to go into the witness-box and say that.

I cannot get people to come forward and give evidence against the Standard Bank. The dishonouring of the cheque and the taking of judgment against me undoubtedly injured my business. I did not take action against the bank on the dishonoured cheque at once, because that would have made the bank much more severe over the realisation of this rice.

Mr. Searle, K.C. (for plaintiff): This is a very simple case. An account of £164 15s. 10d. against the defendant, taken from the bank's books, has been put in. Mr. Thompson contends that the true amount due is £104, but the whole dispute is about the £12 10s. 8d. claimed in reconvention in respect of the silting and waste of rice from the bags; but why should the bank suffer for this? Then, again, he asserts that the bank said they would not charge interest after January 15, but there is nothing to show this, though they were writing letters by the score. The bank could have sold defendant's rice in execution, but they showed him every indulgence, as he himself admits. That even granting a reduction in the rate of interest, I do not mean to say that in doing this they were actuated by philanthropic motives—a bank naturally wishes to nurse its customers. You can dismiss the £85 from your minds. It is arrived at by taking the £104 odd from £190. As to the cheque for £30, dishonoured in November, the question is: has defendant sustained any serious damage thereby? Then, again, it has been said that Searle and Thompson have a legal dispute. That is perfectly true, but that has nothing to do with this case. I can, of course, understand that a Supreme Court judgment for £1,205 must affect a man's credit, but we are not responsible for that. I would ask you to dismiss this claim in reconvention for £500, which was not made till the 29th of July, and I ask for judgment in favour of the bank for £104.

Mr. Upington (for defendant): I should like, first of all, to take the point that the plaintiffs are not entitled to recover the £104 11s. 9d. on the grounds stated in paragraph 5 of their declaration. A judgment of this Court was taken out in December, 1900, for a larger sum, and they cannot now come to the Court and ask for judgment for a portion of the amount which was then given. That could only be done if they had attempted to execute the former judgment, and the Sheriff had made a return of *nulla bona*.

[Hopley, J.: That exception should have been taken before. The judgment may have been novated at a certain stage in these proceedings; but what do you say, Mr. Searle?]

Mr. Searle: It may be that our plea in reconvention is not quite correct, but the whole thing is a pure technicality.

Mr. Upington (continuing): If the plaintiff were now allowed to amend his declaration, the whole course of our action would be changed. I submit that we can raise this objection now, and were not bound to except. In no case should this amendment be allowed.

Mr. Searle: I apply to have the words, "there is still due by the first defendant, £164 15s. 10d." struck out.

Mr. Upington opposed the application.

[Hopley, J.: I think that the amendment should be allowed. It would not be fair to bring parties into court and then to throw out the whole case on a technicality like this. The amendment cannot prejudice defendant on the merits.]

Mr. Upington (continuing): My previous remarks sufficiently dispose of the claim of £464, and now, after reducing this to £104, plaintiffs cannot claim the larger sum. People cannot be heard to say in an indefinite way, "we will reduce our claim to so much, and you ought to be very satisfied, and to pay the reduced sum without a murmur." The accuracy of Thompson's bank-book has never been disputed, and I do not admit that the bank showed him any consideration whatever. But be this as it may, the real question is, whether the bank has taken up any unassailable position? If so, Thompson would clearly have no case. But their position is quite illegal. The manager of the bank complained that the rice was full of weevils. This Thompson denies. Then they pro-

fees to shelter themselves behind their legal position; but the whole correspondence with Thompson shows that they have acted in a most unbusiness-like manner. They first say that he owes them £117, and then they say that there were other items, amounting to £164 odd. As to special damage in respect of the dishonoured cheque, it always damages a trader's credit to have a cheque dishonoured. The matter is sure to leak out. See *Rollin and Another v. Stewart* (2, Weekly Reporter, p. 467). In this case £500 damages were awarded for a dishonoured cheque, though no special damages were proved. A new trial was applied for on the ground of misdirection. It is true that the damages were then reduced to £200, but these damages were substantial. In this case plaintiffs have stood on their legal rights; these rights they have exceeded, and I therefore ask for substantial damages.

Mr. Searle (in reply): I deny that we have exceeded our legal rights. The bank could have had this rice seized by the Sheriff and sold in execution; but we wished to show every consideration. If it was not full of weevils, why does not the defendant come into Court to show that it was in a sound and merchantable condition? As to *Rollin v. Stewart*, the excessive damages were reduced very substantially. See *Goldsmith v. The Bank of Africa* (1 H.C., 53), in which special damage was proved, and yet only £50 damages were awarded. I submit that our tender is ample.

His Lordship directed the jury, who retired, and after an absence of ten minutes returned with a verdict for plaintiff on the claim in convention for £104 11s. 9d., and for defendant (plaintiff in reconvention) for £50 on the third claim in reconvention (that in connection with the dishonoured cheque).

His Lordship: You find for £50 beyond the amount foregone by the plaintiff?

The Foreman: Yes, my lord.

Judgment was entered for plaintiff in convention for £104 11s. 9d., with costs in convention, and in reconvention for defendant for £50 on the third claim in reconvention, with costs, such costs to include one-third of counsels' fees. Judgment was given against the second defendant with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorney: D. Tennant, jun.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice HOPLEY.]

DA COSTA V. DA COSTA. } 1902.
May 14th.

This was an action by Abraham da Costa, a printer, for a divorce from his wife, Abigail da Costa, on the ground of misconduct.

Mr. Alexander, who appeared for plaintiff, said that the respondent, who was now in London, had been served by edictal citation.

The plaintiff stated that he was married to the defendant in December, 1894, at the Spanish and Portuguese Synagogue, Bevis Marks, London. Shortly after the marriage he went to Johannesburg, and his wife followed him shortly afterwards. They lived at Johannesburg until 1897, when a child was born, and the defendant went to London for the benefit of her health. She resided at first with his mother, and afterwards went to live with her own parents. He sold up his home in Johannesburg, and came down to Cape Town in September, 1899. He sold his printing establishment in Johannesburg, and established himself in business in Cape Town as a printer. He corresponded regularly with the defendant until last December. He sent her money for her passage to South Africa, and she should have come by the Scot in September, but never came. He then received a letter from her brother, in consequence of which he instituted these proceedings. Up to this time he had sent his wife money regularly—about £10 a month. The little girl, who was with the mother, was now about five years of age. He had no letters from the defendant. He had destroyed them. The tone of the correspondence was most affectionate and loving, and gave him no suspicion of anything being wrong.

Evidence taken in London on commission as to the misconduct was read.

The Court granted a decree of divorce, and gave the plaintiff the custody of the child of the marriage.

BUCK V. BUCK.

In this case Edward Clark Buck petitioned for a decree of nullity of mar-

riage, alleging that the defendant was already married when he went through the ceremony of marriage with her.

Mr. Benjamin appeared for plaintiff.

Plaintiff said that on July 14, 1898, he went through a form of marriage with the defendant at Perth, Western Australia. She gave the name of Grace Blake Green, and described herself as a spinster. Two or three weeks after marriage they came out to South Africa, and he got employment on the Grand Junction Railways. He afterwards went for a holiday to England, and whilst there he learnt something about his alleged wife. He taxed her with having been married before, and she admitted that there had been a marriage, but said that her husband had divorced her. He then came back to the Colony, and resumed his employment with the Grand Junction Railways. He continued to live with the defendant until he obtained certain information, after which he ceased to live with her. She said she wanted to go to Beaufort West, and he gave her money to go there. She admitted that she had committed bigamy, and that her husband, whose name was George Adams, was still alive. There was one child of the marriage, which died.

The evidence of George Adams, which was taken on commission at Geelong, Australia, was read. He stated that he was married to the defendant in 1884, and she deserted him about August, 1891, and went to Melbourne. The marriage was still in force. The defendant had been sentenced to twelve months' imprisonment for bigamy.

It appeared from the marriage certificates that at the time of the first marriage the defendant was seventeen. Fourteen years later, when she went through the form of marriage with the plaintiff, she gave the age of twenty-four.

The Court pronounced a decree of nullity.

[Before BUCHANAN and HOPLEY, J.J.]

MASTER OF THE "TERESA" { 1902.
V. PURCELL, YALLOP { May 14th.
AND EVERETT. { " 15th.

Freight—Lost Cargo—Demurrage.

The "Teresa" had been chartered to load a certain cargo

for Table Bay. One portion of the said cargo was to be a "deck cargo" and the other was to be carried "between decks." Two-thirds of the rate charged for the latter was to be paid per ton for the former. Half the entire freight was to be paid in cash on signing bills of lading, and the remainder on delivery of the said cargo at Table Bay. In the course of the voyage the deck cargo was lost.

The owners of the "Teresa" now claimed (1) the balance of the freight (including the half for the cargo lost), (2) certain charges for demurrage.

Held, (1) that no claim could be sustained in respect of freight for the cargo lost; (2) that as the custom of the port in respect of the discharge of cargoes of timber had not been sufficiently proved, the Court would grant absolution from the instance in respect of the second claim.

This was an action to recover money alleged to be due: (1) in respect of a certain charter party; (2) of demurrage suffered by plaintiff's vessel in Table Bay.

The plaintiff's declaration was as follows:

1. The plaintiff is Gaetano Mastellone, master of the Italian ship *Teresa*, now in Cape Town Docks; and he sues in this action on behalf of the owner of the said ship; the defendants carry on business in Cape Town as timber merchants.

2. On June 19th, 1901, a charter party was entered into between the agent for the owner of the "*Teresa*" and the agents in London of the defendants for the conveyance in the said ship of a cargo of timber from Mo Umea, in Sweden, to Cape Town.

3. The defendants are the consignees of the cargo and holders of the bills of lading, which incorporated the terms of the said charter party, and the defendants are bound by all the obligations of

the said charter party to which document the plaintiff craves leave to refer when produced.

4. The greater portion of the cargo was stowed below deck; but a certain portion was placed on deck; the freight of the cargo below deck was £4 7s. 6d. per standard hundred; and for the deck cargo $\frac{2}{3}$ of that sum.

5. In accordance with the terms of the charter party half the freight was paid in advance, less 6 per cent. to cover all charges. According to mercantile custom the words "all charges" cover insurance on advanced freight.

6. Bad weather was experienced upon the voyage, and it became necessary for the sake of all concerned to jettison the deck cargo, and this was accordingly done.

7. The defendants refuse to pay the balance of freight, to wit, half freight due on the cargo below deck, contending that they are entitled to deduct from the amount payable by them the amount of half freight advanced on the deck cargo; to wit, the sum of £92 19s. 8d., but the plaintiff claims that such deduction cannot be made, and that he is entitled to recover the sum of £577 19s. 3d., being the full half-freight on the cargo below deck, which cargo has all been delivered to the defendants, less advances made in Cape Town.

8. The said vessel arrived in Table Bay on December 3rd, 1901, but was unable to get into dock on account of the congested state of traffic, until February 22nd, 1902.

9. The charter party provided that the cargo should be discharged as fast as the custom of the port would allow, and ten days on demurrage over and above the said lay days at 4d. per registered ton per day.

10. According to the Harbour Board Regulations and custom of the port, the cargo should have been discharged at the rate of 150 tons per day, and calculating at this rate and allowing for Sundays, holidays, and non-weather working days, as provided for in the charter party, the lay days reckoned from the date of arrival in dock expired on March 22nd, and demurrage commenced to run thereafter.

11. The amount of demurrage due from March 23rd to the date of summons in this suit, reckoned at the rate of 4d. per ton per day is £362 5s. 4d.

12. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the

plaintiff to claim from the defendants payment of the said sum of £577 19s. 3d. for balance of freight, and £362 5s. 4d. for demurrage, but the defendants neglect and refuse to pay the said sums.

The plaintiff claims:—

(a) The sum of £577 19s. 3d., with interest *a tempore morae*.

(b) The sum of £362 5s. 4d., with interest *a tempore morae*.

(c) Alternative relief.

(d) Costs of suit.

To this declaration defendants pleaded as follows:—

1. The defendants admit paragraphs 1, 2, 3, and 4, and they admit paragraph 5, down to the words "all charges," but deny the rest of paragraph 5, and say that according to mercantile custom the words "all charges" cover insurance on advance freight insured for the benefit and on account of the charterers and consignees.

2. As to paragraph 6, the defendants say the cargo was partly jettisoned and partly lost by perils of the sea.

3. Defendants say that they contend that they are entitled to deduct the advance freight paid on deck load not delivered; that they have tendered the plaintiff a statement showing that the balance due to him was £398 0s. 5d. They say that they have paid the plaintiff this sum which in all he is entitled to. Save as above, they deny par. 7.

4. As to pars. 8 and 9, defendants admit the dates alleged, and beg to refer to the charter party, and say that in addition to the provision in par. 9 of the declaration the charter party provided that charterers and consignees were not responsible for delays or demurrage caused by causes beyond their control. They say that the Docks, berths, quays, rate, landing and delivery were all, at the time the vessel was in dock, subject to the jurisdiction, control and regulations of the Harbour Board, and that the cargo in the said ship was discharged in accordance with the said regulations and control and the custom of the port.

They deny that by the Harbour Board regulations and the custom of the port the cargo should have been discharged at the rate of 150 tons. They deny that there was any demurrage; and they say that if the vessel was delayed, or not discharged as quickly as the plaintiff alleges (which the defendants do not admit) it was through causes beyond the

control of the defendants and through no breach of duty or contract on their part.

5. Save as aforesaid, and save that they refuse to pay the sums claimed, defendants deny all the allegations in pars. 8, 9, 10, 11, and 12.

The replication was general.

Mr. Searle, K.C. (with him Mr. Close), for the plaintiff; Sir H. Juta, K.C. (with him Mr. Benjamin), for defendants.

Mr. Close read the evidence of the captain of the *Teresa*, taken on commission. The witness said that he commenced the discharge of the vessel on the 25th February. According to the Harbour Board Regulations the ship was bound to discharge 150 tons a day. It did not do this because the space on the quay was blocked by the timber, which was not being removed fast enough. He had repeatedly complained of this to the defendant. If the cargo had been removed as it was discharged, they could have discharged at the rate of 150 tons a day. The ship finished discharging on the 10th April. For some five or six days he was at a bow berth, where the discharging was slower.

Mr. Searle called

Edwin Alex. Eales, superintendent of the East Quay at the Cape Town Docks, who said the vessel came into dock on the 22nd February. The average discharge was about 80 tons a day. That was without counting holidays and non-working days. The vessel had two side ports. Witness thought the discharge would be easier through side ports than through bow-ports. Most ships used the bow-ports. Through the side-ports the cargo required less handling. The cargo was not taken away so quickly as it should have been. Witness' men sorted the goods where they were landed in front of the ship. That was the usual thing. The timber was taken away with wagons; they did not take it away very fast sometimes. When the timber was not taken away quickly after having been sorted, they could have discharged, perhaps, 100 tons a day. That would be a good day's work, taking the sorting into consideration. The order for sorting was given by the consignees. If the timber had been taken away quickly without being sorted the ship could have discharged, perhaps, 110 tons a day. The total cargo was slightly under 3,000 tons. The *Abner Cobun* and *Teresa Castellano* cargoes were also consigned to defendants, and there was another vessel, the

"Hugo," also at the quay at that time with cargo for defendants. The captain of the "*Teresa*" complained to witness, who went up and saw one of the defendants' clerks. Witness asked him why they did not send the wagons back and why they did not off-load them quickly. The clerk said they were doing their best.

Cross-examined by Sir Henry Juta: The Docks were very congested at the time. Every ship complained of the slowness of the discharge. The Harbour Board delivered the cargo. Witness's complaint to the defendants was that they kept the wagons too long. The cargo had to be sorted; that was the custom. The vessel had no bow-port; and while at bow-berths she would be able to discharge, witness thought, about 50 to 60 tons a day.

By the Court: The cargo could have been discharged more rapidly if trucks had been used. The consignees ordered wagons to be used.

Re-examined by Mr. Searle: The "*Abner Cobun*" discharged about 110 tons a day. There was very little delay by sorting. There was delays some days through the wagons not coming back quickly from Purcell's stores, the timber having consequently to be stacked. The "*Teresa Castellano*" discharged faster than the "*Teresa*." She (the "*Teresa Castellano*") also was discharging timber. The captain sorted most of the timber in the "*Teresa Castellano*" on board.

By the Court: If delivery was to be made to places about town, wagons were used, not trucks.

Sven Linblad, delivery-clerk to the Harbour Board said he had been employed by McKenzies for three or four years prior to the Harbour Board taking over the delivery. Witness made a list of the loads which came away from the "*Teresa*." Some of the cargo was delivered by truck to the railway stores and to the stores of a certain firm. The rest was delivered by wagon. There was delay in getting the wagons back quickly. If there had been no delay in getting the wagons back, and if the timber had not been sorted, witness thought about 50 loads (each load between 2 and 2½ tons) a day could have been delivered. With sorting, about 30 loads could have been delivered. The actual amount delivered averaged 24 loads a day. Witness had been ordered by his superiors to stop delivery in consequence of the

wagons not coming back. While the "Teresa" was being discharged witness had seen wagons—about 20—waiting to be unloaded at the defendants' place.

Cross-examined by Sir Henry Juta: When a man kept a lorry or trailer, demurrage notes were sent, charging the consignees for keeping the wagons. Witness had nothing to do with this. Witness had complained to his superiors on several occasions of not having wagons back.

This closed the evidence for the plaintiffs.

Sir Henry Juta called

George Murray, contractor, who said he made a contract with defendants to receive cargo from the "Teresa." He employed about 70 men. There were three different stores. The quicker they delivered the cargo the better for himself. There was no unnecessary delay in off-loading the timber from the wagons. There was no delay of the wagons at Purcell's store. Witness had been to the Docks on several occasions to see why more timber was not being sent up from the "Teresa." He had spoken to officials at the Docks about it. At one time, when no wagons were coming to the stores from the vessel, witness went down and he then saw timber stacked on the quay.

Christian Degna said he was now in the employ of Small and Morgan, but was for many years previously in the employ of Phillip Bros., who were large importers of timber. It was customary to sort timber in the Docks. The different sorts of boards were divided on the quay. Witness did not know whether timber was sorted for different consignees. Phillip Bros. used to have shipments for themselves alone.

Cross-examined by Mr. Searle: The sorting of the different descriptions of timber did not cause much delay.

Herbert S. Everett, member of the defendant firm, said the cargo of the "Teresa" was imported by his firm. There had been no settlement with the insurance company, and witness offered the captain that if the company paid, they (defendants) would pay the captain. The defendants could have insured for advance freight. Up to the 22nd March, when the firm wrote to defendants concerning the matter, the question of demurrage had not been raised. The defendants had nothing to do with the de-

livery; they could not even take delivery at the Dock-gates. The cargo of the "Teresa" had to be delivered to various places. This, witness considered, expedited the delivery, as, for several persons, there were more wagons. When delivered at different places, more wagons could be dealt with. The sooner the firm had timber, the better it was for them. They had sold a certain amount of the cargo before the ship arrived, and could not get the money until the timber was delivered to the buyers. There was no delay on Murray's part in regard to the off-loading of the wagon. Any ship, witness thought, could discharge faster than it would be possible for the Harbour Board to take away the stuff. The whole system of discharge had been altered since October. There was nothing reasonably within the firm's power to facilitate the discharge left undone. If the firm had detained the Harbour Board wagons, they would have been charged demurrage. The Harbour Board was "pretty smart" about that. No demurrage charge had been made in respect of this timber. If the timber had been left on the quay through the firm's default, they would have been charged rent. No such charge had been levied by the Board. Witness had never heard of a timber vessel discharging 150 tons a day.

Cross-examined by Mr. Searle: There were six vessels in the Dock containing cargoes of timber for witness's firm at the same time the "Teresa" was discharging. The cargoes of two of these ships were delivered to other people, and from one-quarter to three-quarters of the other four ships' cargoes was delivered to the firm's stores. The firm instructed Murray to engage sixty or seventy men. Witness considered this number to be sufficient. It was never brought to witness's notice that the Harbour Board complained of the firm detaining the wagons. The firm was put under great pressure at this time, owing to the large amount of timber they were receiving. They at one time offered to undertake the discharge and delivery of the whole of their timber cargoes, but that the Harbour Board rejected. They did not, however, offer to place any wagons at the Board's disposal on the occasion in question.

Re-examined: All the captains complained of the slow discharge at this port.

Witness never knew a master of a vessel who did not complain of this; it seemed a part of the contract.

Mr. Searle, K.C., for plaintiff: We have two points to consider. (1) The terms of the charter party, and (2) the circumstances under which the vessel was discharged. As to (1) the vessel had deck cargo and cargo below the hatches, but the defendants now say that the whole of the deck cargo having perished, they are entitled to take advantage of the freight we have paid on that. It is true that freight paid in advance cannot be recovered—*Carver* 637, 3rd Edit. They say that though they could not recover they may set off this amount; but see *Scrutton*, 248, Art. 137, and judgment of *Esher, M.R.* (18 Q.B.D. 77) and *Allison v. Bristol Insurance Company* (1 H. L. 209). It has been said that where separate freight has been paid on different portions of the cargo, the portion paid on the lost cargo can be recovered. But much depends upon the terms of the charter party. This case I have alluded to came before Brett, L.J. in C.P. It was taken to Ex. Ch., then to H.L., where there was great difference of opinion among the judges. That case, however, is already distinguishable from this. There, *Esher, M.R.*, pointed out that in this way the owner might get more per ton delivered as freight than he had bargained for. As to the deck goods, it is true the freight is lower, but then the insurance is higher, and defendant is not entitled to be paid for 'tween deck cargo by reckoning in what he had been paid in advance for such cargo. Suppose that two charterers had insured, one for deck cargo and the other for 'tween deck cargo. If half had been paid in advance and half the cargo had been lost, you cannot apportion the insurance. In the case I have mentioned the cargo was a uniform cargo; here it is not. See *Carver*, Sec. 569. Here the deck cargo has been totally lost, so defendants cannot bring what has been paid into consideration.

[Buchanan, J.: The House of Lords was unanimous in *Allison's* case.]

Yes; but the majority of the judges called in to advise their lordships differed from the judgment of the House of Lords. *Esher*, afterwards *M.R.*, was particularly emphatic. This case is not on all fours with that, and therefore that does not bind us. The Court never

decided that all advanced freight could be brought into account if a portion of the cargo in respect of which it had been paid was lost.

As to the second point, the words of the charter party are rather strong. "The ship is to discharge as far as the custom of the port will allow." If the ship had to discharge 150 tons a day she would have discharged by March 22nd. We admit that demurrage ran from April 10th at £27 17s. 4d. a day. As to the circumstances under which the vessel discharged the officials of the Harbour Board had to admit that the vessel was delayed in her discharge, and that this arose from sorting and from detention of the wagons by defendants. But we have nothing to do with neglect on the part of the consignee. In *McAloney v. Spilhaus* (11 Sheil, 509), it was shown that the onus of having shown no negligence was thrown on the consignee. If we once prove the custom of the port, it is for the consignee to disprove negligence. I gather that one defence set up will be that it is the custom of the port to delay delivery, but every custom must be reasonable. The clerk of the Harbour Board admits that 50 wagon loads of goods would have gone away had it not been for the sorting, and that would give from 120 to 150 tons a day.

[Buchanan, J.: Was the ship bow on to the jetty?]

We do not know how long she was allowed to lie bow on. Everett admits that the delay was due to the sorting and not to the fact that the ship was not discharging fast enough. Twenty-three of a crew were at work, and were often kept idle because the consignees could not send wagons fast enough. There was a block of goods in front of the ship, and on two occasions the Harbour Board forbade more cargo to be landed, until that already discharged had been removed. The captain frequently complained to defendants about these delays. The evidence shows that the consignees could have taken much quicker discharge, and it would seem that by the Harbour Board regulations sailing vessels of this class should discharge about 125 tons a day. Instead of that an average of only 80 tons was discharged. It was for defendants to take special precautions in order that the vessel should not be delayed.

[Buchanan, J.: What do you say about the last clause in the charter party, viz.,

that the charterer will not be responsible for delay?]

That point was discussed in *McAloney v. Spilhaus*. Defendants did not use due diligence in taking delivery.

Sir H. Juta, K.C., for defendants: We cannot draw distinctions between the wording of various charter parties. Were we to attempt to do this we should have innumerable distinctions and innumerable cases. But we do not find that English cases make any distinctions of this kind. Freight is only paid on cargo delivered unless a lump sum is paid. We cannot draw distinctions between the wording of charter parties. Freight is only paid on the cargo delivered, unless a lump sum is paid. See *Carrer* (pp. 645 and 646, Sec. 569). *Leggett on Charter parties* (p. 194), after mentioning *Allison v. Bristol Marine Insurance Co.* ((L.B., 1 Apl, c. 209) case says that freight paid in advance cannot be recovered back on account of failure to deliver cargo. *Maude and Pollock* (v. 1, p. 365) quote the same case and refer to it in a foot-note. The only possible distinction is between the payment of a lump sum as freight and the payment on cargo delivered. Take the case of the Union-Castle Co., and suppose they give up a portion of the passenger accommodation on one of their ships to cargo, could they charge higher freight for that particular part of the cargo? In the present case no allocation was made of different parts of the cargo.

A contract of freight is a contract to pay the shipowner for goods carried and delivered. Why, then, should the owner be in a better position because he gets a portion of the freight prepaid?

[Buchanan, J.: Suppose the cargo consists of two kinds of goods?]

Then if two consignees prepay half on each kind, each would lose the half he had prepaid. It may well be that you cannot sue on a pact on which there has been no consideration, but you can set off any payment which has been made. These principles are well established both in our law and in English law. The fact that different goods are carried at different rates does not involve an allocation of various proportions of the freight to different things. As to the demurrage, the history of that part of the case is very simple. The regulations produced were not in force when the captain came in. Under those regulations a ship of

over 1,000 tons had to discharge at least 150 tons a working day.

[Mr. Searle: My copy of the regulations had certain interlineations in pencil from which I read.]

I cannot imagine that counsel's attorneys gave him a set of manufactured regulations. I do not admit that a ship of 1,000 tons was bound to discharge more than 75 tons a day. As to time charters, see *Scrutton* (Art. 131 and 133). He there contrasts time charters, and charters without time. As to demurrage, on what does the applicant base his claim? The captain draws attention to the *Teresa Castelon*, which was docked on February 27 and discharged on March 31st. She had 2,256 tons on board, so she discharged at the rate of 83 tons a day. In the new regulations a distinction is drawn between sailing ships, steamers with timber, and other steamers. According to Sec. 10 of the declaration, and to the port regulations, 150 tons a day ought to have been discharged. The captain says that the lay days expired on March 22nd; but what lay days? There could be no lay days save on the assumption that we were bound to discharge 150 tons a day, and that that is the custom of the port. That is the whole of plaintiff's case. If demurrage is chargeable, from when does it run. If Sundays, wet days, and non-working days are taken into account it is impossible to say when the demurrage began. There is no regulation to the effect that 150 tons a day must be discharged, and no one was called to prove the custom of the port. In case of a time charter, the consignee has to prove his case. In a non-time charter the onus of proving diligence rests on the ship. The Harbour Board has the whole control of discharging and of delivering in town. We cannot sue the Harbour Board for not discharging our ship; we can say nothing till the cargo is over the ship's side; then we might sue for negligent delivery.

[Hopley, J.: Is there any privity of contract between the owner and the Harbour Board?]

There is privity of law. The Harbour Board are the statutory agents of the ship, and they will not allow the public to interfere until six days after the goods have been landed. Again there is no proof that the Harbour Board was negligent. We have nothing to do with discharge; and as to delivery no attempt

has been made to prove negligence on the part of the Harbour Board. What then caused the delay—was it want of wagons, the handling of the goods on the quay, sorting, or discharge over the bows? How can we apportion the demurrage? After plaintiff's counsel gave up the 150 tons, he said there were not sufficient wagons. There was no evidence of delay in sorting the cargo, and not a word of anything of the kind on the pleadings.

Mr. Searle (in reply): As to the freight, see *Weir and Co. v. Girrin and Co.* (Q.B.D., 1899, v. 1, 193). The case was taken to the Court of Appeal (Q.B.D., 1900, v. 1, 45), which affirmed the judgment of the Court below. *Allison's* case was quoted in the Court below by Russell, L.C.J. There a portion of the cargo was destroyed before freight had been paid. I do not agree with the defendant's counsel as to the rationale of advanced freight. See the judgments of Brett, L.J., and of Penzance, L.J., in *Allison's* case (p. 245 of the report). See also *Carrer's* remarks on this case. From what he says in Section 569, he clearly does not think that the principles on which the case was decided should be further extended. They paid half freight on both classes of cargo, but the one part cannot be set off against the other. As to demurrage, we say that it was the custom of the port to discharge 150 tons a day, and we prove that by putting in the Harbour Board regulations. As to the regulations affecting a ship of less than 1,000 tons, these are divided into two classes, viz., timber ships and other ships. The regulations then proceed to provide for ships of over 1,000 tons, and it would be absurd to suppose that they had been forgotten. See *Wright v. New Zealand Shipping Co.* (4 Exc. D., p. 665). This and other cases were discussed in *Hick v. Rodocanachi* (2 Q.B.D., 1891, part 2, p. 626—(see also p. 635). The time taken in removing the goods from the quay showed negligence somewhere, probably on the part of the consignees. When we have once proved the custom of the port, that settles the whole case. See *Carver* (Sec. 614), who quotes *Ashcroft v. Crow Orchard Co.* and *Keuron v. Pearson* (31 L.J., Exc. 1), quoted in *McAloney v. Spilhaus* (11 Sheil, p. 509).

Buchanan, J.: This is an action brought on behalf of the owners of the ship *Teresa*

against the defendants upon a certain charter party entered into on their behalf. Two questions arise under the charter party. One is the claim for balance of freight, and the second is the claim for demurrage. As to the freight, the ship was chartered to load certain timber for Table Bay, Cape Town, at a specified rate per standard for cargo placed below the deck, and two-thirds of that rate for cargo placed above the deck. The cargo placed above the deck was lost on the voyage from Sweden to the Cape, and only the cargo below the deck was delivered. Reckoning the amount of timber put on board the ship at the port of lading the freight according to the bill of lading for the cargo above deck would have been £185 13s. 6d., and the amount for the cargo below deck £3,096 16s. 6d. The charter party contracted that one-half of the freight was to be paid in cash on signing the bills of lading, less a certain percentage to cover charges, and the remainder in cash on right and true delivery of the cargo at the port of discharge. When the vessel came to be discharged, as only the cargo below deck was delivered, the freight earned by the ship on the cargo delivered was £3,096 16s. 6d. The amount of freight already advanced was £1,641, which left a balance of £1,455 16s. 6d. Defendants have now paid the whole of this sum. The plaintiff, however, claims the further sum of £92 16s. 9d., which is equivalent to one-half the freight which would have been due on the deck cargo, had the deck cargo been delivered. The question in dispute between the parties is whether the whole amount of freight advanced at the time of lading can be deducted in settlement of account or whether the amount of the advance must be reduced by one-half of the freight for the deck cargo. The plaintiffs claim that the defendants are not entitled to take the £92 16s. 9d. into account, because advance freight on cargo lost cannot be recovered. Now, it is a settled principle in English law that freight advanced cannot be recovered, but this is not an action to recover freight which has been advanced. The question is one of settlement of accounts between the parties. Plaintiff has earned £3,096. He has been paid an amount in advance of £1,641, and the whole balance of £1,455 has been paid to him, and there is nothing more due by defendant to plaintiff on

the contract to pay freight. That is the way in which I look at the contract between the parties. The technical rule of English law that freight once advanced cannot be recovered does not apply to this case at all. It is simply a settlement of accounts between the parties. The ship earned so much, and it has been paid so much before lading, and she is bound to be paid the balance. The question of insurance does not arise in this case. There is no doubt the owner of the ship could not recover freight which was not "at risk," but he could insure all that had not yet been paid, and if he had done so he would have recovered from the insurers the freight he had lost through the deck cargo being washed away. This was a ship entirely laden for defendants, and the fact that part of the cargo was stowed on deck and part below does not in this case make any difference to the principle which has been laid down. This being so in regard to the first claim, that of freight, plaintiffs must be held to have failed so far in their action, and judgment must be given for the defendants thereon. On the second claim, that for demurrage, the ship began to unload in dock on the 25th of February and finished on the 10th of April. This action, however, was brought on the 4th of April, before the days for demurrage expired. Demurrage is claimed under this clause of the charter party: "the ship to be discharged as fast as the custom of the port will allow." Now what is the custom of the port? The custom of the port at the time the ship had to discharge was for a ship to come into dock, and discharge there under the control and under the guidance of the Harbour Board. What the custom of the port is as to the rate the timber is to be taken out, there is very little evidence indeed. Some evidence is supplied by the regulations of the Harbour Board. On reading these, all one can find applicable to timber ships is that which says that vessels under 1,000 tons gross register shall discharge 75 tons a day. This ship discharged at the rate of about 80 tons per working day, and, consequently, if this regulation applied the custom of the port has been met. The ship was of larger tonnage, but the evidence is not clear whether that would make any difference in the rate of discharge. The authorities cited by Mr. Searle lay down that a condition like this would in a sense become certain if

you could fix the time allowed for discharge by the custom of the port. If there was a hard and fast regulation which required a vessel of this size to discharge 100 tons a day, or 150, or even 200 tons, that might perhaps be taken as the custom of the port. But there is also another point which arises in this case. I don't mean to say that the charters would be altogether absolved, but it might be a question as to whether the delay is the fault of the charterers. The charter party says that the charterers are not answerable for delays occasioned by war or other accidents or causes beyond their control. I am not prepared to say that because it was the Harbour Board who discharged the ship it is a cause altogether beyond the control of the charterers, but still it is a question to be considered. As, however, it is not raised in this action, and as the custom of the port is not conclusively proved, and as the whole of the demurrage claimed is not included in this action, I think judgment on the demurrage claim should be absolution from the instance. On the freight claim, judgment will be for the defendants. On the claim for demurrage, judgment will be given for absolution from the instance, and as the plaintiff has altogether failed in his action he must pay the costs.

Hopley, J., said he was of the same opinion, and for the same reasons.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

ADMISSION.

{ 1902.
May 15th.

Mr. Benjamin moved for the admission of Mr. William Dunbar as an advocate.

Granted.

PROVISIONAL ROLL.

ANDERSON V. WEINTROB.

Mr. Gardiner moved for provisional sentence on a judgment of the Resident Magistrate of Paarl for £75 13s. 3d. (less £25) and £1 12s. 1d. costs, and for certain immovable property to be declared executable.

Granted.

STEYTLER V. BARNARD.

Mr. Rowson moved for provisional sentence for £171, interest on a mortgage bond.

Granted.

PHILLIP BROTHERS V. GRAND JUNCTION RAILWAYS.

Mr. Percy Jones asked for provisional sentence on a bill of exchange for £1,269 2s.

Granted.

REINERS V. GRAND JUNCTION RAILWAYS.

Mr. Upington moved for provisional sentence on a bill of exchange for £417 17s. 3d.

Granted.

HOLT AND HOLT V. GRAND JUNCTION RAILWAYS.

Mr. Upington moved for provisional sentence on a bill of exchange for £908 6s. (less £21 11s. 8d.).

Granted.

SAVAGE V. GRAND JUNCTION RAILWAYS.

Mr. Upington moved for provisional sentence on a bill of exchange for £565 3s. 7d.

Granted.

PROVINCIAL CHURCH V. MARAIS.

Mr. Rowson moved for provisional sentence for £25, interest on a bond.

Granted.

ILLIQUID ROLL.

MAYERS V. SMITH. { 1902.
May 15th.

Mr. Wilford moved for judgment under Rule 329d for £100 (less £34).

Granted.

FOSTER SHORT AND CO. V. WADDELL.

Mr. Wilkinson moved for judgment under Rule 319 for £22 14s. 9d.

Granted.

GARLICK V. BERMAN.

Mr. Buchanan moved for judgment under Rule 329d for £101 15s. 3d., balance of account for goods sold and delivered.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF WM. ARTHUR CURREY.

This was a motion to make absolute a rule nisi authorising the issue of a certificated copy of a certain mortgage bond.

Mr. Close made the application, which was granted.

ESTATE NAUDE V. HALL AND CO.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), appeared to move for an order declaring certain proceedings to be abated.

Mr. Currey, for the respondents, asked for a postponement for a week, as the replying affidavits would not be accepted by the Registrar on the ground that they were not on proper paper.

Mr. Schreiner did not oppose, and the application for postponement was granted.

SALT RIVER CEMENT WORKS { 1902.
V. RABBICK { May 15th

Interdict — Action — Motion —
Costs.

Provisional interdict granted on motion to restrain the lessee of a quarry and sandhill from taking stones from land situated some distance from the quarry, but the respondent alleging that the portion from which he took the stones was within the boundaries pointed out to him by the applicant before the lease was made, the latter, who denied the allegation, was ordered to

bring an action within a limited time, and the question of costs was reserved.

This was an application for an interdict restraining Richard Rabbick from removing certain stone on ground leased by applicants from the Glencairn Estates.

It appeared from the affidavits that the applicants leased to the respondent the right to remove stone from a certain quarry at Glencairn, near Simon's Town, and to remove sand from a sand-hill on the property. The plaintiffs claimed that the respondent was contravening the agreement of lease by removing stones from the surface of the property generally, instead of confining himself to the particular quarry and hill leased to him. The respondent alleged that the boundaries of the property were shown to him when it was leased to him, and he had never removed stone from beyond those boundaries. To this the applicants replied that only the quarry and the sand-hill were pointed out to the respondent, and it was clearly understood that the stone should be removed from the quarry only. No boundaries were pointed out, as alleged by the respondent.

Sir H. Juta, K.C., for applicant; Mr. Schreiner, K.C., for respondent.

Sir Henry Juta K.C.: There is a trolley line to the quarry in question, and the limits of the quarry are well defined. This quarry the lessors (the present applicants) wished to develop. Surface boulders are not a quarry.

[De Villiers, C.J.: There is a direct conflict of evidence as to the facts on the affidavits.]

The respondent says that before he entered into the lease he was shown the boundaries of the property, and he claims the right to take stone from any part of it.

[De Villiers, C.J.: Is not that what the lease amounts to?]

No, the term "quarry" is well defined, and the fact that here a trolley line leads right up to it renders any doubt as to the locality impossible. If I lease a quarry on a farm, I am not leasing the whole farm.

[De Villiers, C.J.: May not a quarry be on the surface?]

Yes, but you cannot call untouched ground a quarry. Respondent wants to quarry anywhere, but his lease clearly speaks of "a quarry and a sand-hill." Another point is, that the evidence clearly shows that respondent has been selling us stone at the rate of 22s. per six tons. We should certainly not sell him the right to take this same stone for a royalty of 4s. 6d. per six tons.

Mr. Schreiner, K.C. (for respondent): We have a three years' lease, and it cannot be said that in order to get stone we are bound to go deeper and deeper into the quarry and not to touch any stone on the surface. The space within which quarrying was to be carried on was neither defined nor pointed out. The respondent said that Mitchell pointed out the boundaries of the farm. Mitchell does not deny this, and Cran (who was present) does not deny it. The trolley line ran to the quarry, but did not define it. Our lease allows us to quarry on the estate, and that is what we are doing by removing boulders.

[Hopley, J.: But to remove surface stone is not quarrying.]

If once it is admitted that we may break fresh surface ground, my case is made. We only took the land for the sake of the stone. Davidson, the manager, knew where the stone we supplied came from; and as to the royalty, a royalty of 4s. 6d. on 22s. is a very high one. Again, the company admit that they sold some of the sand, and yet they claim to have protected our rights. In this case there is no question of irreparable damage, and hence this is not a case for an interdict. No doubt, if this interdict were granted, the applicant's next step would be an ouster on the ground that we have not taken 16 trucks of six tons each per week from the quarry.

Sir H. Juta (in reply): We are not seeking to oust the respondent from the property he has leased, but to interdict him from coming on property which he has not leased. We are quite willing to allow him to work the quarry in the usual way, but we object to his working half a dozen quarries. If one of these holes is 50 or 100 yards from another nobody can say that they are the same quarry. If you hire a quarry you certainly do not hire the right to go all over the estate to look for stone. We only ask for a temporary interdict restraining the respondent from taking

stone from any place, save the quarry, pending an action to be brought.

Mr. Schreiner remarked that the lease gave the lessee the right to take stone anywhere within the area pointed out to him. For anything they knew the whole property might have been pointed out.

[Buchanan, J.: You can hardly say that you were at liberty to go anywhere within an area of 116 morgen.]

There is nothing to show that we could not. I submit that this is not a matter which should be decided on motion.

De Villiers, C.J.: If the Court were to be guided by the lease alone, I think the applicants would be held to be right in their contention, and would be entitled to confine the respondent to a certain defined quarry and sand-hill, because I think the lease means that only the quarry worked by the applicants at the time the lease was entered into was to be worked by the respondent. I certainly do not consider that the respondent would be entitled to go over the whole of this farm of 118 morgen and take out stone anywhere; in fact Mr. Schreiner does not go so far as that. What he does contend for is that, inasmuch as the boundaries of the quarry were pointed out to the respondent before the lease was entered into, he is entitled, at all events, to work within these boundaries. Unfortunately on this point the evidence is very contradictory. The respondent said these boundaries were pointed out to him by Mitchell and Crann. This Mitchell denies, and while Crann does not deny it in so many words, he certainly does not admit it. Upon the affidavits, it is impossible to decide which is right, and it must be decided by action. But, in the meantime, great injury might be done to applicants if the respondent were allowed to go indiscriminately over this land, which he said was pointed out to him, and proceed to open quarries. Therefore, I think a case has been made out for a provisional interdict restraining respondent from working anywhere except on the quarry which had been worked by applicants themselves. A provisional interdict will be granted, and the applicants will have to bring an action for the purpose of having this interdict made perpetual. The interdict will therefore continue until the 15th of August, by which time action must be brought. As to the costs that question should be reserved

pending the action. I am satisfied there cannot be much injury done the respondent in the meanwhile, because he will be entitled to take stone from the quarry from which, at all events, he can at present take stone, but if he suffers any injury from the interdict, he will be entitled to claim in reconvention any damages he may sustain. A condition of the interdict must be that the time for giving notice in writing be extended from the 1st to the 31st August.

Their lordships concurred.

[Applicant's Attorneys: Godlonton and Low. Respondent's Attorneys: Van Zyl and Buissinne.]

EDGCOMBE V. HODGSON. { 1902.
May 15th

Restraint of trade—Public policy
— Consideration — Pacts or
covenants—Interdict.

In the absence of proof that the applicant is seeking to obtain an unfair advantage, the Court will, by interdict, enforce a covenant in reasonable restraint of trade if there is bona fide consideration for such covenant.

This was an application for an interdict restraining the respondent Hodgson and his wife from carrying on the trade or profession of a photographer in the town or division of Beaufort West, or from being connected with any such business or from selling or causing to be sold photographs or pictures in the said town or division.

From the affidavits it appeared that the respondent and his wife were engaged by the applicant under a contract, whereby they agreed not to set up business on their own account in competition with the applicant. In January last the applicant discovered that the respondents were secretly carrying on business for their own benefit, and he gave them a month's notice. In February he found that they had opened business as photographers in Beaufort West. The respondent alleged that he was not informed of the nature of the agreement when he signed it. He stated that the applicant consented to his doing work for himself in his spare time, and he

ascribed the applicant's action to jealousy. He asserted that there was ample scope in Beaufort West for another photographer.

The Chief Justice asked Sir Henry Juta what he said was the consideration for respondents undertaking not to carry on business as photographers in the town or division.

Sir H. Juta, K.C. (for applicant): This is a very clear case. The first respondent does not deny the terms of the agreement entered into with the applicant. Possibly applicant wanted to monopolise the trade in Beaufort West. We have, however, nothing to do with that; respondent took service under applicant's conditions, and that service was good consideration for signing the contract.

[De Villiers, C.J.: The employer could give a month's notice.]

Still there was consideration. Respondent might have refused to enter our service; and when he did enter it Edgcombe clearly wanted to keep him on, but he would not keep to his agreement.

[De Villiers, C.J.: Can you say that if a man once signs such an agreement he is for ever debarred from competing?]

I must go that length, and as to the sufficiency of the consideration we cannot go into that as long as there was good consideration. The first agreement, made in September, 1897, bound respondent not to compete under a penalty of £200. That agreement was never annulled, and respondent remained in Edgcombe's employ for five years. Surely there was ample consideration.

[De Villiers, C.J., cited *Story's Equity Jurisprudence* as to the validity of agreements.]

Mr. P. S. Jones (for respondent): As to consideration, the argument for applicant is based partly on the first contract. That contract is void because it is in general restraint of trade. It fixes no limit either as to time or space. As to the second contract, there is no consideration.

[Buchanan, J.: Why should not £12 a month be a consideration?]

Because respondent got nothing which he had not before. He already had his £12 a month and was free to compete, the first contract being void. Hence the second contract must fail for want of consideration. Contracts in whole or even in partial restraint of trade must be very strictly construed. I submit that the Court will not grant the second por-

tion of the prayer, because by doing so it would take the bread out of a man's mouth.

[Hopley, J.: What would there be to prevent him from opening a shop at Beaufort West and putting in a bogus manager?]

The 3rd clause of the agreement. I only ask that he should be allowed to take service with any photographer in Beaufort West. As to partial restraint of trade, see *Bartholomew v. Stableford* (7 Sheil, 14).

[Hopley, J.: Here there is no limitation as to place out of Beaufort West.]

That is so, but where the consideration is so very slight and so doubtful, I submit the Court will not grant the application.

Sir H. Juta (in reply): No authority has been quoted for the respondent in opposition to the ordinary principle that if any good consideration has been given a contract is valid. The views of jurists as to restraint of trade have changed very much since Storey's time. Here the consideration was retention in applicant's service and future wages. See *Nordenfelt v. Maxim Nordenfelt Co., Ltd.* (Ap. H.L., 1894, p. 535). There a contract was upheld by which a man bound himself not to practice his profession for 25 years. Now the Court will in such cases hold a man to his contract; formerly the Courts took a different view.

Cur. Adv. Vult.

Postea May 20th.

[De Villiers, C.J.: The covenant or pact which the Court is asked to enforce is undoubtedly in restraint of trade, for it prohibits the respondents, after the termination of their engagement, from carrying on the trade or profession of photographers, either directly or indirectly, in the town and division of Beaufort West. The engagement of the respondents as assistants in the applicant's business as photographers was a monthly one, at a salary of £12 and £6 a month respectively, with liberty to either party to terminate it at one month's notice. The question does not now arise whether the Court would have enforced the covenant if the applicant had, without any fault on the respondents' part, put an end to the engagement by giving them a month's notice. In such a case it might have been justly contended that the applicant was taking an unfair advantage of the respondents by insisting upon the prohibition without giving

them the full benefit of the employment upon which the prohibition was founded. In the granting or withholding of interdicts the Court possesses large discretionary powers, more especially where the applicant has his remedy for damages for the breach of the covenant or agreement. Where the Court is satisfied that the party asking for an interdict is seeking to obtain an unfair advantage, it would be quite justified in declining to interfere and in leaving him to his action for damages. In the present case, however, the evidence is clear that the agreement was entered into by the respondents with a full knowledge of its effects upon their prospects, and that during the subsistence of their engagement they broke their contract by indirectly carrying on the business of photography. The applicant thereupon gave the month's notice, and thereafter the respondents, in breach of their covenant, opened business as photographers in Beaufort West and advertised the fact by means of posters in the streets and notices in the local newspaper. The question has never been pointedly raised whether and to what extent the English doctrine relating to restraints of trade is applicable in this colony. *Voet* (2, 14 16), in his enumeration of matters which may properly be provided for by means of binding pacts, excludes promises, the performance of which would be contrary to law or tend to the injury of the public. As an illustration, he points out in a later passage (2, 14, 21), that pacts in restraint of marriage are invalid, as being contrary to sound public policy for the encouragement of lawful marriages. He does not mention the encouragement of trade as a matter of public policy, but in our time it can hardly be doubted that any general restraint of trade must necessarily be detrimental to the community. If, therefore, in the present case the covenant had been that the respondents should be prohibited from carrying on their lawful occupation as photographers in any part of South Africa, or even in this colony, I should have refused to enforce a covenant which would be detrimental to the public without any corresponding advantage to the person in whose favour it has been made. But the restraint was a partial one, being confined to the town and district of Beaufort West, and therefore affords a reasonable protection to the applicant without

entirely depriving the public of the Colony of the benefit of the respondents' services in their trade or profession. In regard to the consideration for the restraint, if there had been none, or if it had been merely colourable, I should have been prepared to hold that the restraint is invalid. But there had been a previous breach of an undertaking by the first respondent, who is the husband of the second respondent, and one of the conditions upon which he was employed was that the restraint in question should be imposed upon him. As to both respondents, I am satisfied from the evidence that the salaries to be paid to them were accepted as consideration, not only for performing their services during the subsistence of their engagement, but also for consenting to the restraint after the termination of the engagement. There are really no facts in dispute, and therefore there will be no necessity for granting a provisional interdict only. The Court will order that the respondents be interdicted as prayed, with costs.

Buchanan, J., said he fully concurred in the judgment.

Hopley, J., also concurred.

[Applicant's Attorneys: Scanlen and Syfret; Respondents' Attorney: G. Trollip.]

PENKIN AND GIN V. GIN.

Mr. Alexander asked that this matter be allowed to stand over until the last day of term.

Postponement allowed.

Postea, May 31st.

On the motion of Mr. Rowson, the rule was made absolute.

IMPEY V. HADJE.

Mr. B. Uppington moved that the *rule nisi*, restraining respondent from alienating certain property, be made absolute.

Rule made absolute as prayed.

PETITION OF HELEN AND ARTHUR PARKES.

Mr. De Waal moved that an award of arbitrators be made a rule of Court.

Granted.

Re ESTATE OF THE LATE EDMUND TILLEY.

Mr. Upington moved for confirmation of the sale of certain land in the above estate to Mrs. Tilley, widow of the late Edmund Tilley. The petition set forth that Mrs. Tilley and Mr. C. Bruce Sellar were executors testamentary in the above estate, one of the principal assets in which were lands and buildings situated on the Kloof-road. This property was on August 13 last put up for sale by public auction, and knocked down to Mrs. Tilley as the highest bidder for the sum of £2,115. As the purchaser is one of the executors in the estate, an order was required from the Court confirming the sale, and authorising the Registrar of Deeds to pass transfer. There was a verifying affidavit from the auctioneers stating that the property had been put up for public sale and sold to Mrs. Tilley for £2,115, and that there was a fair attendance of buyers.

Order granted as prayed.

Re MINOR BUTLER.

Mr. P. S. Jones moved for leave to the father and natural guardian of the above minor to pay out certain moneys in which the minor was interested. The petitioner asked leave to raise money, for the education of the minor, on a life policy which the petitioner had ceded to his minor son.

The Master had recommended that the petition be granted.

Order granted in terms of the Master's report.

Ex parte MALAN.

Sir Henry Juta, K.C., appeared for the petitioner, who under a mutual will with his wife, now dead, bequeathed certain property to his sister and her children. This formed portion of other property which the testator wished to sell, but he could not do so without this portion, and, therefore, he proposed to substitute another piece of land in place of the piece which had been bequeathed.

The Master's report was favourable.

Order granted as prayed.

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Ex parte HUMAN.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to pass transfer of certain property. The petitioner in March, 1898, purchased for £21 certain land at Beaufort West which he had transferred to himself in trust for his minor son. At that time it was his intention to build on the said land, but he was now unable to carry out that intention, and as he could now sell the land for £40, he believed it would be more profitable to do so, and invest the money more beneficially.

The Master had reported that he had no objection to the application being granted, provided the proceeds of the sale be paid into the Guardians' Fund.

Counsel asked, however, that the father be allowed to invest the money in a way more profitable to the minor.

The Chief Justice: When the father gets an investment more profitable, he can apply again to the Master.

An order was granted in terms of Master's report.

Re ESTATE OF THE LATE LE ROUX.

Mr. Hull moved for leave to the executor to sell certain property belonging to the estate, the amount so realised to be applied to the reduction of a bond upon property in the estate.

Order granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLEY.]

CRAIK V. ROBERTSON. { 1902.
May 16th.
" 22nd.

Pledge of movables — Sale of goods pledged.

Where respondent had pledged certain goods without making delivery thereof, and afterwards sold them by public

auction; the Court granted a rule calling upon respondent to show cause why the auctioneers should not be restrained from paying over the proceeds of the sale to the respondent: the said rule to operate as an interim interdict, but with leave to any third person to apply for a discharge of the said rule.

Mr. Wilkinson applied, as a matter of urgency, for an order restraining the respondent from parting with the proceeds of the sale of certain furniture, which sale was to take place that morning. From the petition it appeared that the respondent, James Tindal Robertson, had been employed by the applicant, David Craik, provision merchant, Long-street, Cape Town, as a salesman, and drew money on a running account, which had become overdrawn. In March last the respondent owed the applicant £145, and an agreement was arrived at whereby the respondent consented to pass a mortgage bond on certain furniture at No. 7, De Lorentz-street, in favour of the applicant. The applicant alleged that the respondent was attempting to deprive him of his security by the sale of the furniture.

Mr. Wilkinson (for applicant): 'This is a matter of urgency, as the sale of these goods is advertised to take place this morning. No damage will result to respondent if the order is granted, but irreparable damage may be done to respondent if it is not. We do not seek to restrain the sale, but only to attach the proceeds in the hands of the auctioneer.'

[De Villiers, C.J.: What is the use of your bond?]

It is valid as between debtor and creditor. Of course, it is of no value as against other creditors without delivery.

[Buchanan, J.: In the event of the insolvency of the pledger it would not give preference even over concurrent creditors.]

That is so.

[Buchanan, J.: Is this a voluntary sale by the debtor?]

We do not know, but we are not trying to restrain the sale, but only the delivery of the proceeds.

[De Villiers, C.J.: You have never taken delivery of these goods?]

No, but I submit that as between ourselves and the debtor the bond is valid. He is bound to make delivery. for a pledge to mortgage property implies an engagement to do everything necessary in order to make that mortgage effective.

[Buchanan, J.: A bond over movables is not made effective by registration.]

No, I do not argue that.

The respondent was in default.

The Chief Justice said: *Prima facie* there appears to have been some breach of faith on the part of the respondent, but it is by no means clear that the applicant would be entitled to succeed in the particular form of action mentioned by him. He will have to consider what action, if any, can be brought when the rule is made returnable. For the present, the Court will grant a rule calling upon the respondent to show cause on Thursday next why the auctioneers, Messrs. Stamper and Zoutendyk, should not be restrained from paying over the proceeds of the sale to the respondent, pending a further order of the Court, the rule to operate as an interdict in the meantime, with leave reserved to any third party concerned—there may be other creditors—to apply to the Court for the discharge of the interdict.

Postea, May 22.

Mr. Wilkinson applied to have the above rule made absolute.

Mr. Langenhoven (for respondent) applied to have the rule discharged. A letter was put in by respondent to show that the goods had never been pledged to the applicant.

Mr. Wilkinson (for applicant): The only use of this letter is to show that there was a partnership between these parties.

Mr. Langenhoven (for respondent): I wish to abstain as much as possible from arguing on the merits. The petition is not in agreement with petitioner's affidavits, particularly as to the amount of his overdraft. The applicant wishes the Court to believe that he had advanced, first, £137, and then a further sum of £12, to a man who used to try to get run over by tramcars, and in other ways did not act like a responsible being. That is very improbable on the face of it. There is no evidence of the existence of any partnership, and the affidavits tend to show that there is none. Assuming that the Court should refuse the interdict asked for, the applicant could sequen-

trate the respondent's estate. If the amount is due, he can sue for it, and if not yet due, he can sue to have a bond passed as security. He is, therefore, not without remedy; nor can he show any clear right. He has certainly no *jus in rem* over the goods pledged, since there was no delivery; and I submit that the Court will not grant an interdict *in rem* when applicant's only right is *in personam*.

Mr. Wilkinson was heard in reply.

De Villiers, C.J., in giving judgment, said: When this application was made to the Court in the first instance I intimated that it was a matter of considerable doubt, and the Court refused to grant an interdict, but granted a rule *nisi* calling upon the respondent to show cause why an interdict should not be granted. The respondent has now come in, and denies that any such agreement as is alleged by the applicant was ever entered into. The applicant, in order to make himself secure, might have obtained delivery of the furniture, or he might have got a bond, but the whole thing is done in a very loose manner, and there was merely a verbal undertaking. The rule is discharged with costs.

[Applicant's Attorney: R. Greening;
Respondent's Attorney: J. J. Michau.]

DADA V. MUNICIPALITY OF (1902.
MAFEKING. (May 16th.

Municipalities — Regulations —
New buildings—Construction
of Municipal Acts.

The 5th section of Act 22 of 1893 empowers municipalities to frame regulations for prohibiting the erection of objectionable buildings. The 4th section of Act 20 of 1896 greatly enlarges their powers. The later Act was not extended to the municipality of Mafeking until in 1897 and after its passing, but before it was so extended that municipality framed detailed regulations for municipal approval of the plans for new buildings. In 1901 the appellant, after ob-

taining municipal approval of certain plans, deviated from those plans in the construction of the building, and was convicted of a contravention of the regulations; but the summons did not allege and the evidence did not prove that the building as constructed was objectionable.

Held, that the liability of the defendant must be decided under the Act of 1893, and that the summons was bail.

This was an appeal from the judgment of the Resident Magistrate of Mafeking. The appellant was prosecuted by the Municipality for contravening section 10 (sub-section 5) of the Municipal Regulations, in that he unlawfully commenced certain new buildings on erf No. "L.C." before the plans thereof were approved by the Municipal Council, and, secondly, that he erected new buildings not in accordance with the plans and specifications approved. The regulations under which appellant was summoned provided that no new buildings or any excavations for the foundation thereof should be commenced without the consent of the Municipality; and that no new buildings should be built except in accordance with the plans or specifications approved of. The grounds of appeal were that the regulations were *ultra vires*, and that the evidence recorded did not show that the buildings in question were objectionable in terms of the power which the Municipality had to prohibit objectionable buildings. The evidence for the Municipality was to the effect that three rooms (not shown on the plans) were built by defendant at the back of premises approved by the Council, and that certain rooms in the premises approved had been constructed in a manner not in accordance with the plans. It was contended for the appellant that the regulations were *ultra vires* of the power given by Act 22 of 1893, which prohibited the erection of objectionable buildings, and that if the Municipality had acted *intra vires* of the authority

given them by that Act, the buildings were not objectionable in terms of that Act.

Mr. Buchanan said that Act 20 of 1896 was not promulgated in the Municipality at the time of the offence. New regulations had been made subsequent to the alleged offence, these being made in pursuance of the powers conferred upon the Municipality subsequent to the promulgation in the Municipality of the Act of 1896. The objection in regard to the rooms built in the premises approved by the Municipality was that they were lower than specified in the plans approved.

Mr. Buchanan (for appellant): We appeal on three grounds: (1) These building regulations have been promulgated in an incorrect form; (2) the regulations are *ultra vires*; (3) the buildings were not objectionable. The powers given under Act 20 of 1896 differ from those given by Act 45 of 1882. The new regulations purport to be made under Act 23 of 1893. The alleged offence had been committed before the new regulations were promulgated, and the section under which we were prosecuted was framed under Act 22 of 1893. This Act must be read with Act 45 of 1882. My point is, that under Act 22 of 1893, the Council had no power to make the very wide regulation they have made in section 10. That section even gives them power to pull down buildings. It is true that this question is not before the Court now, but I instance it merely to show how far they have gone beyond their powers. In this country municipalities often try to do by regulation what in England they would never think of attempting without an Act of Parliament. No doubt, some of the powers assumed by these regulations may have been given by Act 20 of 1896, but they were made under Act 22 of 1893.

[De Villiers, C.J.: Does not the power to prevent the erection of objectionable buildings imply the obligation to submit plans to the Council before buildings are erected?]

[Hopley, J.: Do you say that the Council must keep a man on the spot to say when a building begins to become objectionable?]

They can very soon ascertain whether a building is objectionable or not. Then again, these regulations have never been promulgated, as required by Act 45 of 1882. Act 20 of 1896 gave larger powers

than were given by previous Acts, but not the power to demand that plans should be lodged with the Municipal Council. See *Lumley on Bye-laws* (p. 25). Parliament cannot delegate its powers unless it does so expressly.

[Hopley, J.: It is doubtful from the context whether the word "objectionable" in these regulations is used in a moral, a sanitary, or an architectural sense.]

Quite so, but even if these regulations are *intra vires*, they must be strictly interpreted. The latest regulations were promulgated on January 22, 1902, and the offence was prosecuted in December, 1901. The only evidence we have is that these buildings are unsightly, but an aesthete might hold that half the buildings in Cape Town are unsightly. My contention is: (1) That these regulations are *ultra vires*; (2) that the buildings in question are not unsightly.

Mr. Searle, K.C. (for respondents): I do not admit that we cannot take advantage of Act 20 of 1896. If an offence is committed at a date when the Act is in force, and the regulations thereunder made, though not promulgated, it is the merest technicality to say that these regulations were not made under that Act. Should, however, the Court uphold this technical objection, I am prepared to argue that the Council could have made these regulations under Act 22 of 1893. I must admit that section 13 of the regulations would have been *ultra vires* before the passing of Act 20 of 1896, but I submit that the Court will not object to acts valid under one Act being done under another.

[Hopley, J.: It is rather a dangerous doctrine that you can shake into vitality some illegal bye-law, as soon as subsequent legislation validates it.]

I admit that we must prove the building objectionable, and that the fact that it is so should be stated in the summons; but the Magistrate found, as a fact, that the buildings were objectionable, because they were unsightly. I do not admit that section 5 (b) refers only to buildings which are objectionable on sanitary grounds. See *Claremont Municipality v. Hudson* (9 Sheil, 390) As to these kitchens; they were erected without any permission, the inspector reported strongly against them, and I submit the Court will not readily overturn the decision of the Magistrate on

facts. The fact that it was not stated in the summons that the buildings were objectionable, is not fatal to the summons.

Mr. Buchanan (in reply) was not heard.

De Villiers, C.J.: I am of opinion that upon the summons as it stood the appellant could not be convicted of a contravention of section 10, sub-section 5, of the regulations. The only Act under which appellant could have been convicted was that of 1893, and the 4th section provides that the Council of any Municipality, under Act 45 of 1882, may from time to time make, alter, and revoke byelaws or regulations for the purposes of prohibiting brothels, the overcrowding of houses, dwelling-places and rooms, and the erection of objectionable buildings within such Municipality. Now I quite agree that the only way in which objectionable buildings can be prevented would be by the requirements on the part of the Municipality that plans or specifications or buildings shall be submitted to the Council. But when there is a prosecution for a contravention of such a regulation under the Act of 1893, I am of opinion that the Council should allege as a matter of fact that the plans which were submitted would be a contravention of the section. In this case there is no allegation whatever that the building was an objectionable one. It is no doubt true there is some evidence on the point, namely, that the buildings were unsightly, for which reason the Magistrate seems to think they were objectionable; but in my opinion there ought to have been an allegation in the summons that the buildings were objectionable. I cannot in any way agree with Mr. Searle's contention that the regulations may be read as if they had been made under the Act of 1896. That Act had not been extended to the Municipality of Mafeking when the regulations were made. Subsequently fresh regulations were made under the Act of 1896, but the prosecution took place in regard to regulations made under the Act of 1893. I am of opinion that the appeal should be allowed.

[Appellant's Attorneys: Finlay and Tait; Respondent's Attorney: Mr. Sonnenberg.]

APPEAL CASE.

WEBB V. ST. LEGER. } 1902.
May 16th.

Collision on road—Negligence—
Presumption.

A horse, driven by defendant's servant, having bolted, ran from behind into a bicycle which the plaintiff was riding and injured it.

Held, on appeal, that there was prima facie proof of negligence, and that such proof not having been rebutted by satisfactory evidence that the horse bolted without negligence on the part of the groom, the Magistrate was justified in finding for the plaintiff notwithstanding that the horse was proved to be a quiet animal.

This was an appeal by Mr. Frederick Luke St. Leger against a judgment of the Resident Magistrate of Wynberg in a case in which appellant was sued for damages caused through the alleged negligence of his servant.

In the Magistrate's Court the appellant was sued for £20 damages, which plaintiff (now respondent) alleged was due to him for damages sustained. It was alleged in the summons that on the 23rd January last the plaintiff was cycling along Lansdowne-road, Claremont, on the left side, when a cart and horse, the property of the defendant, and at the time in charge of a driver who was a servant in the employ of the defendant, ran into his bicycle, damaging the same. Plaintiff alleged that the damage was caused by the negligence of the driver, who had lost control of the horse, and failed to keep on the proper side of the road. The record of evidence adduced in the Court below was read by counsel. The plaintiff stated in evidence that the horse was not under the control of the driver. The vehicle was a four-wheeler. The defendant had offered to pay half the cost of the machine, and said he would see about getting the other half from the groom. Jacob Fratz said he was driving a Scotch cart in Lansdowne-road at the time. The vehicle driven by de-

fendant's groom came along at a very fast pace, and when it got to the witness's cart, it swerved to the right and collided with the bicycle. The vehicle was forced to go to the right of the witness's cart. For the defence, Mr. St. Leger said that the horse was a quiet one, and the driver competent, steady, and reliable. He had made an offer to plaintiff to pay half, and had told him that the affair was an accident. The driver stated that the horse bolted. He never knew the animal to have done so before. He could not account for the horse bolting. The Magistrate gave judgment for £18, with costs, and against this decision defendant now appealed. The Magistrate, in his reasons, stated that he found that the damage resulted as alleged, the plaintiff having in no degree contributed thereto. The onus was on defendant of proving that it was an inevitable accident. In the absence of any explanation why an ordinarily docile horse should behave in this way, the Court was bound to presume negligence in its management.

Mr. Langenhoven, for appellant; Sir H. Juta, K.C., for respondent.

Mr. Langenhoven: If the count in the summons in the Court below alleging wilful negligence were proved, there could be no question of liability for the damage done by the horse; but if a man alleges negligence, he must prove it.

[De Villiers, C.J.: Is it clear that if a horse bolts, it is not for the owner to show that there has been no negligence?]

I submit that the onus is not upon him. In cross-examination, plaintiff admitted that the horse bolted. If an accident raises a presumption of negligence, that would apply no less to an accident caused by a cycle than to one caused by a horse; people have not as much control over a cycle as over a horse.

[De Villiers, C.J.: If the driver comes behind a rider and runs him down, is it not presumed that the driver is negligent?]

If your lordship holds that negligence is presumed on the part of the driver, the question is, whether he has discharged the burden of disproving negligence. The Magistrate only finds negligence because he presumes it. He reasons from an imaginary case, which is quite different from the present case. The evidence of the driver and of the

owner is not contradicted, and it needs very little uncontradicted evidence to rebut a mere presumption, and here we have a good deal of evidence. If the driver was not at fault, it would be going very far to hold a man liable for the act of his animal. See *Cowell v. Friedman and Co.* (5 H.C., 22) and *Grotius* (3, 38, 10).

Sir H. Juta, K.C. (for the respondent), was not called upon.

De Villiers, C.J.: It is not necessary to hear Sir Henry Juta in this cause, because the Court is satisfied that the Magistrate's judgment ought not to be interfered with. It is quite clear—it is not denied—that there was no contributory negligence whatever on the part of the plaintiff. He was riding a bicycle, when the defendant's cart came from behind and knocked his bicycle over, injuring it to such an extent that it is wholly useless to him. Now that fact in itself is sufficient to throw upon the defendant the burthen of proving that there was no negligence on his part. Without such proof, the Court would be justified in assuming that the driver was at fault and guilty of negligence. Whether the defendant has discharged the onus upon him of proving that there was no negligence is a point best judged of by the Magistrate who decides the case. If a case of this sort came before a jury, the Court would not interfere with the decision of the jury. The Magistrate in the present case discharged the functions of a jury. He was not satisfied, from the explanation given by the groom, that there was not negligence on his part. Now in the cases which counsel has referred to, there has always been something to account for the sudden behaviour of animals which have caused injury, like a sudden noise, or the sudden appearance of an unaccustomed object. In the present case, here is a horse which for eight years has been in the possession of the defendant, and has been described as an animal which has never caused any trouble, and suddenly, on this occasion, it causes this accident. Well one would expect some explanation of it. It is clear that the Magistrate did not accept the explanation given by the groom. He saw the demeanour of the witness, and he was better able to consider whether the explanation is sufficient. I am of opinion that the appeal should be dismissed, with costs.

Their lordships concurred.

[Appellant's Attorneys: J. J. Michau;
Respondent's Attorneys: Fairbridge,
Arderne and Lawton.]

MEYER V. ESTATE MEYER. { 1902.
May 16th.
" 20th.

Collation—Will—Construction—
Fidei-commissum—Bequest—
Inheritance.

In the absence of a direction to the contrary in a will, legacies and prelegacies are not brought into collation.

A testator by his will appointed all his children as his heirs, and by codicil gave prelegacies to several of his children, and burdened the inheritances of his sons, save and except the bequests of money, with a fidei-commissum. By a clause in the codicil he directed "that the sum of £1,000 already advanced by me to my son N. shall be brought into my estate and be deducted from his inheritance, and that the land F shall form part of his fidei-commissary inheritance, but that his present wife shall upon his death have the rent or occupation of the said property so long as she shall remain unmarried." On the death of the testator N. took possession of the land, but as expensive repairs became necessary which he was unable to pay for, the land was, with his consent, ordered by the Court to be sold for £1,040. The sum of £250 was awarded to him as his share of inheritance of the rest of the estate. After his death his wife claimed the right to the interest on the proceeds of the sale of the land for her life without deduction of the £1,000 advanced.

Held, that this amount should be deducted from N.'s inheritance, but that according to the true construction of the codicil, no deduction should be made from the proceeds of the farm specifically bequeathed.

This was a special case brought for the decision of the Court as to the construction of a clause in a certain will. The plaintiffs were Elizabeth Cornelia Meyer (widow of the late Nicholas Wollessen Meyer, jun.), Anna Judith Meyer, widow, as guardian of the minors Nicholas Wollessen Meyer, Mary Ann Alice Meyer, and Constance Ann Meyer, and John William Walsh (married in community of property to Elizabeth Adriana Walsh, born Meyer) and Nicholas Wollessen Meyer, and the defendants were William Edward Moore and William Arthur Currey, in his capacity as the secretary of the General Estate and Orphan Chamber, in their capacity as executors testamentary of the estate of the late Nicholas Wollessen Meyer, sen.

The special case stated was as follows:

1. The plaintiffs are the widow of the late N. W. Meyer, jun., to whom she was married in community of property, who has not remarried, and who was at the date of the hereinafter mentioned will and codicils the wife of the said Meyer, and Anna Judith Meyer, the widow of the late L. C. B. Meyer, a son of the said N. W. Meyer, jun., in her capacity as guardian of her minor children, Nicholas Wollessen Meyer, Mary Ann Alice Meyer, and Constance Ann Meyer, also John William Walsh, married in community of property to Elizabeth Adriana Walsh, a daughter of the said N. W. Meyer, jun., and also Nicholas Wollessen Meyer, a son of the said N. W. Meyer, jun. The defendants are the executors testamentary of the estate of the late N. W. Meyer, sen., hereinafter called the testator.

2. The testator executed a certain will and codicils, to which the parties crave leave to refer.

3. By his said will the testator appointed his children his heirs of the residue of his estate, and by codicil he directed as follows: I will and direct that the sum of £1,000, already ad-

vanced by me to my son N. W. Meyer, jun., shall be brought into my estate and be deducted from his inheritance, and that the property at Salt River belonging to me, called Fresh Water Valley, shall form part of his *fidci-commissary* inheritance, but that his present wife (i.e., the first-named plaintiff) shall, upon his death, in case she shall survive him, have and enjoy the rent or occupation of the said property, so long as she shall remain unmarried, and in the same codicil thereafter the testator directed that he burdened the inheritance of his sons (save and except certain money bequests) with the burden of *fidci-commissum*, so that they should receive only the interest or profits thereof, and upon the death of my said sons the capital of such inheritance shall devolve upon their lawful issue.

4. The testator died in February, 1880, and the defendants thereafter filed accounts of their administration of the estate at four various periods between 1881 and June, 1901, and no objection thereto has been filed or taken. The parties crave leave to refer your lordships to the said accounts.

5. In none of the said accounts did the defendants bring up £1,000 due by N. W. Meyer, jun., as aforesaid, as an asset of the said estate, and in the said accounts the defendants awarded to N. W. Meyer, jun., the following sums, to wit: (a) Legacy of part of amount settled by antenuptial contract, £85 17s. 8d.; (b) share of residue (second account), £86 8s. 4d.; (c) share of residue (third account), £38 19s. 7d.; (d) share of residue (fourth account), £38 16s. 5d.; and the following sums are in the defendants' hands as portion of the *fidci-commissary* inheritance of N. W. Meyer, jun., to wit: (e) Amount received from Colonial Government on expropriation of a portion of Fresh Water Valley, £40; (f) amount received upon sale of remainder of Fresh Water Valley, with authority of Supreme Court, £1,000—amounting in all to £1,290 2s.; and the defendants did, under the authority of the Supreme Court, expend sums amounting to £138 17s. 11d. in repairs of the said property known as Fresh Water Valley, and did pay to the said N. W. Meyer, jun., during his lifetime, interest upon the sums awarded, and upon the said sum of £40, amounting in all to £106 7s. 11d.

6. In March, 1900, the said Fresh Water Valley having fallen into disrepair, the defendants applied to this Honourable Court for authority to sell the said property, and thereupon the Master of the Supreme Court reported as follows: "The testator in the codicil to his will directs that the property at Salt River, belonging to him, called Fresh Water Valley, shall form part of the *fidci commissary* inheritance of his son, Nicholas Wollessen Meyer, jun., but that his present wife shall, upon his death, in case she shall survive him, have and enjoy the rent or occupation of the said property so long as she shall remain unmarried. If the consent of Mrs. Meyer be obtained I see no objection to the property being sold, the proceeds invested by the administrator, and the interest paid as directed above." And the Court made an order in terms of the said report. The record of the said application is taken to be portion of this case.

7. Thereafter the said property was sold in terms of the said order of Court for £1,000.

8. Thereafter in August, 1900, the said N. W. Meyer, jun., died, having during the period between his father's death and his own occupied and enjoyed the use of the said property until it was sold.

9. After the death of the said N. W. Meyer, jun., the first-named plaintiff applied to the defendants for payment of the interests accruing from the said sum of £1,000, but the defendants refused, and still refuse to pay the same.

The first-named plaintiff contends that having survived her husband she is entitled, so long as she remain unmarried, in terms of the aforesaid will, to the interest accruing from the said £1,000.

The other plaintiffs contend: (a) That upon the death or remarriage of the first-named plaintiff they are entitled to the said sum of £1,000. (b) That they are entitled to the capital of the *fidci commissary* inheritance other than the aforesaid £1,000 bequeathed to the late N. W. Meyer, jun., under the said will and codicils, executed by the said N. W. Meyer, sen., without deduction of the £1,000 in paragraph 5 referred to.

The defendants' contentions are the following: (1) That the capital amount of the said debt of £1,000 must be deducted from the several sums awarded to and

held by them as aforesaid for the said N. W. Meyer, jun., and also the amount of £138 17s. 11d aforesaid. (2) That the balance of the said amount of £1,290 2s., after such deductions, to wit the sum of £151 4s. 1d., should, together with such further sums as may in their distribution of the amounts so deducted be awarded as N. W. Meyer, junior's inheritance, be administered, subject to a life interest in favour of the first-named plaintiff (so long as she remains unmarried), as part of the *fidei commissary* inheritance to which the children of N. W. Meyer, jun., are entitled.

Wherefore the parties pray for judgment upon their respective contentions or for such other directions as to this Honourable Court may seem meet, and also for an order as to the costs of this suit.

Sir H. Juta, K.C., for plaintiffs; Mr. Schreiner, K.C. (with him Mr. J. E. R. de Villiers) for defendants.

Sir Henry Juta, K.C.: Our contention is that the will shows that the testator intended that Mrs. Meyer should enjoy Fresh Water Valley for life quite independently of any legacy left to her. There is not one word in the codical about a *fidei-commissum*. The testator intended that there should be two inheritances, the one unburdened, and the other *fidei-commissary*. It is clear that the testator intended his daughter-in-law to have a life interest in this property. The expenditure on the property took place during his life, and possibly this should have been deducted from Mr. Meyer's inheritance, but the executors had no right to subsequently spend so much money on the property, and then saddle the *fidei-commissary* heir with the debt. Now the property has been sold, and the interest on the price realized has been handed over to the fiduciary.

[De Villiers, C.J.: Is that quite clear?]

Nobody else can have got the money. It is a mere matter of calculation to analyse the account, if we once establish the principle that the fiduciary cannot take all the benefits of property, and then saddle the *fidei-commissary* with the expenses. These expenses were incurred for repairs in 1888 and 1896. The usufructuary was in very poor circumstances and was receiving the income from the property. Mrs. Meyer holds that the tes-

tator intended her to have the occupation of the property. Children who succeed by representation are bound to collate the debts owing by their father to their grandfather. But the case is different with regard to children who are *fidei-commissary* heirs. In their case there is no collation, and hence the £1,000 was never intended to be deducted from Freshwater; that would have left nothing for the *fidei-commissaries*. As to the children, the difficulty begins with the creation of the *fidei-commissum* in the latter part of the codicil. In the first place is that *fidei-commissum* to affect Freshwater Valley? I contend that the testator never intended the £1,000 to come out of Freshwater. The estate was valuable, as the accounts showed, and the testator evidently thought that there would be enough to pay off the £1,000 without touching Freshwater or the *fidei-commissum*. It turned out that the fund from which this £1,000 was to have been paid was non-existent, but that did not justify the executors in deducting this sum from the *fidei-commissary* inheritance. I submit that the contention of Mrs. Meyer is fair and reasonable, as is also the contention of the children as regards Freshwater. The testator intended the £1,000 to be deducted from the son's unencumbered inheritance: the Salt River property was to be unburdened, and Freshwater to be burdened with *fidei-commissum*.

Mr. Schreiner, K.C. (for defendants): The codicil affords the whole key to the will, and it clearly contemplates only one inheritance, viz., the *fidei-commissary* inheritance, which was the only inheritance out of which the £1,000 could come. If the executors did not take a right view of their duties that cannot prejudice the heirs. Freshwater was not specifically bequeathed. No doubt it was intended that the son should have it as a part of his *fidei-commissary* inheritance, but not as a specific bequest. There is nothing to show that Nicholas Meyer was intended to be preferred to the other children. If plaintiff's contention is right, the eighth branch of the family is to take £1,000, and each of the other seven, only £250.

[De Villiers, C.J.: The farm was not directed to be sold or valued, how can you deduct £1,000 from a farm?]

That is a part of my case. My contention is, that you must follow the pre-

sumption of equality among the children. The estate did not realise as much as the testator expected, and the result was that the son who got the farm, got far more than his share. In their first distribution, the executors clearly regarded the farm as a specific bequest. They no doubt did so *bona fide*, but the question is, is it now possible to rectify their mistake? I submit it is. Throughout the testator uses the words, "I give and bequeath," both in respect of what he gives to his wife and what he gives to his sons. If a testator gives express directions, there can be no question of inheritance. *Jooste v. Jooste's Executors* (8 Juta, 288). Plaintiffs now contend that the will showed an intention to place one branch of the family in a specially advantageous position, but surely such an intention ought to be expressed very clearly. Here there is no such clear expression of intention. N. W. Meyer was not entitled to a single penny unless he could put his £1,000 into the estate. And yet under the first account he got over £600, and then a balance of £250 odd was carried over to him, while the other heirs got nothing. We might go further than we do, and contend that the widow of N. W. Meyer should have nothing.

Sir H. Juta (in reply): It is sought to give the words "give and bequeath" the effect of constituting a pre-legacy. If they have this effect, either Freshwater Valley is a legacy or there is no bequest of this property at all. Both the executors and the other heirs understood that this property had been specially bequeathed, and that therefore it was not subject to the deduction of £1,000. It has been argued that the widow (Mrs. Meyer) was only entitled (if to anything) to that part of the farm which was left after paying off the £1,000; but there can be no doubt that the testator intended her to have the usufruct of the whole farm. The executors therefore have no right to take her interest in order to pay off N. W. Meyer's debt to his father. The testator would never have said, "I bequeath the life usufruct of this farm to Mrs. Meyer, but then £1,000 must be paid out of it." It is quite another question, whether, after her death the *corpus* of the estate can be taken to pay off the debt; but clearly her life interest is not available for this purpose.

Cur. Adv. Vult.

Postea, May 20th. The Court gave judgment.

De Villiers, C.J.: The testator by his will appointed all his children or their lawful issue to be the heirs of the residue of his estate, and by codicil he gave prelegacies to several of his children, and burdened the inheritances of his sons, save and except the bequests of money, with *fidei-commissum*. By a clause in the codicil, preceding the clause imposing the *fidei-commissum*, the testator directed "that the sum of £1,000 already advanced by me to my son Nicholas shall be brought into my estate and be deducted from his inheritance, and that the property at Salt River called Freshwater Valley shall form part of his *fidei-commissary* inheritance, but that his present wife shall, upon his death, in case she shall survive him, have and enjoy the rent or occupation of the said property so long as she shall remain unmarried." The testator died in 1880, and the defendants, who are the executors testamentary, have filed four accounts of their administration. From these accounts, it would appear that they awarded to Nicholas, as part of his *fidei-commissary* inheritance, the sum of £250, paying him the interest on that amount, and allowed him to remain in possession of Freshwater Valley. They also expended sums amounting to £138 17s. 11d. on repairs of that property, and subsequently, with the consent of Nicholas and his wife, they sold the property, by order of the Supreme Court, for £1,000, which, in addition to £40 received by them for the expropriation by Government of part of the property, made £1,040 in all, as the proceeds of the sale of the property. Nicholas has since died, and the question has now arisen whether his wife is entitled to the interest on the proceeds of the sale without deduction of (1) the sum of £1,000 advanced by the testator to Nicholas; and (2) the sum of £138 17s. 11d. for repairs; and whether, after her death, the children of Nicholas will be entitled to the capital without such deduction. It is clear that the construction of the will cannot be affected by the circumstance that, after the death of the testator, it was found to be advisable to sell the entailed property. The rights of the parties must be ascertained, as if the property had never been sold, and were now in the posses-

sion of Mrs. Nicholas Meyer, as the first *fidei-commissary* heir after her husband's death. The codicil directs that the sum of £1,000 advanced to him shall be deducted from his inheritance. It does not appear from the case stated whether the sum so advanced was at the time of his death a debt still owing by him. If it was, it would, of course, be deducted from his inheritance, and if it exceeded the inheritance, Nicholas would have been liable to the executors for the balance. If it was a debt, but prescribed by lapse of time, his inheritance would still have been subject to collation, as was decided by this Court in the case of *Jooste v. Jooste's Executor* (8 Juta, 288). But such a collation would only affect the inheritance coming to him as one of the heirs, and would not affect any legacies given to him over and above the amount of his inheritance. Such prelegacies could not—independently of the terms of the will or codicil—be brought into collation, nor could they be reduced by reason of advances made by the testator during his lifetime to his son Nicholas. The question to be determined is whether, under the terms of the codicil, the proceeds of the sale should be reduced by the amount advanced. The codicil, after directing the deduction from the inheritance, directs that Freshwater Valley shall form part of the *fidei-commissary* inheritance. By this direction, however, I understand that Nicholas is to be *fiduciary* legatee of that property, in addition to being one of the *fiduciary* heirs of the residue of the estate. The words, "deducted from his inheritance," would hardly be applicable to the specific bequest of land which the testator did not intend to be sold, and which, until sold, could not be subject to deduction. In my opinion, therefore, the deduction was to be made, not from the value of the farm, but from the share of the inheritance which, by a clause of the will, was given to Nicholas and, by a clause of the codicil, was entailed in favour of his children. If this view be correct, it would follow that the whole of the inheritance of £250 would disappear, and the children would receive nothing as *fidei-commissary* heirs of such inheritance. But in regard to the land, the wife would be entitled to her life interest after her husband's death, and his children would take it after her marriage or death. The question still re-

mains whether the expenses of the repairs should be borne by the estate or by the *fidei-commissary* legatees. In my opinion, the expenses of those repairs should be borne by those who are beneficially interested in the property. If the property had not been sold, and the parties so interested had been unable to bear the expense, the Court would, according to its usual practice, have authorised them to mortgage the property for the purpose of paying the necessary expenses. The interest on such mortgage would have been borne by Mrs. Nicholas Meyer, so long as her life interest lasts, and after her death the capital would be a debt owing by the children. The property having been sold, the amount of the expenses of repairs must be deducted from the proceeds, and the interest on the balance, viz., on £901 2s. 1d., must be paid to Mrs. Nicholas Meyer, and after her death or marriage, the capital sum of £901 2s. 1d. must be paid to the children of Nicholas Meyer. Costs to be paid by the testator's estate.

Buchanan, J., in concurring, pointed out that there was no dispute as to the law applicable to the will; the whole question turned upon the construction. He was very strongly impressed by Mr. Schreiner's contention that there was only one inheritor.

Hopley, J., also concurred.

[Plaintiff's Attorneys, Godlonton & Low. Defendant's Attorneys, W. E. Moore & Son.]

VIVIERS V. JUTA AND CO. { 1902.
May 16th.

Agent—Mandatory—Negligence
—Liability of bailee to insure
against fire.

A declaration alleged that the plaintiff delivered certain books to the defendants for sale, that they failed to insure the same, that a fire occurred which destroyed the books, and that the plaintiff was entitled to recover the value from the defendants. Held, on exceptions, that the declaration disclosed no cause of action. There is no rule of

law imposing on a bailee the duty of insuring goods intrusted to his care or custody.

This was an argument on exceptions.

The plaintiff was David Johannes Viviers, a resident of Maitland, and the defendants were J. C. Juta and Co., who carried on business as booksellers, etc. Plaintiff alleged in his declaration that he was the author of a certain book which was published for him by Messrs. W. A. Richards and Sons. He made an agreement with defendants for the latter to sell copies of the book at 2s. 6d. per copy, defendants to receive commission at the rate of 6d. for each copy sold. On the 25th July, 1901, 1,300 copies were delivered to the defendants. On or about the 11th October, 1901, the books were destroyed in a fire which occurred at the defendants' establishment, and were totally lost to the plaintiff, owing to defendants' not insuring the books while they were in their possession, which they were legally bound to do. To this declaration, defendants excepted that there was no legal duty on them to insure the books, and that hence the declaration disclosed no cause of action.

Mr. Schreiner, K.C. (with him Mr. Buchanan) for the exceptors. Mr. J. E. R. de Villiers for the respondent.

Mr. Schreiner, K.C.: The plaintiff's declaration discloses no cause of action, as defendants deny that they were bound to insure these goods. A usufructuary even is not bound to insure the usufructuary property. *Meyer v. Meyer* (1 Juta, 377). There is no general duty to insure another man's property; we had no special instructions to insure, and no custom of the trade has been alleged. But people may insure who are not bound to insure. *Van der Keessel* (Th. 715) citing *Bykershock Quest Jur. Priv.* (Bk 4, C, 50, p. 524), and *Porter on Insurance* (p. 57) who refers there to some four or five cases. *Bunyon on Fire Insurance* (p. 26), *Evans on Principal and Agent* (pp. 258 and 259), *Smith v. Lascelles* (2 Term, Rep. 187), *Evans* (p. 271), *Bowstead on Agency* (p. 146), *Storey on Agency* (sec. 111), *Storey on Bailments* (sec. 446). In the absence of instructions to that effect, an agent is bound not to insure.

J. E. de Villiers (for the respondent): I will argue that our law differs from English law on the subject of negligence, and hence that the English authorities cited do not apply. In the present case the contract between the parties was not *locati-conducti*, but *mandatum*. See *Thomas v. Benning* (8 Buch., 16), particularly the remarks of De Villiers, C. J., at page 25. A man does not cease to be a mandatory because he receives a remuneration. *Voet* (17, 1, 2 and 17, 1, 9), and a mandatory is bound to *diligentia boni patrisfamilias*.

[Buchanan, J.: Is non-insurance a question of neglect or of contract?]

Of negligence, and I press this point to show the measure of diligence required in a mandatory. See *Cod.* (4, 35, 13, and 4, 35, 21), *Voet* (17, 1, 9), *Juta's Van der Linden* (p. 147). Roman law exacts more from a mandatory than English law. He is liable for *culpa levissima* and *diligentia exacta* is required from him. To apply these principles to the present case. The exceptors were bound to take the same care of the books entrusted to their charge that they take of their own books. They insure their own books.

[De Villiers, C. J.: There is no evidence of that.]

I do not see how we can bring the fact before the Court that they insured their own stock; so I can only go on the ground that it would be the action of an ordinarily prudent man to insure them.

[Buchanan, J.: Then why did not you insure?]

They received our books, and it was for them either to insure or to suggest to the respondent to insure.

[De Villiers, C. J.: We do not know that they did not do so.]

Then that question may stand over till the trial.

[Buchanan, J.: Does not your argument run to this: that they were bound to insure?]

No, I rather go on the high standard of diligence which our law requires in a mandatory. The books have disappeared, and it is for the exceptors to show that by no possible care could they have been preserved, *Dig.* (19, 2, 25, 7). As to the exceptors not having insured their own books, they may still have been under a duty to insure ours, for they were bound to that high standard of diligence known as *exacta diligentia*.

Mr. Schreiner was not heard in reply.

The Court upheld the exception.

De Villiers, C. J.: I assume for the purposes of this case that the defendants were mandatories in regard to these books, but, even so, there is no allegation in the declaration of such negligence on the part of the defendants as would render them liable in this action. The authorities cited would apply if there had been proof in the present case that the fire occurred through the negligence of the defendants, but the plaintiff now asks the Court to go further, and to hold that, because the defendants had not insured the books, because they had not done something to recover an indemnity in case there should be a fire, however careful they may have been to prevent a fire, they are to be held liable. There is no authority in English, Dutch, or Roman law to support such a contention. The Roman law knew nothing about insurance, but in Holland insurances were well established at the time the latest text-books were written, and in none of those cited was there stated to be liability in such a case as this. There are many prudent persons who do not insure their own goods against fire, and it cannot therefore be said to be conclusive proof of negligence if a person does not insure the goods of another entrusted to his care. Beyond the bare statement that the defendants did not insure the plaintiff's books, there is no allegation of negligence, and the exception against the declaration must therefore be allowed, with costs.

Buchanan, J., said he concurred, and his reason for doing so was the agreement set forth in the declaration, the third paragraph of which said that the defendants agreed to store and sell copies of the plaintiff's book at 2s. 6d. a copy, receiving 6d. per copy as commission for storing and selling such book. There was no allegation that would imply that by contract, or by the custom of the trade, they should do anything more than store and sell the books. If they had stored the books negligently, and loss had occurred through that, then they would have been answerable, but the question of negligence was not raised on the pleadings at all.

Hopley, J., also concurred.

[Exceptor's Attorney, J. J. Michau; Respondent's Attorneys, Silberbauer, Wahl and Fuller.]

REX V. RADAS.

{ 1902.
} May 16th.

Public Health Act—Government
Notice No. 854 of Oct. 1st,
1901—Native Location—Cer-
tificate of residence.

This was an appeal from a decision given by the Assistant Resident Magistrate at Uitvlugt, in a case where Radas was charged with contravening one of the regulations, framed under the Public Health Act, for establishing and governing the Uitvlugt Native Location. The appellant had been charged in the Court below with contravening section 7 of Government notice 854 of October 1, 1901, which was framed under paragraph 15 of Act 23 of 1897, in that on or about February 7, 1902, and at Uitvlugt, in the Cape district, the appellant (Arthur Radas), being an inhabitant of the Uitvlugt Native Location, did wilfully and unlawfully fail or neglect to take out a certificate of residence, after being required to do so by the Acting Inspector in terms of the said Government notice.

The appellant pleaded "Not Guilty," but was found "Guilty" and fined £2, or seven days' imprisonment. From this sentence he now appealed.

The evidence showed that appellant had lived in the said location for four months, that he had duly received a notice calling upon him to take out a certificate of residence, and had said "it would be all right"; that he had reported himself to the inspector of the location, and that "an identification card" has been issued to him by the said inspector, but that, having never paid his rates, appellant had not received a "certificate of residence"; that the only complaint against appellant was that he had not paid his rent. The evidence for appellant showed that he was a Fingo, and had been ordered by a Government official, in May, 1901, to live in the location. He admitted that he had paid no rent there, but said that he was able to provide a house for himself and his family. He objected to the condition of the hut assigned to him in the location and to the invasion of his privacy therein by police officials. He was willing to take out a "certificate of residence," but objected to pay for the same. For appellant it was contended in the Court below: (1) That the "identification

card" aforesaid was the "certificate of residence" according to the regulations par 5 of Government Notice 430, of May 6, 1901, and (2) that if par. 7 of Government Notice 854 of October 1, 1901, refers to rent, it is *ultra vires*.

Mr. Wilkinson appeared for the appellant.

Mr. Howel Jones appeared on behalf of the Crown, and said that he did not oppose the appeal, as he thought the evidence did not support the conviction.

Mr. Wilkinson said that then he need not say anything.

The Chief Justice: I am not quite sure. A rather important question is involved, and I don't think the case should be decided only on the particular facts in this case. It is a question how far these regulations can be supported at all. (To Mr. Jones) On what account do you admit that the Magistrate was wrong?

Mr. Jones said that the applicant was charged under the 6th section, and the evidence did not support the allegation that he contravened that section.

The Chief Justice: I will tell you how it strikes me. The appellant was forced to live in this location. He said, "I am quite prepared to live elsewhere," but he was told "No, you must go and live there." He goes and lives there, and then they try to force him to take out a certificate of residence, which he refuses to do.

Mr. Jones said appellant was ordered there like other natives at the time of the plague outbreak, but the question did not now arise as to whether or not he was rightly there. He was charged with failing to report himself in terms of a certain paragraph of the regulations, and with having failed to take out the necessary certificate of residence. As a matter of fact the evidence showed that he had reported himself, although he had not taken out the necessary certificate of residence. As far as he (counsel) could see the certificate of residence should have been given to him when he reported himself. It appeared from the record that he was quite willing to take out the certificate of residence, but that he objected to pay the rent, and the superintendent of the location refused to give him a certificate of residence until he did pay such rent. But the question as to his not paying his rent might be another case.

The Chief Justice said that in reading over the case it struck him that they might like the general question decided.

After hearing Mr. Wilkinson, the Court allowed the appeal and quashed the sentence.

De Villiers, C. J.: It would be very advisable that the legality of these regulations should be decided, but it is not clear to the Court that the present is a case for that purpose, seeing it is admitted on behalf of the prosecution that the facts proved in this case do not justify the conviction. After that admission the Court cannot well go into the legal question, because that is a fatal admission for the prosecution. Upon that admission we must allow the appeal and quash the sentence. If the parties wish for the opinion of the Court on the legal question they should raise a case in which that is involved.

[Appellant's Attorneys, Silberbauer, Wahl and Fuller.]

EXECUTOR OF HITE V. JONES. 1902.
May 20th.
" 29th

Sale of land—Lease—Right of renewal—Executor — "Hire goes before sale."

During the absence from the Colony of H., his wife, under his general power of attorney, purchased certain premises, part of which had to her knowledge been leased to the defendants for a year at a monthly rental, with a right of renewal at the expiration for 7, 14 or 21 years, and the land was duly transferred to H. Notice was then given by the seller to the defendants to pay the rent to Mrs. H., to whom the written agreement of lease had been given. H. died in England, and the plaintiff took out letters of administration in this Colony as executor. He allowed Mrs. H. to remain in possession of the premises as the usufructuary of the estate under H.'s will, and she continued to receive the

rent of the leased portion from the defendants. Before the expiration of the first year the defendants, who believed Mrs. Hite to be the owner, and had never heard of her having a husband, gave her notice of their intention to renew for 21 years, and she raised no objection. No renewal was executed, but the defendants remained in occupation as tenants and paid the monthly rent as it fell due to Mrs. H. After her death the plaintiff, as executor, sought to eject the defendants.

Held, (1) That the rule "hire before sale" applies only to leases in existence, and which, if unregistered, do not extend beyond ten years and not to a right to renew; (2) That if, however, the purchaser adopted the lease and accepted the lessee as his tenant, the purchaser may be compelled to execute a lease for such renewal, which if it exceeds ten years must be duly registered; (3) That under the circumstances of the present case the notice given by the defendants to Mrs. H., whom the plaintiff as executor had allowed to appear as the ostensible owner, and whom the defendants believed to be the real owner, was a sufficient notice to the plaintiff of their intention to renew the lease.

This was an action for declaration of rights, brought by George William Steytler, secretary to the Colonial Orphan Chamber and Trust Company, in his capacity as executor testamentary of the estate of the late John Hite, against John Davies Jones, carrying on business under the style or firm of J. D. Jones and Co.

The plaintiff's declaration was as follows:

1. The plaintiff is the secretary of the Colonial Orphan Chamber and Trust

Company, and as such is the executor testamentary of the estate of the late John Hite, and the defendant carries on business in Cape Town and elsewhere under the style or firm of J. D. Jones and Co.

2. The said John Hite in his lifetime purchased from one Herbert John Edmed, and on the 2nd October, 1895, received transfer of certain land, with buildings thereon, situated at Claremont, hereinafter referred to as the said premises.

3. Theretofore the said Edmed had let and the defendant had hired the said premises for a term or period of one year, reckoned from the 1st day of August, 1895, and expiring on the 31st day of July, 1896.

4. The said John Hite died in November, 1895, and by his last will and testament, executed jointly with his wife, one Sophia Hite, their children and a certain grandchild were instituted heirs of their entire joint estate, subject to a usufruct in respect of the said estate in favour of the survivor of the testators, the said estate to be divided among the heirs after the death of the survivor.

5. The widow, the said Sophia Hite, adiated and accepted benefits under the said will, and enjoyed the usufruct of the entire joint estate during her lifetime, and she died on the 26th day of February, 1901.

6. The said Sophia Hite permitted the defendant to continue in possession of the said premises after the 31st day of July, 1896, and throughout the remainder of her life, and received from time to time rent from the defendant as lessee thereof, but the plaintiff, in his said capacity as executor testamentary of the estate of the late John Hite, or any other capacity, at no time consented or agreed to any continuation of the lease or relocation of the said premises to the defendant.

7. The lease aforesaid contained a clause empowering the lessee, the defendant, to renew the said lease for a further period of either seven, fourteen, or twenty-one years, and the defendant wrongfully and unlawfully contends that by reason of having notified to the said Sophia Hite, on or about the 21st July, 1896, his wish to renew the said lease for twenty-one years from the 1st August, 1896, he is entitled, notwithstanding the death of the said Sophia Hite as afore-

said, and notwithstanding that no notice of renewal was given to the plaintiff, and that no consent to renewal was at any time given by the plaintiff, to a renewed lease of the said premises for a period extending to the 1st August, 1917.

8. The plaintiff denies the said contention, and contends that the defendant is legally bound to deliver up to him possession of the said premises, either forthwith or after such reasonable notice as this Hon. Court may fix, and has notified his willingness to permit occupation until the end of the present year, but the defendant refuses to either forthwith, or at the end of the present year, or after reasonable notice to deliver up possession.

9. In the alternative, if the above contention be held incorrect, but not otherwise, the plaintiff contends that the defendant is, at any rate, bound to deliver up possession of the said premises on the expiration of seven years, reckoned from the 1st August, 1896, but this contention the defendant also disputes.

Wherefore the plaintiff prays for an order declaring his rights as executor testamentary of John Hite as aforesaid in regard to the said premises, and compelling the defendant, either forthwith or at the end of the present year, or after such period as this Hon. Court may fix, to deliver up quiet possession of the said premises; or that he may have such alternative relief as to this Hon. Court may seem meet, together with costs of suit.

The defendant's plea and claim in re-convention was as follows:

1. The defendant admits paragraph 1, and has no knowledge of and does not admit the allegations in paragraphs 2, 4, and 5.

2. On the 26th July, 1895, the defendant entered into an agreement of lease in writing of the said premises in the declaration mentioned with one H. J. Edmed for the period of one year commencing on the 1st of August, 1895, and in which it was agreed that at the expiration of the lease the lessees should have the right to renew the same for a further period of either 7, 14, or 21 years, as they, the lessees, may desire, at the same rental, and upon the same terms, as set forth in the said lease, provided that should they, the lessees, not wish to renew the lease after the termination of the first period of one year, that they

shall be obliged to notify their intention of such to the lessor in writing at least one month before the expiration thereof.

3. On the 30th of October, 1895, the defendant received notice from the said lessor Edmed that he had sold the said premises to Mrs. Hite, Bedford Lodge, Westerford, Newlands, to whom the rent was to be paid, and the defendant thereafter paid the said rent to the said Mrs. Hite, who received the same and has continued to do so. The defendant received no notice or intimation from the late John Hite, the plaintiff, or the said Mrs. Hite, the wife of the said John Hite, that the property had been sold to or was vested in the estate of the said John Hite, except as hereinafter stated.

4. On the 31st of July, 1895, the said John Hite gave and signed a general power of attorney to and in favour of his said wife, the said Mrs. Hite, who had full knowledge of all the terms of the lease, of which power of attorney the plaintiff was and became aware, but the said fact was not known then or thereafter until now to the defendant.

5. On the 19th May, 1896, the defendant gave due notice in terms of the said lease to his said lessor Edmed, and to the said Mrs. Hite, that he exercised his right of renewal under the said lease for a further period of 21 years, and the said Edmed and the said Mrs. Hite duly received the said notice. The plaintiff was aware of the terms of the said lease, and was aware of the fact that the defendant was continuing in occupation of the said premises and was continuing to pay the rent stipulated for in the lease to the said Mrs. Hite, in terms of the renewal under the said lease.

6. On the 6th October, 1896, a formal renewal of the said lease was drawn up to the knowledge of the said Mrs. Hite, and it was not until the month of January, 1898, that the defendant received any intimation or notice that the said premises were vested in the estate of the said late John Hite, or that the plaintiff was the executor thereof.

7. The defendant says that owing to the failure and neglect on the part of the said John Hite and the plaintiff to give him any notice or intimation that the premises were vested in the said John Hite or in his estate, they being fully aware that he was the lessee thereof in terms of the lease, and on failure of any notice or in-

timation whatsoever that the premises were so vested, that due and proper notice in terms of the lease given by him to the said lessor and to the said Mrs. Hite was a valid and legal notice of renewal, and that the defendant is not bound to give up possession of the said premises except in terms of the said renewal of the said lease.

8. Save as aforesaid the defendant denies the allegations in paragraphs 3, 6, 7, 8, and 9.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a claim in reconvention:

1. The defendant begs to refer this Honourable Court to the pleadings in convention.

Wherefore he claims: (a) An order declaring the defendant to be entitled to possession of the said premises in terms of the said lease for a period of 21 years from the 1st of August, 1896; (b) alternate relief; (c) costs of suit.

Mr. Schreiner, K.C. (with him Mr. Gardiner) appeared for the plaintiff; Mr. Searle, K.C. (with him Mr. Benjamin) appeared for the defendant.

Mr. Schreiner called

George Wm. Steytler, secretary of the Colonial Orphan Chamber and Trust Co., and as such executor testamentary in the estate of the late John Hite. Witness said he did not personally know Hite, who died in England on November 6, 1895, witness taking out letters of administration on December 5, 1895. Witness saw Mrs. Hite, and ascertained her position. From that time onwards Mrs. Hite took the benefit of usufruct up to her death. He did not hear from her or anyone else about any lease being on the property at Claremont. Early in 1898 Mrs. Hite saw him about the question of a sub-lease, and before that time witness had no knowledge that there was such a lease. Mrs. Hite carried on a partnership with a person called Kennedy, and she drew the rents from the Claremont property during her lifetime. After her death witness communicated with defendants, and said that they should pay the rents to him, which they agreed to do in the future. The estate was getting £15 a month rent for the property next door to the one occupied by defendant. Witness thought the lease would be very detrimental to the realisation of the property.

Cross-examined: John Hite was a Namaqualand trader. Mrs. Hite did not consult witness on all questions connected with the estate. The rent of the property was £8 a month; at that time this was a fair figure, but rents had since gone up. Witness thought Mrs. Hite had no right to bind the estate. Kennedy and Mrs. Hite became insolvent, and witness was one of the trustees in the estate.

Mr. Searle called

Herbert John Edmed, a Seventh Day Adventist minister, now a resident of Uitenhage, who stated that in 1895 he lived at Claremont, and built the premises now in dispute. Witness subsequently sold the property, the whole transaction being negotiated with John Kennedy, to whom witness showed the lease, Kennedy purporting to act on behalf of Mrs. Hite. Witness obtained the lease from the office of Messrs. Silberbauer, Wahl and Fuller, and Kennedy asked permission to show the lease to Mrs. Hite. Kennedy accordingly took the lease, and on his return Kennedy said they thought the lease would be renewed for 21 years. On October 30, 1895, witness wrote to the defendant Jones stating that he had sold the property, and asking him to pay the rent to Mrs. Hite, to whom he (witness) had given the lease. Witness never saw John Hite. Kennedy and Mrs. Hite went to Mr. Syfret's office to make the declaration of purchase, but witness did not observe John Hite's name in the declaration. On May 19, 1896, witness received a letter from Messrs. Silberbauer, stating that Messrs. J. D. Jones and Co. had given notice that they would require the lease to be renewed for 21 years; the letter added that this notice was being given to witness, as the former owner of the property, so that he could communicate with Mrs. Hite, to whom notice had also been given.

Cross-examined: Witness could only account for the fact that he signed the declaration of sale to John Hite, instead of, as he thought, to Mrs. Hite, through the name escaping his notice. He knew nothing about John Hite at all. Witness was satisfied with the rent of £8 a month paid by defendant, and had no idea that the value of property would go up so much as it had since done. At the time the property was sold, he handed

the lease to Kennedy, who was Mrs. Hite's agent all the time.

John Davies Jones, the defendant, said that in 1895 he entered into an agreement of lease with the last witness. Since the sale by Edmed to Mrs. Hite witness had always paid the rent regularly to Mrs. Hite. Witness had no knowledge of John Hite being the owner of the property. Kennedy and Mrs. Hite occupied a portion of the premises for some time. Witness thought £8 was a very good rent for the premises.

Cross-examined by Mr. Schreiner: Kennedy and Mrs. Hite were not in occupation at the time of the insolvency.

James Adams Low, bookkeeper to the firm of J. D. Jones and Co., said that Kennedy and Mrs. Hite occupied the premises at Claremont for about three years. The rent for the first few months was £3 10s. After that it was £3.

Johannes S. le Sueur, conveyancer of the Supreme Court, said that he was formerly a partner in Silberbauer, Wahl and Fuller. Previous to that he was a clerk in the office from 1895 to 1898. Witness had charge of the correspondence in this matter. Witness deposed to having, in 1896, written and received a number of communications, to and from Mrs. Hite and Kennedy, in reference to a lease. He forwarded Mrs. Hite a draft lease, and there were letters in Kennedy's handwriting. He never got the lease back.

Mr. Schreiner, K.C. (for the plaintiff): This case must be determined on the principle "hire goes before sale," otherwise it can scarcely be held that there was any contract between the parties. I take it that our law adopts this principle, and it would be quite applicable had there been no *particularis successor* to Hite. I cannot, however, find a single case in which the Court has upheld a right to renew a one year's lease for a long period, and in this respect the present case differs essentially from those of *Maynard v. Usher* (2, Menz, 170) and *Green v. Griffiths* (4 Juta, 346). In the present case there was a mere executory agreement that the lessee might possibly get a renewal for 17, 14, or 21 years. Unless such a right is endorsed on the title deeds, I submit it would not bind a *particularis successor*. The principle of registration must be strictly adhered to. The law on the whole question was very fully dis-

cussed in *Green v. Griffiths*. With us it is not necessary (as in English law) that all leases for a longer term than one year should be in writing, and hence unless we insist upon registration anybody might come in, after all who can contradict him are dead, and say that he has made an agreement for a renewal of his lease. The question of the position of the successor of a lessor was also considered in *Maynard v. Usher*, and reference was made to *Groeneregen ad Cod.* (4, 65, 9) quoted by *Loenius Decis* (p.p. 10 and 11). *Voet* (19, 2, 1) denies that a lease is binding on a *particularis successor*, though it no doubt is upon a *successor universalis*. See *Neostadius Decis*, 70, of *S. C. Holl and Matthaeus, Paroem, Belg. Jurisc.* (Paro, 5, n. 13.) Even if this were a lease, it could not bind for more than ten years without registration. If a man may buy a right to a 21 years' renewal without registration, registration is useless; registration is required for any lease over 10 years. Notice must in such a case be given by registration. It was the duty of Mr. Le Sueur to find out in whose name the property was registered, and who was the trustee, and then to give that trustee notice.

[Buchanan, J.: You say that notice was not given to the proper person?]

Two notices are required: (1) Of the right to a renewal; (2) of the exercise of the right. We say that the first notice must be by registration.

[De Villiers, C. J.: If a purchaser had bought the property with a knowledge of the lease, would it not be fraud for him to repudiate the lease, because it was not registered?]

Every man is supposed to know the law, and therefore there can be no fraud in insisting on one's legal rights. A usufructuary can lease only during the term of his own life, *Voet* (19, 1, 16). See also *Parkin v. Lippert* (12, S.C.R., 179). Mr. Steytler had nothing to do with either Kennedy or Hite. No notice was given to Mr. Steytler till long after May, 1896, but then it was too late, as the year expired in July, 1896. Mrs. Hite could give no rights beyond her lifetime, for she was only a usufructuary, and if defendants want to make a case they must argue that, though a usufructuary cannot only let the property during his lifetime, he can give an option for a 99 years' lease. We are entitled to say: (1) That there has been no notice of lease; and (2)

that the lease cannot be valid for more than ten years on account of non-registration.

Mr. Searle, K.C. (for defendant): Two points arise for consideration in this case: (1) What is the true construction of the lease? (2) assuming that the lease was only for one year, can plaintiff eject us? As to the first point, section 1 of the lease says that that lease is for a year, but section 7 says that the lease is to run on. It was for the lessee to give notice only if the lessee wished to terminate the lease.

[Buchanan, J.: For how long was the lease stamped?]

For a year, because we wished to be able to terminate the lease at the end of the year, but if no notice is given the lease runs on for 7, 14, or 21 years.

[De Villiers, C. J.: How long would it in point of fact run on?]

At least for seven years, but possibly for 21 years (see section 9 of the declaration). Defendant has a right to hold on for seven years, unless he gives notice of his intention of giving up the lease. It may even be argued that it should run on for 21 years. I wish first to argue the general question of the construction of the lease, irrespective of its length. If defendant gave no notice, he was bound by his lease for at least seven years, and was entitled to it for that term.

[De Villiers, C. J.: The clause does not say what is to follow if he gives no notice.]

It is quite a logical deduction that such a clause binds the lessee.

[De Villiers, C. J.: Then you say that this clause was the benefit of the lessor?]

Yes, but it binds him for at least seven years.

[De Villiers, C. J.: Is he then bound to take a benefit if he does not want it?]

The clause was for the mutual benefit of both parties. One must take the lease as a whole. The lessee has a right to renew, and, if he does not wish to do so, he must give notice. These seven years have not yet expired, as they run from July, 1896.

[De Villiers, C. J.: Mr. Schreiner urges that the lease cannot run for more than ten years.]

We are entitled to ten years at all events. The Court will give us as long as the law allows, and will not stop at seven years. As to the second point, viz., the question of notice, defendant's case is founded on the equitable doctrine

of notice. The only object of considering what occurred after the purchase by Mrs. Hite is to infer what had occurred before the sale. The only question is, "Did she purchase with notice of the lease?" There is no distinction in this matter of notice between executors, administrators, and assigns. They are all in the same position. A lease runs with the land, and in English law a right of renewal runs with the land. See *Botha's Executors v. De Ploy* (14, S.C.R., 414), and the judgment (p. 428) where *Voet* (19, 2, 19) is cited; also *Van der Byl v. Findlay* (9, Juta, 178). Personal rights bind a purchaser if he has notice of them, just as much as a servitude registered on the title deeds binds him, *Richards v. Nash* (1, Juta, 312), *Judge v. Fourie* (2, E.D.C., 441), *Van Wyk v. Van Wyk* (2, E.D.C., 462), *Jansen v. Fincham* (2, Shiel, 230). If John Hite knew of the lease when he purchased the property he would be bound by the lease. Mrs. Hite had her husband's power of attorney, and she commissioned Kennedy to purchase. Hence, if he had notice she had, and so had her husband. Options of renewal would be valueless if they did not bind unless the principal was notified. Surely a lessee is not bound to examine deeds and find out what burdens there are on the lands leased: it is for the purchaser from the lessor to find out what burdens are on the property.

[De Villiers, C. J.: But must not notice be given to the purchaser?]

It was given, because it was given to Mrs. Hite, thus John Hite bought with knowledge of the lease, and is therefore bound.

[De Villiers, C. J.: Notice should have been given to the executor, just as if he had been the original purchaser.]

There would be much force in that contention were it not for the seventh clause of the lease. Edmed says that Mrs. Hite was the purchaser. He did not know Hite in the transaction.

Mr. Steytler never took the trouble to find out whether there were any mortgages on the property. No doubt Mr. Steytler ought to have known about the lease, but in point of fact he did not know. It would be unreasonable to oblige all purchasers to inspect the titles in the Deeds Office. It is quite immaterial that Hite died a few days after we gave notice. Mrs. Hite's knowledge was that of her husband. She knew what

had been done as to the lease, the rent was paid to her, and notice to her agent Edmed was notice to her. Lastly, as to the third point, to cite some English authorities, see *Woodfall on Landlord and Tenant* (16th edition, p. 173, chap. 5, section 8 sub-sec. (a), *Brook v. Bulkeley* (2, Vesey, sen., 498), *Roe and Bamford v. Halcy* (11, Rev. Rep., 458, and also 12, East, 464), *Encyclopædia of the Laws of England* (Vol. 9, p. 189, Art. "Notice"). The only other point is the length of the lease. It has been argued for the plaintiff that no lease is good for more than ten years, unless it is registered, and *Green v. Griffiths* (4, Juta, 346) has been cited in support of this opinion. But there the question was not between lessor and lessee, as in the present case, but between the lessor and his creditors, so that that case is not in point. The whole *raison d'être* of the rule is to protect the creditors: but here there is no question of creditors. In *Maynard v. Usher* (2, Menz, 181), a 99 years' lease was upheld, but I admit it had been registered. On the construction of leases, see *Woodfall* (p. 116), *Fergusson v. Cornish* (2, Burrows, 1032), *Woodright d. Doe v. Richardson* (3, Term, Rep., 462).

[De Villiers, C. J.: In none of these cases was there any question of a one year's lease.]

No, but in the case of this lease we must read section 1 and 7 together.

[Hopley, J.: On what notice do you rely?]

On that given to Edmeds.

[De Villiers, C. J.: Mr. Schreiner, may it not be said that if the notice given to Edmeds reached you, you were bound by it?]

Mr. Schreiner (in reply): The notice given was not given to any person interested, because then Edmeds had transferred the property to Hite. In November, 1895, the rent was paid to Mrs. Hite, and therefore the notice to Edmeds in May, 1896, came too late. We rely upon the absence of notice.

[De Villiers, C. J.: That is a mere technicality; may it not be met by another technicality, viz., that the lease required that notice must be given to the lessor, and it was given to him?]

As Jones knew that Edmeds had ceased to have any interest in the property, he could not give notice to Edmeds. Edmeds was no longer lessor, *Gronewegen ad cod.* (4, 65, 9). It has

been repeatedly laid down in this Court that no lease is valid for more than ten years, unless executed *coram lege loci*, *Fergusson v. Cornish*. There the lease was held good for seven years because that was the original term agreed upon, but here the original term was one year.

Cur. Adv. Vult.

Postea, May 29.

De Villiers, C. J.: On the 8th of October, 1891, John Hite and his wife made a mutual will, by which they appointed their children as heirs, directing, however, that the survivor of the testators should enjoy the usufruct of the joint estate during his or her life, and they appointed the plaintiff as executor of their will, administrator of their estate, and guardian of their minor heirs. It does not appear that they had executed an ante-nuptial contract, and the Court must therefore assume that they were married in community of property. Some time after the execution of the will, but at what date does not appear, John Hite went to England, and before leaving left his general power of attorney with his wife, who remained in this colony. The power is in the widest possible terms, and among other things authorises Mrs. Hite to buy or sell immovable property in South Africa, to let houses, collect the rents, and to execute all such instruments as may be necessary as fully and effectually as John Hite himself might have done. Under this power Mrs. Hite purchased certain premises at Claremont from one Edmed, and on the 2nd of October, 1895, transfer of the premises was effected in favour of John Hite. Before the date of the sale, namely, on the 26th of July, 1895, Edmed had leased part of the premises to the defendants. The agreement of lease was in writing, and provided, among other things, that the tenancy should be for the term of one year, commencing on the 1st of August, 1895, and that the rent should be at the rate of £8 per month, payable monthly. The seventh clause, which forms the subject of the present dispute, is as follows: "At the expiration of this lease the lessees shall have the right to renew the same for a further period of either seven years, fourteen years, or twenty-one years, as they, the said lessees may desire, at the same rental and upon the same terms as are set forth in the lease, provided that

should they, the lessees, not wish to renew the lease after the termination of the first period of one year, they shall be obliged to notify their intention to the lessor, in writing, at least one month before the expiration thereof." It is abundantly clear from the evidence that at the time when the lease was entered into it was considered a very favourable one for the lessor, and that before Mrs. Hite purchased the premises she was made fully acquainted with the terms of the lease. She had the written agreement in her possession for some time, and, according to the evidence of Edmed, which I see no reason for discrediting, "it was the lease which really induced the sale." He was not aware of the fact that Mrs. Hite was purchasing the property for her husband, and indeed did not know that she had a husband, although, if he had carefully read the declaration of seller before he signed it he might have ascertained that the purchase was on behalf of John Hite. On the 30th of October, 1895, Edmed wrote to the defendant as follows: "Having sold my property, which you occupy at Claremont, I would kindly ask you to make your rent payable to Mrs. Hite, to whom I have given your lease." Accordingly, when the current month's rent fell due the defendants paid it to Mrs. Hite. A few days, however, before this John Hite had died in England. The defendants, who knew nothing whatever, and had no reason for knowing, of the existence of John Hite, continued thereafter to pay the rent as it fell due to Mrs. Hite, who had been indicated by the lessor as the person to whom the lease had been given, and to whom the rent was payable. In 1895 the plaintiff took out letters of administration as executor of John Hite's will. He filed an inventory of the estate, which included the premises in question, but he allowed Mrs. Hite, as the usufructuary, to remain in possession. He admits that he knew that part of the property was let at £8 a month, and that he did not inquire for how long it was so let. He did not, however, know of the existence of the written agreement of lease until the year 1898, when Mrs. Hite first informed him of it. I am satisfied, however, that if he had made inquiries from the defendants, to whom the property was let, he would have

ascertained the terms of the lease. He allowed Mrs. Hite to deal with the property as her own, and gave no notice whatever to the defendants of the fact that she, having accepted the benefits of the will, was now only a usufructuary instead of part owner of the joint estate, and that he was the administrator thereof. The consequence was that, when, before the expiration of the first year of the lease, the defendants wished to renew the lease, they made no communication to the plaintiff; but on the 19th of May, 1896, gave notice to the only persons whom they knew in the transaction, namely, Edmed, their lessor, and Mrs. Hite, the person whom they believed to be the purchaser, and whom the plaintiff had left to deal with the premises as the ostensible owner. The notices were to the effect that the defendants would renew the lease for a further period of twenty-one years from the 1st of August, 1896. Edmed, in his answer, of course, referred the defendants to Mrs. Hite, and she, in her answer, raised no objection to the renewal, but promised to call on the defendants' attorneys. For some reason or another the renewal was never executed, and Mrs. Hite continued to receive the monthly rent as it fell due. She died in February, 1901, and on the 19th of June, 1901, the plaintiff notified to the defendants that they should in future pay all rents on the leased property to him, and to this course the defendants assented. The first payment was made on the 2nd of July, when a clean receipt was given on behalf of the plaintiff, but the receipts for subsequent payments contained the words, "without admitting any right under lease granted by Mrs. Hite." The plaintiff, as the executor of Hite, now seeks to eject the defendants from the premises, and they, relying upon the 7th clause of the agreement, claim to be entitled to remain in possession for a period of twenty-one years, from the 1st of August, 1896. Upon these facts, I am clearly of opinion that the defendants cannot be ejected from the premises, and that they are entitled to claim that a lease for twenty-one years be executed by the plaintiff, reckoned from the 1st of August, 1896. I fully concur in the view, contended for by Mr. Schreiner, that the rule "hire goes before sale" applies only to leases actually in existence, and not

to a mere right of renewal. I agree also that even in regard to leases actually in existence at the time when the land under lease is purchased, the rule giving a real right to the lessee, as against the purchaser, does not extend to terms exceeding ten years, without notarial registration of the lease upon the title-deeds of the property. If, therefore, Mrs. Hite had not, during her husband's lifetime, done acts which placed her husband in the same legal position as if he had himself been the lessor of the premises, I would not have enforced the 7th clause of the lease as against his executor. But the evidence clearly shows that Mrs. Hite not only had full knowledge of the terms of the lease before she bought the land, but after she had bought, she accepted the defendants as her tenants, under the lease and subject to all the provisions thereof. The plaintiff, therefore, as executor has no greater rights as against the defendants than he would have had if John Hite had himself been the lessor by whom the agreement was made with the defendants. The plaintiff's counsel does not seriously dispute this position, but he contends that after John Hite's death, the defendants could acquire no legal right of renewal, under the 7th clause of the lease, without due notice to the plaintiff himself, as executor, and that the notice given to Mrs. Hite was not sufficient. In my opinion, the notice given to her must be deemed, under the circumstances of this case, to have been given to the executor. He allowed her to remain as the ostensible owner of the premises, and although he knew that the premises were let, he took no pains to ascertain from her or from the defendants, as lessees, upon what terms they were in occupation. It is true that, as usufructuary, Mrs. Hite was entitled to possession of the premises or to the rents thereof during her lifetime, but the plaintiff, as executor, and more especially as administrator, was bound to inform himself as to the nature of the property which he was to administer. The defendants having hired the premises from Edmed, had no reason for knowing or even suspecting that Mrs. Hite, to whom they had been directed to pay the rents, was a married woman, or that a certain Mr. Hite, whose death they might, if they had examined the death notices, have seen advertised, was the

husband of their landlady. The plaintiff, on the other hand, knowing that a part of the premises was let, ought to have inquired whether they had been so let during the husband's lifetime, and, if so, whether there was a written agreement of lease in existence, and what its terms were. If Mrs. Hite would not give him the information, inquiry by letter or by word of mouth from the defendants would have given him all the information he needed. Having made no such inquiry, and having left the defendants under the impression that Mrs. Hite was the owner, he cannot now avail himself of the somewhat technical objection that the notice was not served on him also. I call it a technical objection, because the consent of the plaintiff was not required at all to perfect the defendants' absolute right of renewal. Formal notice of the defendants' intention to exercise their right may have been requisite, but no possible injustice could be done to any one if that notice was directed to the only person whom the defendants knew in the matter, namely, Mrs. Hite. It may, indeed, be a question whether, if the notice so given was not in order, the notice given by the defendants' claim in reconvention is not a sufficient notice to the plaintiff of the defendants' intention to avail themselves of their right of renewal. In England the agreement would probably be construed as keeping the right of renewal in operation after the expiration of the terms of the lease, so long as the tenancy continues. In the case of *Buckland v. Papellon* (L.R., 2, Ch. A.C., 67), the owner of a long term had agreed to let it for three years, seven years, or the whole term. The tenant continued in the occupation beyond the three years, and became bankrupt. The assignee sold the bankrupt's estate and interest in the leasehold to a purchaser. It was held by Lyndhurst, L.C., affirming the decision of Romilly, M.R., first, that the option of the tenant to take a lease was not gone at the end of the three years; secondly, that it passed to the assignee in bankruptcy; and, thirdly, that the option had passed to the purchaser. In that case there was no limitation of the time within which the lessee was to perform his option, nor is it clear that there is such a limitation in the present case. It is only in case the defendants did not

wish to renew the lease "after the termination of the first period of one year" that they were obliged to give notice to the lessor before the expiration of the lease. It is not necessary, however, to decide to what extent the English rule of construction is applicable to the present case. The plaintiff admits that a notice, given to him at the time when notice of renewal was given to Mrs. Hite, would have entitled the defendants to such renewal. For the reasons which I have already stated, the notice given to Mrs. Hite as the person whom the plaintiff allowed to appear as the ostensible owner, and whom the defendants, without any fault on their part, believed to be the owner, was a sufficient notice to the plaintiff. The Court will therefore give judgment for the defendants, and declare that they are entitled to have a lease for a period of twenty-one years executed by the plaintiff, as executor of John Hite, and duly registered in the Deeds Office against the title deeds relating to the premises in question, such period to be reckoned as from the 1st of August, 1896. The plaintiff to pay the costs, with the exception of the costs of the day on 25th February, which are to be paid by the defendants.

Buchanan, J., said that in this case he was not concerned as to whether the rule of law in regard to hire going before sale was applicable or not, because he founded his judgment upon the fact that Mrs. Hite purchased the property with the knowledge of and subject to the lease. There was distinct notice given to her of the lease, and she accepted the property with that lease. Although she transferred the property into the name of her husband, instead of her own, she had her husband's power of attorney, and her knowledge bound her husband. As to the argument founded on the question of a contract running with the land, the husband might, no doubt, be considered as a particular successor to Edmed, but the executor in the husband's estate stood in no better position than Hite himself would have done. However, these technical distinctions need not be considered under the circumstances proved. Hite bought the property subject to the lease, and was bound by the conditions of the lease. That lease did not contain any clause limiting the time within which notice had to be given by the lessee of his intention to exercise his

option of renewal. If there had been such a condition there would have been great force in the contention that the notice, not having been given within the specified time, the right of renewal was lost. Here the executor had himself knowledge of the lease as far back as 1883, and had allowed the defendant to continue in possession until 1902 before taking any action. It would be highly inequitable to allow the executor, owing to any technicality founded on the fact that the lessee had given notice to Mrs. Hite, instead of to him, to cancel the lease. His Lordship thought that, under the circumstances of the case, the executor having allowed the defendant to continue in possession, could not now refuse to allow the lessee the option of renewal. The executor might have called upon the lessee at any time to state whether he meant to renew the lease, and for what period, but he did nothing of the kind. He concurred in giving judgment for the defendant in the terms stated by His Lordship the Chief Justice.

Hopley, J., also concurred.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN, the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

REX V. SASCHOLSKY. } 1902.
 } May 20th.

Resident Magistrate — Jurisdiction—Act 13 of 1886.

Where a charge of contravening sec. 2 of Act 13 of 1886 had been tried by a magistrate, and he had imposed a fine of £25 with an alternative of three months' imprisonment, which sentence was within the limit of punishment fixed by the Act the fine was reduced to £10 as

the charge had been tried under the ordinary jurisdiction of the magistrate.

This was a case which came before Buchanan, J., as judge of the week, where the defendant was charged under section 2 of Act 13 of 1886 with having injured a person through negligent driving. The Act fixes the maximum penalty for this offence at £100 or two years' imprisonment, but this case was tried under the Magistrate's ordinary jurisdiction, and consequently the Magistrate was limited to the ordinary sentence, which is £10 or three months' imprisonment. In this case the Magistrate fined the defendant £25 or three months' imprisonment and this fine must be reduced to £10. I would point out that the Magistrate himself, after giving judgment, discovered his error, and brought it to the notice of the Court.

REX. V. KRIEK. { 1902.
May 20th.

Abusive language—Act 27 of 1882,
sec. 5, sub-section 18—Public
place.

This was a case which came before Hopley, J., for review from a Special Justice of the Peace in the district of Mossel Bay, in which a man was charged under the 18th section of the Police Offences Act, in that he wrongfully and unlawfully insulted a man called Klaasen by saying, "You thief, you have stolen my bee-hive." On turning up that section, his lordship had found that it had really nothing to do with any such offence, but provided for the arrest of persons under certain circumstances. Obviously the section mentioned was an entirely wrong one, but probably what was meant was the 18th sub-section of section 5, which provided for the offence of using abusive language towards any person in a public place. In the present case the charge did not allege in any way that the offence was committed in a public place, but even if that could be got over it did not, from the evidence, seem to have been committed in a public place, but on a farm. On both those grounds it seemed to his

lordship that the conviction was bad and accordingly it must be quashed.

EDWARDES V. DE JONG. } 1902.
May 21st.

Interdict—Account of profits—
Damages.

Where an applicant sought to interdict the respondent from performing certain plays within Cape Colony and failed to satisfy the Court of his exclusive right to such performances; the Court refused either to grant an interdict or to order respondent to keep an account of profits, as respondent was known to be a man of sufficient means to satisfy the applicant in any action for damages he might be advised to bring.

Mr. Schreiner, K.C., mentioned as an urgent motion an application by George Edwardes for an interdict restraining Frank de Jong from producing a certain play ("A Gaiety Girl").

Sir Henry Juta, K.C., appeared for the respondent, and drew the attention of the Court to the fact that some of the affidavits had only been served upon them that morning, and time would be required to answer these. The respondent had replied to the first affidavit, but to these supplementary affidavits he had had no opportunity of replying.

Mr. Schreiner said he had thought the respondent might take up that position, and he would suggest that the matter stand over until two o'clock that afternoon, by which time respondent could reply to the supplementary affidavits.

Sir Henry Juta said he could not give the assurance that they would be able to reply by two o'clock.

Buchanan, J., said that they might reply if they could by two o'clock, and if they could not, he did not suppose there would be any great damage if the application stood over for a day.

Mr. Schreiner said that the respondent was producing the play again that evening.

Buchanan, J.: Even so, it will be merely a matter of account.

Mr. Schreiner said the difficulty was that great damage would be done by the production of the play.

The Court decided that the matter should stand over until two o'clock, and suggested that an endeavour be made in the meantime to get the replying affidavit prepared.

At 2 p.m. the application was heard, upon notice given, calling upon the respondent to show cause, if any, why an order should not be granted interdicting him from playing and performing in any part of the Cape Colony, either personally or through any agents or company, and more especially by means of a certain company known as Mr. Frederick Mouillot's Musical Comedy Company, the play known as "A Gaiety Girl," the sole right of performing the said play being vested in the applicant. The respondent was also called upon to show cause why he should not be ordered to pay the costs of the application.

The petition of the applicant, George Edwardes, was as follows:

1. That your petitioner is a theatrical manager, resident in London.

2. That your petitioner has acquired the sole right of performing in this colony a certain play, known as "A Gaiety Girl."

3. Frank de Jong, the respondent, has given notice in the papers that the company known as "Mr. Mouillot's Musical Comedy Company" will perform the play "A Gaiety Girl" in Cape Town this evening, and until further notice.

4. That your petitioner has, through his attorneys, given notice to the respondent of his rights, and has warned him not to perform the said play. In reply to this letter, of which a copy is hereunto annexed, the respondent called on your petitioner's attorneys and stated that he intended playing "A Gaiety Girl," and did not intend to withdraw the notice, as he had full right to play that piece.

5. That your petitioner is in the habit of organising companies for the purpose of performing plays in South Africa.

D 3

6. That your petitioner will suffer serious damage if others not authorised by him are allowed to perform the said play in the Colony.

7. Your petitioner annexes hereto a letter received from your petitioner's business manager in London by your petitioner's business manager in South Africa.

Wherefore your petitioner humbly prays that your lordships may be pleased to grant an interdict prohibiting the respondent or any company brought out by him from performing in Cape Town or elsewhere in the Cape Colony the said play known as "A Gaiety Girl" and also order the respondent to pay costs of this application.

The following is the letter referred to in the petition: "Daly's Theatre, Leicester-square, London, W., April 16, 1902.—My Dear Frank, — I have arranged definitely for the "Lady Slavey" for us, or it would have fallen into the hands of the opposition. We can play it with the next company. I understand that Mr. Livesey has assigned some imaginary rights, he thinks he has got, in the "Artist's Model," and "Gaiety Girl" to Mr. De Jong. Of course, you quite understand Mr. Livesey has no power to do this, and if Mr. De Jong attempts to play either of these two pieces you must stop him.—Yours faithfully,—J. E. Malone."

The replying affidavit of Frank de Jong was as follows: I, Frank de Jong, the above-named respondent, make oath and say: That I am a theatrical manager, carrying on business in this colony and in London. That I have read the notice of motion and petition, and annexures therein referred to, which were served on me this afternoon. I admit the allegations of paragraphs 1 and 3 of said petition. That save that the letter referred to in the fourth paragraph was written on behalf of Messrs. B. and F. Wheeler, I admit the allegations of said fourth paragraph. In reply to paragraph 2 of the said petition, I deny that the above-named respondent has the sole right to perform in this colony certain play known as "A Gaiety Girl." That on the contrary, I have acquired the sole right to perform the said piece in South Africa, including the Cape Colony, all which I am prepared to prove.

The following further affidavit on behalf of the applicant was read:

I, Alfred Wyburd, make oath and say:

1. I am the manager in Cape Town for Messrs. B. and F. Wheeler during their absence.

2. Messrs. B. and F. Wheeler are the South African representatives of Mr. George Edwardes.

3. I know that Mr. George Edwardes has the sole right of playing "A Gaiety Girl" in South Africa.

4. I have seen the copyright which was sent to Pretoria just shortly before the outbreak of war for the purpose of interdicting the Lilliputian Company from playing "A Gaiety Girl" and other pieces.

5. On instruction from me, my solicitors have written and telegraphed to Pretoria to have the copyright sent down. It has not yet arrived. Some other copyrights have been forwarded on, but they are not the ones telegraphed for.

6. I annex a power of attorney by Mr. George Edwardes, the applicant, in favour of Benjamin Franklin Wheeler, a partner in B. and F. Wheeler, in which it is clearly stated that Mr. George Edwardes has the sole right to "A Gaiety Girl," as well as other pieces, and in which he instructs Mr. Wheeler to take action against anyone infringing his rights.

7. About the end of 1898, or the beginning of 1899, this Honourable Court was petitioned to interdict one Pollard and a Mrs. Lester from performing amongst other pieces "A Gaiety Girl." The record of the proceedings are filed with the Registrar of this Honourable Court.

8. The letter from Mr. Malone, the joint manager for Messrs. B. and F. Wheeler and Mr. George Edwardes in England, addressed to Mr. Frank Wheeler, and which letter is attached to the petition, confirms my opinion that Mr. Edwardes still has the sole right to "A Gaiety Girl."

9. In any case, he still has the same rights now as he then had.

10. The play is George Edwardes' own property. It was originally produced at the Gaiety Theatre by him.

A further affidavit of Frank de Jong, dated May 21, was read as follows:

I, Frank de Jong, make oath and say that I have perused the affidavit of Alfred Wyburd, as sworn to this day.

In reply to paragraph 3, I deny that George Edwardes has the sole right to "A Gaiety Girl" in this country. In reply to paragraph 4, I say that on

the 19th March, 1902, I acquired the sole right to perform the play in question in South Africa, including this colony, from one Reginald Livesey, of Daly's Theatre, Leicester-square, London, in terms of the agreement hereunto annexed, to which I crave leave to refer this Hon. Court.

I further annex hereto an affidavit, made by Frederick Mouillot, on the 13th May instant, which my solicitors obtained from him prior to his departure for England on the 14th May. I requested him to make the said affidavit in connection with this case, which I was led to believe was being brought by Messrs. B. and F. Wheeler.

In reply to paragraph 6, I beg leave to refer this Hon. Court to the said power of attorney which is dated the 12th January, 1899.

In reply to paragraph 7, I crave leave to refer this Hon. Court to the record of the proceedings therein referred to. In the petition the present applicant applied for an interdict restraining one Pollard from performing *inter alia* the said play, "A Gaiety Girl." This Hon. Court, while granting an interdict restraining the performance of certain other plays, did not include "A Gaiety Girl" in the final order.

I cannot of my own personal knowledge say what rights the said Edwardes had in the year 1899, but I deny that he has the sole rights to said play as alleged in paragraph 10 of said affidavit.

The following is the affidavit of Frederick Mouillot, dated May 13:

I, Frederick Mouillot, of 4 and 5, Broad Court Chambers, Bond-street, London, at present in Cape Town, make oath and say:

That I am a theatrical proprietor and manager of fourteen different theatres in Great Britain and Ireland, and am proprietor of twelve travelling companies.

That the repertoire of the various companies owned and managed by me is a very extensive one.

That I have had large dealings with George Edwardes, of London, and have at various times obtained from him the right to play in England, among others, such pieces as the "Shop Girl," "Circus Girl," "Runaway Girl," "My Girl," "My Friend the Prince," "Greek Slave," and "The Geisha."

That in each case I have paid the fees or royalty for the right to play the above pieces direct to George Edwardes, or to

his company called the Gaiety Theatre Company, of which he is the managing director.

I have, with some of my said companies, also at different times during the last four years, in England played certain piece called the "Gaiety Girl," but I acquired and obtained the right to do this from one Reginald Livesey, of Daly's Theatre, Leicester-square, London, to whom I have paid all fees and royalties for the right to play said piece as aforesaid.

The custom in England is to pay all fees and royalties direct to the owner of any play which you have obtained the right to perform.

The affidavit, dated May 21, of James Nelson, was as follows:

That I am a theatrical manager, and have been engaged in the theatrical profession in this colony and England for upwards of twenty-three years.

I have read the affidavit of Alfred Wyburd, sworn to on this day. I know of my own personal knowledge that Frederick Mouillot, theatrical proprietor and manager, has with his companies been performing the play called the "Gaiety Girl," and that he acquired the right to play same from one Reginald Livesey, who for some years past has been the recognised owner of the said play, and to whom all fees for the right to perform said piece have been paid.

In reply to paragraph 10 of the said affidavit, I say that the said Alfred Wyburd is mistaken in asserting that the said piece was originally performed at the Gaiety Theatre. It was first performed at the Prince of Wales Theatre, London.

I lastly say that the custom in the theatrical profession is always to pay fees direct to the owner of any play.

Mr. Schreiner, K.C. (for applicant): In the case of *Edwardes v. Pollard and Chester* (9, Sheil, 31), Mr. Searle, K.C. (for applicant Edwardes) said they had the right to perform, but he had no proof of the right, as far as some of the plays were concerned. In that case a rule nisi was granted as to some of the plays, but those to which no title could be shown were excluded from the rule. The proofs of our right to "The Gaiety Girl" are in Pretoria. We have wired for them, but they have not yet arrived, but we are in possession of the right to perform this play in South Africa. Possibly we may not be entitled to an inter-

dict, but I would ask that an account be kept. An order such as I ask for was granted in *Serelle v. Bonamici* (3, Sheil, 171). This play was originally produced at the Gaiety Theatre, in London, by Edwardes. Livesey has no right to the play. Our case is that we have a strong presumption in our favour founded on possession since 1899. Respondents cannot be prejudiced by keeping an account and I would ask that the Court should make an order to that effect. The order to relate back to last night.

Sir H. Juta, K.C. (for respondent): This is an application for an interdict. In such cases the first thing the applicant has to show is a clear right. Here, however, no clear right has been established. Van Zyl spoke only to the best of his knowledge. Wyburd could only speak as to what happened "before the war." There is nothing before the Court to show what rights the applicant has in this country. Wyberg knows nothing about Livesey's rights. Then there is the letter annexed to applicant's petition, in which it is said that if they had not secured the "Lady Slavey" it would have fallen into the hands of the opposition, and yet in 1899 they said this was Edward's own property. But let applicant show his title. He could not do so in 1899, and he cannot do it now. In the "Magda" case we got a postponement, and then produced our copyright, but there is nothing of the sort here.

Mr. Schreiner (in reply): The absence of our document is easily explained, because the war interposed difficulties in the way of postal communication, and prevented us from getting it down. Livesey may have rights in England, but that does not prove that he has rights here. The case heard in 1899 was substantially the same as this as to documents of title. No muniments of title were produced as to any of the plays then. Ours is a stronger case than that, and we ask for less than was granted then.

The Court refused the application.

Buchanan, J., in giving judgment, said: The applicant Edwardes in this case alleges that he is the owner of a certain play, known as "A Gaiety Girl," and in the notice of motion he applies for an interdict restraining the respondent De Jong from playing this, either personally or through any other company, in Cape Colony. The question of the ownership of the right to perform this play in this country has been before

the Court on a previous occasion, and on that occasion it was not clearly established that Edwardes had the sole right to the play. On this occasion also Edwardes, the applicant, has not been able to establish his title to the play by the production of the copyright or any other muniment of title, but he alleges that he had certain documents, which he sent to the Transvaal before the war, and that he has not been able to recover these documents. As far as the case put before the Court is concerned, Edwardes's right is founded solely upon a power of attorney signed by himself, in which he alleges that he is the sole owner of the play. This power of attorney is dated January 12, 1899. The respondent De Jong produces a contract entered into between him and one Reginald Livesey, of Daly's Theatre, London, by which contract Livesey grants to the respondent De Jong the sole right of producing this play in South Africa. Here we have the simple allegations, one by Edwardes, the other by Livesey, that they are the owners of this play. There is no information as to how either of them became owners, and neither of them has produced any muniment of title or any copyright to settle this question. Under these circumstances, we are of opinion that no such clear right has been established as would entitle either the applicant or the respondent to any order, either temporary or otherwise. Mr. Schreiner, however, is willing to forego the interdict if an order is given ordering the respondent to keep an account of the profits he makes by the performance of this play, but it is admitted that the respondent is a man of means, and therefore would be answerable for any damages which applicant might recover from him. As the interdict cannot be granted, I am not inclined under the circumstances disclosed to grant the order for an account in the dispute which has arisen in this case as to who is the owner of the play. If the applicant hereafter succeeds in proving his ownership, and if the respondent has infringed his rights, the respondent would be answerable for any damages, and the Court assessing the damages would probably take a liberal estimate of the wrong which has been done by the respondent in this matter. The applicant has not proved his title, and is therefore not

entitled to an interdict, but he is not without remedy if he establishes his right hereafter. The only question is as to whether the application should be refused, with costs.

Mr. Schreiner said it might be taken as prejudicial in the principal case if applicant had to pay the costs now. He suggested that the question of costs should stand over for a month, and then, if no action be taken by the applicant, the respondent to be entitled to his costs.

Sir Henry Juta said that if the Court gave them their costs now, and the applicant hereafter succeeded in showing that they had infringed his rights, the Court, in assessing the damages, would take the costs into account.

The Court decided that the application would be refused, with costs, but leave would be given to the applicant to include these costs in an action, if he should bring one.

Hopley, J., said it might be prudent of the respondent to keep an account as suggested, although not ordered by the Court, because if applicant afterwards proved his right to the ownership of the play, damages would be assessed on the takings.

[Applicant's Attorneys: Van Zyl and Buissinne. Respondent's Attorneys: Tredgold, McIntyre, and Bissett.]

MALCOLMESS AND CO. V. { 1902.
A. R. MCKENZIE AND CO. { May 21st.
Costs—Shortage of goods delivered.

This was originally an action for the recovery of certain goods or their value, but it now came before the Court on the question of costs only. It appeared that Messrs. A. R. McKenzie and Co. had agreed with the plaintiffs to deliver on their behalf certain 500 cases of sheep dip to the Colonial Government, the defendants undertaking to store, look after, forward, and take receipts for these cases. From what could at first be ascertained, it appeared that receipts had been obtained for 414 cases delivered, but there were none for certain other 86 cases, although it had since been discovered that these cases also had been delivered, and Malcomess and Co. had obtained payment for them. Accordingly the only question was as to the costs of the action,

counsel for the plaintiffs intimating that he would forego any claim with regard to one case, which it was stated had been short-delivered.

Mr. Searle, K.C. (with him Mr. Benjamin), appeared for the plaintiffs; Mr. Schreiner, K.C. (with him Mr. Buchanan), appeared for the defendants.

Mr. Searle called

Charles Dennison who said that in April last year he was a clerk in the employ of Van Ryn and Company, who were instructed by Malcomess and Co. to make inquiries regarding this sheep dip. Witness went to McKenzie's, and asked for the receipts for the eighty-five or eighty-six cases that were missing. Witness did not know the name of the gentleman he saw at the office, but that gentleman said he would look into the matter and telephoned down to the Docks while witness was present. He then told witness to call next day, and they would look out the receipts. Witness called next day, and got the same answer. The last time witness called, they said they could not trace the receipts. They admitted having received all the goods except five cases which they afterwards traced. Witness said he must have the matter settled some way, and the gentleman said: "The only way you can do is to send in a claim to McKenzie for eighty-five cases." That was the last time witness called—between the 19th and 25th April.

Cross-examined: Witness could not remember whether he produced at McKenzie's office the letter his firm had received from Malcomess.

Louis Bertie Jacobsohn, an articled clerk in the employ of Walker and Jacobsohn, attorneys, said that in consequence of a letter his firm had received from Silberbauer, Wahl and Fuller, he went to see Mr. Boyes in regard to the cases of dip, but could get no particulars. He went again on a second occasion, but did not get what he wanted. On the 1st or 2nd August, at a time he had the particulars, witness went to the Agricultural Department. After that the money for the dip was paid.

William Boyes, Yard Superintendent at the Railway Stores at Woodstock, said that they received in-

structions to receive and store for the Agricultural Department certain cases of dip. Certain dip was received from McKenzie in January and February. The practice was for McKenzie to send two tickets with each lot of dip. One ticket was signed by witness's men and taken back by McKenzie's people as a receipt while the other ticket was retained by witness. They had got receipts for 414 cases of dip. In addition, one morning, at half-past six o'clock, when witness went down to the stores, he found there a trailer which had been brought there by a traction engine the night before. There were eighty-five cases of dip on the trailer, and nobody in charge of it. The dip was taken into the store. That must have been early in February. About a couple of months afterwards McKenzie's people came and said that there were eighty-five cases of dip for which they had no receipt. Afterwards Mr. Hamilton came and said they wanted a duplicate receipt, and witness said one had been given already. Witness referred the matter to Mr. Knipe, who was a foreman in his yard.

Cross-examined: The Agricultural Department knew about the eighty-five cases of dip the same day, and that they were received. Witness remembered seeing Mr. Sexton one day at the end of February or beginning of March, and telling him that the man who had charge of the receiving of the dip was away sick. There never was a moment's doubt that the Government had received delivery of the eighty-five cases.

Re-examined: It was the practice when they gave receipts that someone was in charge of the wagon.

Charles Richard Knipe said that he was employed under Mr. Boyes at the Railway Stores, Woodstock. It was his duty to receive this consignment of sheep dip. When the wagons came with dip, the drivers brought two tickets, one of which witness signed as a receipt for the goods and the other he retained. For the trailer with the eighty-five cases mentioned he did not give a receipt at the time because there was no one in charge of the trailer. Some time afterwards a gentleman

came from McKenzie's and demanded a receipt for the 85 cases. He was referred to witness, who gave him a receipt on a railway service forwarding note. That would be a month or two after they had received the goods. The day Mr. Jacobsohn called about the dip, witness was sent by Mr. Boyes to McKenzie's. There he was told that they wanted a lot of duplicate receipts. Witness asked what receipts they were looking for, and on their turning up the receipts he pointed out the one for 85 cases on the railway service form. Thereupon witness would not give another duplicate receipt, as he did not feel himself justified in doing so. They took witness's name and address, and said they would write to him if they required him further.

Cross-examined: Witness believed that it was Mr. Hamilton he gave the receipt to. Witness never had any doubts about the 85 cases being delivered.

This closed the case for the plaintiffs.

Mr. Schreiner called

Warren B. Sexton, who said he was the manager of the baggage and claims departments of McKenzie and Co. Witness went to Boyce twice for the receipts in respect of Malcomess's goods. Witness went after receiving instructions from Malcomess. Witness did not remember Boyes saying anything about a receipt having been delivered. Information had been given to plaintiff's representative. Witness instructed two clerks to make further inquiries. Witness had no receipt for the 85 cases at the railway store. There was a note (produced) brought back by the waggoner, but this was not a receipt. Very often the receipts from the railway stores were two or three days late. Witness asked Boyes to sign a duplicate. Boyes said he was not in a position to give a receipt. He did not say that witness had had a receipt.

Cross-examined by Mr. Searle: The document produced was a memo. from the railway stores that no receipt had been given. The document was brought to witness by one of the clerks in April last.

By the Court: Witness did not reply to Malcomess when the latter telegraphed and wrote about the 86 cases, because witness had already given the information to Cadoe.

Alfred Hamilton, clerk to McKenzie, said he had made inquiries about the

cases on the instructions of the last witness. Knipe refused to give witness a further receipt, taking up the position that he had already given a receipt. In regard to the note produced in connection with the delivery at the railway stores, witness had this note handed to him in May or June by one Brittain, a clerk in the defendants' claims departments. Boyes told witness that he remembered the dip being delivered, but he could not recollect whether it was delivered by McKenzie or Divine, Gates and Co.

Cross-examined by Mr. Searle: Some time in June witness took the document produced to Knipe and asked him for a receipt, saying that this document was not a receipt at all. Knipe said it was a receipt.

In reply to the Court, witness said he did not know where this document had been since June to the present.

Mr. Schreiner closed his case.

Mr. Searle, K.C. (for plaintiff): The whole point in dispute is, are defendants liable for the costs of this action or not? We could get no information from them till July 5, and we issued summons on June 4. The correspondence shows that we applied in vain for information. The defendants were bound to get receipts for our goods; it was a part of their contract, and their only defence is that they told Mr. Cardow, a clerk, that our goods had been received. Even in July we could not get proof of the delivery of our goods, and as McKenzie would give us no receipt, we could not get payment from Government. There was a shortage of 85 cases, and Malcomess would not have written so many letters had the information demanded been given. Even on July 5 the Government doubted whether they had received the goods from McKenzie, and the receipt for the 85 cases was only produced in Court by Knight. McKenzie should have taken the informal receipt, and insisted on getting a proper receipt from the Railway Department. McKenzie and Co. failed to carry out their contract, and were, therefore responsible for costs. It took us from February till July 10 before we could give Government the dates of delivery.

Mr. Schreiner, K.C. (for defendant): Plaintiff's counsel has argued very clearly on the pleadings. He has dwelt on the summons, but in the declaration

nothing is said about defendant's duty to take receipts. The Replication shows that we had delivered everything save one case. Early in March we told Malcomess's representative that we had received and delivered 499 cases, though we had receipts for only 414. The replication sets up quite a new case, and not the case set up in the declaration. Why then, it may be asked, did we not except to this replication. Simply because it did maintain a part of the case set up in the declaration, viz., the claim to £412 ts.

Mr. Searle (in reply) was not called upon.

The Court gave judgment for the applicants for the costs of the action.

[Applicant's Attorneys, Walker and Jacobshon. Respondent's Attorneys, Silberbauer.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice HOPLBY.]

ADMISSIONS. } 1902.
May 22nd.

Mr. Benjamin moved for the admission of Frederick William Greenwood as a conveyancer.

Order granted and the oaths administered.

Mr. Alexander moved for the admissions of Andries Brink Galloway as a conveyancer.

Order granted and the oaths administered.

PROVISIONAL ROLL.

FIELD AND CO. V. KAPLAN.

Mr. P. S. Jones moved for the final adjudication of defendant's estate as insolvent.

Order granted.

EPSTEIN V. CARTER.

Mr. C. de Villiers moved for a decree of civil imprisonment on an unsatisfied judgment of £30.

Defendant appeared in person, and offered to pay the debt by instalments of £3 per month. She was a boarding-house keeper, and £3 per month was all she could offer, as she had been very ill.

Mr. De Villiers thought she could pay more, as she had been paying rent at the rate of £30 per month.

The Chief Justice: But the more rent she pays the less able she must be to pay the debt.

Mr. De Villiers said he would like defendant to go into the witness-box, so that he could put a few questions.

The Chief Justice said that if they did so plaintiff might get nothing if defendant stated that she had no means.

Mr. De Villiers said that in that case he would accept the offer made by defendant.

Decree of civil imprisonment was granted, but execution stayed pending payment of debt by instalments of £3 per month, the first instalment to be paid on June 1, with leave reserved to the plaintiff to apply for an increase of the instalments if it could be proved that the defendant could pay more.

SAVAGE V. GRAND JUNCTION RAILWAYS.

Mr. Hull moved for provisional sentence upon two bills of exchange, one for £549 10s. 9d., and the other for £151 17s. 11d., with costs.

Provisional sentence granted as prayed.

SEARLE V. THE GRAND JUNCTION RAILWAYS.

Mr. B. Upington moved for provisional sentence on two bills of exchange, with costs. He also moved for judgment, under Rule 329d, for £58 7s. 3d., for goods sold and delivered and forage supplied, with interest and costs.

Provisional sentence granted as prayed.

REINERS AND VON LAMR V. GRAND JUNCTION RAILWAYS.

Mr. Hull moved for provisional sentence on two bills of exchange for £644 4s. 6d., with costs.

Provisional sentence granted as prayed.

ALBERTYN V. ROSSOUW AND WIFE.

Mr. Rowson moved for provisional sentence for £255, due on a promissory note, together with interest and costs.

Provisional sentence granted as prayed.

MARAIS V. JOUBERT.

Mr. Nightingale moved for provisional sentence for £450, due on mortgage bonds, with interest less £17 10s. paid in reduction of interest. The bonds had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

EQUITABLE ASSURANCE COMPANY V. LA GRANGE.

Mr. Close moved for provisional sentence for £48, being interest in a mortgage bond.

Provisional sentence as prayed.

ZEEDERBERG AND DUNCAN V. L. AND M. WEINTROB.

Mr. Benjamin, for the applicants, asked that this matter be allowed to stand over.

Postponement allowed.

NESS V. RIPSTON.

Mr. Alexander moved for provisional sentence on a mortgage bond for £350, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of the interest.

Provisional sentence as prayed, and the property declared executable.

DREYER V. ERASMUS.

Mr. Upington moved for provisional sentence for £100, with interest at the rate of 8 per cent., due upon a mortgage bond. The bond had become due by reason of notice given on non-payment of interest. He also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and property declared executable.

ROUX V. CLEWS.

Mr. Alexander moved for provisional sentence for £15, being six months' interest at the rate of 6 per cent. on a mortgage bond for £500.

Provisional sentence granted.

ROUX V. CLEWS AND OTHERS.

Mr. Alexander moved for provisional sentence for £30, being six months' in-

terest at the rate of 6 per cent. due on a mortgage bond for £1,000. The bond was originally for £1,500, but was subsequently reduced to £1,000, and it was then agreed that the rate of interest should be 6 per cent., instead of 5 per cent., as mentioned in the bond.

The Chief Justice pointed out that there was nothing on the face of the bond to show that the rate of interest had been increased, and accordingly provisional sentence could be given for interest at the rate of 5 per cent. only.

Provisional sentence was granted for interest at the rate of 5 per cent., viz., for £25.

LANGE V. SHORTLE.

Mr. Russell moved for provisional sentence upon four promissory notes, for £6, £22, £6 10s., and £5 5s. respectively.

Defendant appeared in person, and said that he only got as consideration for the notes £12 10s. in cash and some cheques, which on being presented to the bank were dishonoured. The cheques were drawn by one Reid in favour of defendant. Reid was a partner in business transactions, and a great friend of Mr. Lange. Defendant asked that the matter might be postponed for a fortnight, so that he might have an opportunity of being represented by counsel.

The Chief Justice said it was a very small amount to have all that litigation about, and if what defendant stated was true, applicant might consider whether it was advisable to go on with the case.

The Court granted a postponement of the case until the last day of the term.

STEER V. HAIRBOTTLE.

This was an application for provisional sentence on a mortgage bond for £154 1s. 5d. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence as prayed and property declared executable.

EVANS AND DICK V. R. D. ELLIOTT.

Mr. Buchanan moved for a decree of civil imprisonment upon an unsatisfied judgment for £50, with £9 12s. 5d. costs.

Decree granted.

HANSEN AND SCHRADER V. GRAND
JUNCTION RAILWAYS

Mr. Buchanan moved for provisional sentence on the six bills of exchange, for sums of £284 1s., £104 16s. 9d., £586 15s. 11d., £930 14s. 6d., £420 0s. 9d., and £383 1s. respectively. There was also included in the summons a claim for £134 19s. 5d. upon another bill of exchange, but as there appeared to have been no acceptance of that bill, he could not ask for provisional sentence on it, but would ask for judgment on it as an illiquid claim.

The Chief Justice pointed out that in the summons the bill of exchange was set forth as the cause of action, and therefore without any other cause of action being disclosed, judgment could not be given in it.

Provisional sentence was given on the six bills of exchange against two respondents only, viz., Frank Hills and John Walker, counsel having stated that it appeared from a letter received that the other two respondents named as being partners in the Grand Junction Railways, viz., John Walker, jun., and T. Cameron Walker, were not, and never had been partners.

Mr. Buchanan also moved for judgment, under rule 329d, as follows: For £150 16s. for storage of certain sleepers, for £6 8s. 8d., amount due for off-loading and reloading certain sleepers; for £36 10s., for storage of and £17 13s. 4d., for off-loading and reloading certain other sleepers, with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

ILLIQUID ROLL.

PHILIP BROTHERS V. GRAND JUNCTION
RAILWAYS.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £119 10s., for goods sold and delivered, with interest and costs of suit.

Judgment granted as prayed.

OHLSSON V. WEIDNER.

Mr. Alexander moved for judgment, under Rule 329d, for £450, being money lent.

Judgment granted as prayed.

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REHABILITATION.

Mr. Buchanan moved for the rehabilitation of the insolvent, Frank Wium, whose estate was sequestrated on February 23, 1887. The liabilities were brought up in the schedules at £110 10s., and the assets at £52. The debts proved amounted to £45, being rent of a farm, while the assets only realised £16 11s., which went towards the expenses of sequestration, so that there was no dividend to creditors. There was nothing unfavourable in the trustee's report.

Order granted.

GENERAL MOTIONS.

PETITION OF TITUS DARIUS.

Mr. Langenhoven moved that the rule *nisi*, granted May 2, 1902, under Derelict Lands Act be made absolute.

Rule made absolute.

Re ESTATE HEYDENREICH { 1902.
AND CO. { May 22nd.
Ex parte BACKSHELL.

Deed of assignment—Duplicate original.

This was an application for an order declaring that the duplicate original of a certain deed of assignment in the above estate might be treated and dealt with as the original thereof; such original having been lost or destroyed.

The petition of the applicant stated:

1. That by a certain deed of assignment, dated March 12, 1900, and signed at Port Elizabeth, petitioner was appointed sole assignee in the estate of Marcuse Behr Fischer and Herman Hendenreich, trading together at Pampoenpan, in the district of Hope Town, and at Douglas, in the district of Herbert, in this colony, under the style or firm of Marcuse Heydenreich and Co.

2. That at the signing of the aforesaid deed of assignment, a duplicate original thereof was also signed by all the parties concerned, and which duplicate original bears a certificate signed by the Civil Commissioner of this town, as follows: "I hereby certify that the original of the deed of assignment, of which the within written is a duplicate, has been

stamped with a stamp of £1 sterling, which has been cancelled by me, as by law required."

3. That on 18th of February, 1901, I went to Hope Town, and left the original deed in my safe at Pampoenpan aforesaid.

4. That about a week after that date I returned to Pampoenpan, and found the safe broken, and all documents extricated and thrown about, presumably by the enemy, who during that interval had visited Pampoenpan.

5. That notwithstanding a thorough search having been made by me, I have been unable to find the aforesaid deed of assignment.

6. That by virtue of the aforesaid deed I am empowered to give transfer of all or any landed property belonging to the estate of Marcuse Heydenreich and Co.

7. That a portion of a certain farm De Kalk, belonging to the aforesaid estate, has been sold by me to a certain Louis de Jager, of which portion I am unable to give transfer, by reason of the Registrar of Deeds refusing to accept the aforesaid duplicate original in lieu of the original deed of assignment, which has been lost as aforesaid, without an order of Court authorising him to do so.

8. Wherefore petitioner prays for an order authorising the Registrar of Deeds to pass the aforesaid transfer under and by virtue of the duplicate original deed of assignment.

There was a verifying affidavit attached.

On the motion of Mr. Buchanan, an order was granted as prayed.

[Applicant's Attorney: G. Trollip.]

ESTATE OF NAUDE V. HALL AND CO.

This was an application in which Frederick Lindenberg, executor dative in the estate of the late Jacobus Stephanus Naude was the applicant, and William Ashworth Hall, trading as Hall and Company, and Frederick Lodewyk Lindenberg individually and in his capacity as the trustee in the insolvent estate of the late Jacobus Stephanus Naude were respondents.

The notice called upon the respondents to show cause, if any, why,

(a) You, the respondents Hall and Company, shall not be ordered to pay the costs in connection with a certain application by you, heard on the 12th of

October, 1901, for the convening of a meeting for the election of a trustee in the insolvent estate of the late Jacobus Stephanus Naude.

(b) The appointment of you, the respondent, Frederick Lodewyk Lindenberg, as trustee of the insolvent estate of the late Jacobus Stephanus Naude, shall not be recalled in pursuance of section 40 of the Insolvent Ordinance by reason of your misconduct in the said trust in regard to the proceedings before the R.M. on the 7th day of April, 1902, in a suit between Levy and Beiles and the estate of the late Jacobus Stephanus Naude or otherwise.

(c) The proceedings instituted by you, the respondent, Frederick Lodewyk Lindenberg, on the 10th of January, 1902, shall not be declared abated, and the argument on exceptions pending for hearing by this Hon. Court be barred with such order regarding the costs thereof, and of the said action, as the Court shall think fit.

(d) The applicant should not be authorised to administer and close off the estate of the late Jacobus Stephanus Naude as the executor dative thereof, in pursuance of the order of this Hon. Court on the 12th day of October, 1901, and make such provision regarding the costs incurred in connection with the abortive proceedings consequent upon the order of the 12th day of October, 1901, as the Court shall decree.

(e) The costs of this application, and consequent upon the order of the 12th day of October, 1901, and the appointment of the trustee, shall not be paid by either or both the respondents.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), for the applicant; Mr. Currey for the respondents.

Mr. Schreiner said that the motion arose as follows: In 1883 the late J. S. Naude became insolvent, but at the meetings called, no creditors appeared, and no trustee was appointed. It appeared that a certain piece of land in the neighbourhood of Worcester, which at that time was of little value, but which had since become valuable, was not brought up in the schedules. Naude having died, an executor dative was appointed, and an application was made to have the estate rehabilitated, but the Court did not entertain the application favourably. The executor dative asked

leave to have the Master joined with him in passing transfer of the piece of land mentioned, and the Court granted this, and the land was sold for £1,300. Transfer, however, was not passed, as in the meantime Hall and Co. and Maritz, creditors in the insolvent estate, had taken steps to have the insolvency proceedings awakened, so to speak, and a trustee appointed in the insolvent estate, and thereupon the Master would not join in passing transfer. On October 12, 1901, Hall and Co. obtained an order authorising the calling of a meeting to appoint a trustee. This was done, and Hall and Co. and Maritz proved their debt, and F. L. Lindenberg was appointed trustee. The executor dative took up the position that the debts in question could not be proved, the rule of prescription applying, and that therefore F. L. Lindenberg, as representing two creditors whose claims should not have been admitted, had no right to the £1,300 or the land in question. The matter came before the Supreme Court by way of motion, and the Court ordered the proofs of debt to be struck out. Counsel contended that the executor dative having succeeded in getting the proofs of debt struck out, the respondents should pay the costs of the application, and that the estate should not be called upon to do so.

Mr. Currey (for the respondent) said it would shorten the proceedings if he stated at once that he was instructed to say that in view of their lordships' decision on the last motion, when it was held that the claims were prescribed, the respondent felt that the ground on which he based his action had been completely cut away, and counsel was prepared to admit that the respondent could no longer hold the position of trustee. He would therefore consent to judgment so far as order (b) was concerned, but he asked that it be done under section 40, and not on the alternative order under section 52. Therefore the only question would be as to costs. As to the question of further proceedings to be taken, in which the respondent as the plaintiff had taken exception to the defendant's (applicant in this motion) plea, his client having no *locus standi*, it followed that these proceedings must be abated.

Mr. Currey: We contend that the election of the trustee was unduly

made, because it was made by persons who had no right to vote, inasmuch as their claims had been prescribed. I quite admit that respondent has no *locus standi* in this matter, in the face of the former decision of the Court. I would ask that Lindenberg should be removed, under section 40 of the Insolvent Ordinance, and not under section 52.

Mr. Schreiner, K.C. (for applicants): If the trustee is removed, all his acts should be set aside, and the action previously instituted by him must abate. As to costs, Mr. Hall has forced these proceedings upon us, and we ought not to be called upon to pay costs. We only want to preserve the estate. The affidavits of respondent do not answer to the merits of the case. Respondents' counsel admits that they have no *locus standi*, and the action should abate.

[De Villiers, C.J.: If the case is abandoned, the whole thing falls to the ground.]

There is, however, the question of costs. We are entitled to costs. In *The Standard Bank v. Jacobson's Trustee* (9 Sheil, 365) counsel's advice was taken, but yet the trustee had to pay costs *de bonis propriis*. When Mr. Justice Maasdorp gave respondents leave to call a meeting of creditors on October 12 last year, he did so at their own risk. The motion then made was quite sufficient to determine the whole case, but the respondents have fought it till the last. I submit that an order for costs should be made against Hall, though none can be made against Lindenberg. We are clearly entitled to the costs of the motion. As to the costs of the action, there is nothing in the estate.

[De Villiers, C.J.: The only point is with regard to the costs of this application.]

Mr. Currey (in reply): I submit that as a formal application would have had to be made for the removal of the trustee, costs would have been incurred in any case, but if a formal application for the removal of respondent had been made on April 12, we should have consented, and further expense would have been saved. The costs which have been incurred have been incurred owing to applicant's own negligence.

De Villiers, C. J.: I am quite willing to believe that until the Court gave its judgment upon the

motion for expunging the proofs of debt, the respondents were acting in good faith, but I think that after that judgment it was hopeless for Mr. F. L. Lindenberg to take up the position that he could remain a trustee in the estate and when the application was made, to have his appointment recalled, he ought to have consented at once, but instead, by entering an appearance, he incurred all this expense. The Court will now order that this appointment be cancelled, and will also order that the costs of this application be paid by F. L. Lindenberg *de bonis propriis*. As to Hall and Co., I think that no order should be made in regard to their costs. First of all, they are asked to pay the costs of an application made on October 12, for convening a meeting for the election of a trustee in the insolvent estate. In my opinion Hall and Co. acted in perfect good faith, and there was a very important question to be decided. The property was in the name of Naude, and he had omitted to bring it up in his schedules, and I think that Hall and Co. had every reason to make that application, and until the Court found that their claim was not a valid one, I think they acted in perfect good faith. As to the costs therefore of that application, the Court will make no order. The result will be that the applicant will be entitled to have his costs out of the estate that he is administering. Then we have been asked to give costs against the respondent Lindenberg in the action, but I think that no order should be made upon the question of costs. If the applicant has incurred any costs he will be entitled to recover them out of the estate which he is administering, and the result of making no order will be that the respondent Lindenberg will have to pay his own costs.

In reply to Mr. Schreiner the Chief Justice pointed out that by the cancelling of Lindenberg's appointment as trustee, the action now pending would be abated, and would fall to the ground.

The order made by the Court was that the appointment of F. L. Lindenberg as trustee be recalled; that he pay the costs of this application *de bonis propriis*, and that the action be abated, each party to pay his own costs thereon. No order as to costs in the matter of Hall and Co.'s application.

[Applicant's Attorneys: Van Zyl and Buissonne; Respondent's Attorneys: Van der Byl and Van der Horst.]

PEDERSEN V. OFFICIAL RECEIVER IN ESTATE WENTZEL.

This was an application for an order compelling the said receiver to admit as a proof against the said estate the claim of the applicant.

Mr. Gardiner appeared for the applicant, and Mr. Searle, K.C., for the respondent.

It appeared that in an action for judicial separation, Mr. Maynard Nash was appointed official receiver in the estate of Mr. and Mrs. Wentzel. The applicant sought to have a claim for £600, alleged to be due on promissory notes, admitted as a proof against the joint estate.

Mr. Searle said the respondent was not satisfied that value had been given for these notes, and suggested that there was collusion between Mr. Wentzel and the applicant in regard to them, the object being to prevent Mrs. Wentzel receiving any of the money.

Mr. Gardiner (for applicant): In this matter facts are in dispute, and it is suggested on the affidavits that there has been collusion between Wentzel and Pedersen, with the object of defeating the claims of his wife.

Mr. Searle, K.C. (for respondent) was not prepared to consent to the matter being tried by action. Applicant had gone to Sweden a few days after he gave notice of motion. Counsel ultimately consented to an action, provided it could be brought next term.

Mr. Gardiner (in reply): We could apply for a commission to take the applicant's evidence in London, and the case might be heard next term. It could not well be decided on motion.

The Court postponed the matter until the last day of next term, and reserved leave to the applicant to bring an action, but directed that he must bring such action before the end of next term, the notice of motion to stand as summons.

BEALE V. CARRE. } 1902.
(May 22nd.

Notice of motion—Costs.

A notice of motion to deliver up an agreement of lease was served on the respondent, but before such service he had sent the agreement by post to the

applicant, who did not receive it until after the notice of motion had been issued and served.

Held, that if there was such a delay as would justify the motion at the time it was issued, the respondent should pay the costs.

Mr. Gardiner (for applicant): Since notice has been served on respondent, he has given up the lease. He had no right to retain it, and cannot complain that he did not get sufficient time wherein to return it. We gave him two months at first, and then he had from May 12 to May 16. There were disputes between the parties; we gave ample time, and, I submit, are entitled to our costs.

Sir H. Juta, K.C. (for respondent): No demand was made for the lease until the applicant sent Dr. Carre a peremptory notice to deliver it up on May 12. Another letter was sent on May 14, and by some accident the respondent received both of these letters at the same time. The lease had been handed to Dr. Carre, that he might have it stamped, but there is nothing before the Court to show that there was any great urgency in the matter.

[De Villiers, C.J.: Should not respondent pay the costs to the date of the summons?]

I submit not; we never refused to give up the lease.

[De Villiers, C.J.: You did not tender to return it.]

We could not do so, as it was at Simon's Town. Applicant was simply courting a law suit. Dr. Carre gave a satisfactory reason for not returning the lease. Mrs. Beale insisted on his having it stamped, and he tried to get that done. He only wanted a reasonable time, and it would seem that Mrs. Beale was quite willing to grant this, until a quarrel had taken place between the parties. The respondent had never set up any claim to the lease, and it was left with him for two months; then in a great hurry he was ordered to deliver it up by noon the next day. Under the circumstances, this was not a reasonable demand.

Mr. Gardiner was not called upon in reply.

De Villiers, C.J.: The only question in this case is whether there was such a delay on the part of the respondent at the time of the notice of motion which justified the notice of motion being issued. The evidence shows that this lease had been in the possession of the respondent for a couple of months, and there had been communications about it, and a request that this lease should be handed over. There was some delay in answering, and in consequence of this delay, this notice of motion was issued. It seems that the respondent got the notice, and he wrote a letter. I am of opinion that that letter was not such a clear promise to forthwith send this lease as would make it an improper thing on the part of the respondent to issue this notice of motion. There is no distinct promise that at such a time this document will be sent. It is true that he admits that he is not going to keep the lease, but there is no definite statement that he is going to deliver it. The respondent will have to pay the costs of the notice of motion, but I think that the costs of the supplementary affidavit should not be included in the costs. The Court will order the respondent to pay the costs of the motion, excepting in respect of the supplementary affidavit.

Applicant's Attorneys: C. Brady; Respondent's Attorneys: Van Zyl and Buissinne.

BENDLE V. BENDLE.

Mr. Russell, for the petitioner, applied for leave to sue *in forma pauperis* in an action brought by the wife against her husband for a judicial separation.

The respondent appeared in person, and stated that he was willing to pay for a room for his wife, but he declined to stay with her.

The Court granted the application.

SOLOMON V. SOLOMON.

Mr. Searle, K.C., appeared for the applicant; Mr. Benjamin for the respondent.

This was an application for a postponement of trial, owing to the defendant's abstinence from the Colony, owing to ill-health.

The Court ordered a postponement of the trial till the next term, to a date not earlier than August 20, the question of costs to stand over.

ANDERSON V. MCKENZIE.

Mr. Benjamin applied for leave to sign judgment against plaintiff for not proceeding in an action against McKenzie for the delivery of a portmanteau and its contents, valued at £30.

The Court granted the application.

SIGALOWITZ V. SIGALOWITZ.

Mr. Wilkinson asked for an extension of the terms of a certain order of the Court in the above case, mentioning that it had been found that defendant was living not in Maritzburg, as was originally understood, but at Durban.

Leave was given to serve the intendit and notice of trial along with the citation.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

EPSTEIN V. EPSTEIN. { 1902.
May 23rd.

This was an action for divorce, brought by Rosa Epstein against her husband on the ground of adultery. Mr. Alexander appeared for the plaintiff; the defendant was in default.

In the November term the petitioner asked for a decree of divorce from her husband, the only evidence before the Court being that of two witnesses who on one occasion saw respondent coming out of a house of ill-fame. The Court ordered the case to stand over until the beginning of the February term for further evidence, which could not be obtained, so the case was withdrawn from the roll, a subsequent application being made for leave to plead *in forma pauperis*.

[De Villiers, C.J.: Are you suing *in forma pauperis* now?]

Mr. Alexander: No, my lord. The declaration set forth that the parties were married in 1894 at the Jewish Synagogue, Belfast, and that subsequently respondent committed adultery with a woman unknown. The summons in that case had been served at the place where respondent resided, but he was out, and the summons was left with his landlady.

Respondent was then called, but did not appear.

The petitioner, Rosa Epstein (born Cohen), stated that after the marriage they went to live at Dublin, her husband subsequently coming out to South Africa, petitioner following him twelve months ago. She lived with him for three months, during which time respondent ill-treated her, and she left him.

Evidence having been given in proof of the allegation of misconduct against the husband,

A decree of divorce was granted, with costs.

VAN DER BYL V. ESTATE OF FAURE.

This was an application for the transfer of certain property.

Mr. McGregor and Mr. De Waal were for the plaintiff; and Mr. Upington and Mr. Goch for defendant.

Mr. Upington applied for a postponement, one of his witnesses being unable to come down that day; he was instructed that the witness in question was a material one.

Mr. McGregor consented to the application.

A postponement was granted, defendant to bear the costs of the day.

THOMPSON V. SEALE.

Mr. Upington mentioned this case as a matter of urgency, and applied for a commission to sit in Cape Town to take the evidence of a witness who was leaving on the 28th inst.

The Court granted the commission.

ROSENZWEIG V. SEARIGHT. { 1902.
May 23rd.

This was an action for the delivery of a certain case of goods deposited by plaintiff with defendant, who traded as James Searight and Co. This case contained trousers; defendant had delivered a case

which they said was the one in question, but it contained overcoats.

The declaration set forth that on November 9, 1900, plaintiff stored with defendant a case containing 340 pairs of trousers, on condition that it was delivered on demand. In June plaintiff demanded the delivery of the case, but delivery was not made. The trousers were of the value of £56 8s. 8d., and damages to the extent of £20 had been suffered by plaintiff through their non-delivery.

Defendant, in his plea, admitted having received from plaintiff six cases in November, 1900, the contents of which they had no knowledge of. On May 11 1901, defendant delivered four of the cases to plaintiff, and three days later the remaining two, plaintiff accepting delivery. Plaintiff subsequently returned a case marked "SR 200," denying that it was his property, and defendant was compelled to store the case in his warehouse.

In replication, plaintiff admitted having deposited six cases with the defendant, five of which were duly delivered, but the sixth case returned by defendant was not his (plaintiff's).

Mr. Buchanan (with him Mr. Alexander) for plaintiff; Mr. Uppington for defendant.

Mr. Buchanan then called

Siefried Rosenzweig, the plaintiff, who stated that he was carrying on business as auctioneer and wholesale clothing importer in Cape Town. On November 8, 1900, he deposited three cases with defendant, and on November 9 he stored another case with defendant.

He never had receipts for the cases from defendant, who sent him back a case containing overcoats instead of one containing trousers. The case of overcoats was not plaintiff's property, but belonged to a Durban firm named Isaacs and Koutner. Plaintiff informed Mr. Stewart, of the defendant's firm, of the wrong delivery, and as overcoats were in demand in Cape Town at that time, plaintiff negotiated with Isaac and Koutner for the purchase of the overcoats, but there being a difficulty about delivery, the sale fell through. The missing case was marked in ink, "S R 200." The trousers cost plaintiff 3s. 4½d.

each; if he had had delivery of them he might have disposed of them at a profit; he generally sold them wholesale for 4s., 4s. 6d., or 5s. per pair. Disposed off retail they would fetch a much higher price.

Cross-examined: Plaintiff did not buy the trousers from Isaacs and Koutner, but from different people. At the time of the purchase, Koutner was in Cape Town; he was dead now. The disputed case was delivered on May 11.

By the Court: Isaac and Koutner were in the habit of sending cases for storage at Searight's.

Cross-examination continued: Plaintiff kept no copies of his letters to Isaac and Koutner regarding the negotiations for the sale of the overcoats. He had lost one letter he had received from Isaacs on this subject.

By the Chief Justice: Witness did not always give instructions for the marks to be examined before cases were opened, because he had never had any trouble before. When delivered to him, the box was not marked "S R 200."

Re-examined: When witness opened the case and saw that it contained overcoats, he closed it up again, as he knew it was not his.

Morris Cohen said he carried on business in Cape Town as a wholesale merchant. He knew the plaintiff, and he knew Isaacs. Witness remembered giving plaintiff some cases marked A.M.C. Witness did not of his own knowledge know what plaintiff did with those cases. Isaacs came to witness's place, and got a case from him in which to pack the overcoats in question. Witness saw him packing those overcoats in the box. Witness saw the overcoats in the box on Thursday, but he could not say if it was the same case, as he did not examine it carefully. Isaacs imported those overcoats from London, and kept them in bond in Searight's. It might be the same case with a different lid, because witness believed he did not give him a lid with the case. It would be impossible to get 340 pairs of trousers in the case witness saw on Thursday. It would be possible to get about 200 pairs in it.

Cross-examined: Witness gave Isaacs the case about twenty months ago at

witness's private house in Primrose-street. The overcoats were at witness's house, having been brought there from Searight's. Witness did not have a store at that time, but carried on his business at his private house.

Mr. Buchanan closed his case, after reading a letter from Isaacs to plaintiff, in which the former said that the overcoats were his, and Searight ought to have known that.

Mr. Upington called

Emile Malzer, who said he had charge of Searight and Co.'s store, and had been in their employment for nearly twenty-five years. He recollected plaintiff depositing goods in their stores. It was witness's custom to note any marks on cases put in the stores and to give receipts for the cases. In the book produced there was an entry to the effect that case 200 was delivered to them on November 9, 1900. Witness was present when that case was delivered. Plaintiff brought it down himself. Witness saw it put on the wagon, and told his foreman to put it along with plaintiff's other three cases in the store in Chiappini-street. Plaintiff pointed out the number on the case (200) to witness in the presence of his two boys. Witness afterwards saw the case in Chiappini-street several times. Some time in May the plaintiff wanted to have the case marked 200 back. The four cases were delivered by Mr. Ireland to Adam, and sent to plaintiff on May 11, for which they had a receipt. Mr. Stewart was the manager of Searight's during Mr. Watson's absence. As far as witness knew, Stewart was now in Johannesburg. He managed the general business, and had nothing to do with the stores, of which witness had the control. At least ten days after the case was delivered plaintiff came down to the store, and Mr. Stewart told witness he had better take the case back, because plaintiff had said something about it being Isaacs'. On June 15 plaintiff brought the case back. It was then in a different condition, having a new lid, with no number whatever on it. About three weeks ago, as nobody claimed the goods, witness, to identify the case at any future time, put on it the number 200 and Rosenzweig's name. He did that in the presence of Mr. Watson. When the case was first received there was only the number 200 on the lid and nothing else. There were no letters "S.R." on it.

Witness had stored cases for Isaacs, but they were stored in the Waterkant-street store, while Rosenzweig's were stored in Chiappini-street. They had the case in question still, and were quite prepared to hand it over at any time upon payment of the charges due upon it.

Cross-examined: They stored at that time for a good many other people besides Isaacs and Rosenzweig. They gave receipts for all such goods. If the goods came direct from the customer they gave the receipt to the customer, but if the goods came from the Docks, they gave the receipts to the shipping agents. The stores in which these goods of Isaacs and Rosenzweig were stored did not have their floors taken up during the plague, and it was not necessary to remove any of the goods in these particular stores. When the box was brought back witness asked Rosenzweig where the lid with the number 200 on it was, and Rosenzweig said the lid had broken to pieces in taking it off, so he had put it in the backyard, and put on another lid. Defendant's case was that this was the case stored by Rosenzweig, and that Isaacs had not at present any case in their stores.

Adam said he had been twenty-two years in the employment of defendants. He remembered plaintiff coming to the store with a case marked 200. There were no other marks on it. On Mr. Malzer's instructions witness took it to the Chiappini-street stores, where there were already three cases belonging to plaintiff. Witness placed that case on top of the other three cases, and afterwards, when two more cases of plaintiff's came, he placed them in front of the others. In May witness put the case marked 200 and two others on the wagons, and the other man, Dannie, took them up to plaintiff's house. Witness saw the box after it was brought back. The case was the same, but three planks of the lid had been changed, and the number 200 was gone. Mr. Malzer pointed that out at the time.

Cross-examined: Witness paid particular attention to this number 200, because Mr. Malzer told him to take box 200 to the store.

By the Chief Justice: He could not remember the number on the other boxes, but he could remember this box.

Daniel Johannes van Niekerk said he was in the employment of defendants,

and remembered the case in question being brought to them in November, 1900. Witness saw the number 200 on the case, and he and Adam took it to the Chiappini-street store, where it was placed along with other cases belonging to plaintiff. In May witness took the same case to plaintiff's place, where it was delivered to plaintiff himself, and they received the receipt which had been put in. Plaintiff never said anything about it not being his case. Witness saw the case when it was brought back four weeks later. It had then a different lid, with no marks on it. Mr. Malzer was present at the time, and witness heard him talking with plaintiff about it.

Cross-examined: Witness did not remember the numbers of any other case he had handled. The three new planks which had been put in the lid were quite different from the others, so that anybody could at once see the difference.

Mr. Buchanan (for plaintiff): The first question in this case is, whether the plaintiff or the defendant is *bona fide*. As to the value of the goods and damages: the trousers cost 3s. 4d. a pair, and this works out for 120 pairs at £20.

Mr. Uington (for defendant): The issue is, have defendants returned the same case which they received? The assistant who returned the box has not been examined. Malzer saw that the case was marked 200, and he told his men to take it to the Chiappini-street store. It is now suggested that these men are mistaken, and it is certainly very singular that they should remember the number of this case, and of no other. That, however, is easily explained (1) because this is the only case in regard to which there has been any difficulty; (2) because their attention was specially directed to it. It has been suggested that the case delivered was not plaintiff's property, but it must be remembered that all his goods were stored in this Chiappini-street store; and those of other persons in the Waterkant-street store.

Mr. Buchanan (in reply).

De Villiers, C.J.: In this case the plaintiff seeks to recover the value of a case and its contents, which he says he delivered to defendant. It is common cause that a case numbered 200 was, amongst other cases,

delivered by the plaintiff to the defendant's stores, but the defence is that this case was returned to the plaintiff. The plaintiff, on his side, admits that with the other cases a case was returned to him on the day mentioned by the defendant, but he says that on opening that case it was found that, instead of containing 340 pairs of trousers—which he said he had put into the case—it contained about 30 overcoats. It is quite clear that if this statement be true it could not be the same case as the one he handed to defendant. It is not alleged in so many words that there is any fraud, but if defendant's case is correct, then there must necessarily be fraud on the plaintiff's part. He either must have put these overcoats originally into the case, or he must have taken the opportunity when the case came back to him to take out the trousers and put in overcoats. I do not see how the defendant can escape this conclusion, but I think the evidence goes to disprove anything of that kind. I think the correspondence between plaintiff and Isaacs clearly shows the *bona fides* of the plaintiff in this matter. There seems to have been an honest attempt on his part to purchase these overcoats from Isaacs, because he says at the time there was a sale for overcoats in Cape Town, and he was prepared to purchase them, but by so doing he did not give up his right of claiming his particular case from defendant. It is unnecessary to go into the whole of the evidence, but I am satisfied that plaintiff's evidence is correct. With regard to the evidence of the defendant's two storemen, it seems to me extremely unlikely that these men, having so many cases to deal with, could have remembered this particular case. It seems to be such an objectless affair; if the whole thing was done by plaintiff with the object of fraud, the utmost he would have gained by it would have only been £20 or £30, and for so small an amount plaintiff would not have practised such a complicated fraud as would have been involved in this exchange of one case for another. I think judgment must be for plaintiff. If we decide against plaintiff, we practically decide that he was guilty of fraud, but by deciding against defendants we say there is a mistake—an honest and *bona fide* mistake. Mr. Malzer may have been mistaken, having so many cases to

deal with. Judgment will therefore be for plaintiff for £56 8s. 8d., the value of the trousers. As to damages, there must have been damages, but upon the whole, the Court thinks £10 a fair amount to award.

Judgment was then ordered for plaintiff for £66 8s. 8d., and costs.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorneys: Van Zyl and Buissinne.]

REX V. NTLONGA. } 1902.
} May 23rd.

Pounds Act, 1892 — Rescue —
Proprietor — Crown Land —
Occupier.

A native in the occupation of a plot of Crown land which has been allotted but not yet transferred to him may, under the 25th section of the Pounds Act, 1892, impound cattle trespassing on such plot, and any person rescuing cattle so impounded is liable to prosecution under the 30th section of the Act.

This was an appeal from a decision of the Assistant Resident Magistrate of King William's Town.

At the Court held at Middledrift on January 24 last, the accused was charged with contravening section 30 of Act 15 of 1892, by wrongfully and unlawfully receiving 35 goats, lawfully seized for the purpose of being impounded. Accused was found guilty, and sentenced to pay a fine of £5, or in default, undergo one month's imprisonment, with hard labour.

The Magistrate's reasons for his judgment were as follows: I am quite satisfied that the goats did trespass upon the land in question, and that accused rescued them from Georgena. The defence appears to be: (1) That accused drove the goats out before Georgena arrived; (2) that the seizure (if any) by Georgena was unlawful, in that the cultivation was on the commonage. I have already disposed of the first point. With regard to the second, I may state that about October, 1889, 408 garden and a corresponding num-

ber of building lots were surveyed, and the allotment was proceeded with, but has not been completed, on account of a number of applicants having failed to pay survey expenses. Orders were issued in October, 1899, 1900, and in July, 1901, to the effect that, in consequence of the incomplete state of the allotment, the people should plough as they did when in a tribal state. The Surveyor-General, being anxious that some of the letters should be issued sent 188 for that purpose about October 1901. The natives were assembled in the Court-room here, and it was fully explained that for this season only, it would be absolutely necessary that they should cultivate the same ground as before, that the 188 titles could not be issued unless they "touched the pen" to that condition. This was cheerfully done, and the 188 titles issued. It appears that all have adhered to the agreement, except Stock (Stokwe) and Bobain. Under these circumstances, it seems to me that the cultivation of the land in question was by lawful authority, and Stokwe's goats had no right there. I may state that the allotment will be completed within a month from this date (February 2).

The grounds of appeal were: (a) That the verdict was contrary to the evidence adduced at the trial, and (b) the evidence did not disclose any offence on the part of the accused, under section 30 of Act 15 of 1892, inasmuch that the goats in question were not shown to have trespassed upon private property.

Mr. Buchanan (for the appellant): It is very irregular for the Magistrate himself to give evidence in a case he is trying, as he has done here. Then it is said that the cultivated land was a part of the commonage. Apart from the Magistrate's evidence, it appears that this was the case. Hence the cultivator was the trespasser. The appellant had a right to the use of the commonage, and it was for the plaintiff in the Court below to show that the cattle were lawfully impounded. Sec. 15 of Act 25 of 1892 does not apply to Government land but to private land. So also does section 30, under which this prosecution was brought.

[De Villiers, C.J.: If a man squats on Government land and cultivates it, could he not impound your cattle if they come on his land?]

I submit not. The Act speaks only of private property. Possibly the cultivator might have some rights under the Common Law, but not under this Act. See also section 50. As to whether a head note forms a part of the Statute to which it is prefixed, see *Lang v. Kerr, Anderson and Co.* (3 Ap., Cases 529 and 536); also *Maxwell on Statutes* (p. 71) who refers to the above case. So whether the words "Private Property" are to be regarded as limiting the Act or not, section 50 shows that animals on Government ground cannot be impounded under section 25 of this Act. In such a case as this the complainant really represents the Government, and if the Government does not protect its own interests it is to blame. See Act 40 of 1879, section 1. In this case, even taking the Magistrate's evidence, the condition that "people should plough as before" was not a valid condition. These people used the commonage as of right, and if they had a good title thereto, they could not be trespassers. As soon as a man signed his papers, he had a right to commonage, and could not be made to wait till some 497 out of 498 lots had been paid for. The only evidence, save that of the Magistrate, only shows that these animals were on the commonage when impounded.

Mr. H. Jous (for the Crown): Counsel for the appellant wishes to exclude the evidence of the Magistrate, but if that be excluded, there is nothing on the record to show that these animals were on the commonage when impounded. The Magistrate decided the case on the facts, using his own knowledge of those facts. Titles, it is true, had been issued, but subject to the condition that they were not to be used till a certain date.

Mr. Buchanan was not heard in reply.

De Villiers, C.J.: The only question to be decided is whether the goats had been lawfully impounded, because if they were lawfully impounded the defendant was guilty of contravening section 30 of Act 15 of 1892 by seizing them. The 25th section of the Act was very general in its terms, and gave any owner who found animals trespassing on his ground the power to send such animals to the pound. The interpretation clause includes under the term "proprietor" a lessee as well as an occupier of land. It

is said that, as the heading to the 25th section is "trespass on private property," and as the land in question has not yet been transferred by Government to Saul, he had no right to impound cattle on the portion allotted to him. The term "private property" seems to me, however, to be used in the same general and popular sense as the term "proprietor." The land occupied by him is certainly *not* vacant Crown land in terms of the 50th section. It is quite clear from the defendant's own evidence that the prosecutor Saul was in lawful possession. He said: "This commonage was surveyed three years ago. Saul was allotted a land, surveyed three years ago," and throughout the land was spoken of as the land of the prosecutor. In my opinion, Saul was in lawful occupation of this land, with the consent of the Government, and he must be treated as the occupier in terms of the Act, and therefore was entitled to impound the goats. The defendant, having seized those goats, which were properly impounded, was properly convicted, and the appeal must be dismissed.

[Appellant's Attorneys: Godlonton and Low.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice HOPLEY.]

BREST AND ZIMMERMAN V. SMART. 1902.
May 26th.
„ 27th.

Lease—Option—Fraud—*Exceptio non numeratae pecuniae.*

This was an action for the return of a sum of £400, alleged to have been paid by plaintiffs to defendant in respect of the purchase of certain property, which sale was afterwards cancelled by mutual consent.

The declaration stated that the plaintiffs carry on business as general dealers in partnership at Maitland, while the defendant, Mrs. Smart, married without community of property, and assisted in this action by her husband, G. H. Smart, resides at Sea Point. On November 11, 1901, the plaintiffs purchased from the defendant, through her husband, acting

as broker, a certain piece of land, with buildings thereon, situated at Maitland, for the sum of £1,000, and in terms of the broker's note plaintiffs paid £400 on account, the balance of £600 to be paid on December 15, when transfer was to be taken. That note was signed by Brest, the defendant Mrs. Smart, and her husband, G. H. Smart, as broker. the £400 was paid and a receipt for the same obtained, but the plaintiffs did not take possession of the property, and did not pay the balance of £600, the contract being cancelled by mutual consent. Therefore plaintiffs claimed that they were entitled to demand back the £400 paid on account.

The plea admitted the formal paragraphs of the declaration, and also that the broker's note was made out as stated, but said that the true purchase price was £600, and that the sum of £1,000 was fraudulently inserted, at plaintiffs' suggestion, in the broker's note. Defendant denied that the plaintiffs paid the sum of £400 or any other sum on account. She admitted that the sale was cancelled by mutual consent, but denied that the plaintiffs were entitled to demand back the sum of £400, such a sum not having been paid.

On these pleadings issue was joined.

Mr. Searle, K.C. (with him Mr. Alexander), for plaintiffs; Sir H. Juta, K.C. (with him Mr. Benjamin), for defendant.

Mr. Searle called

Isaac E. Brest, a partner in the firm of Brest and Zimmerman, who said they carried on business at Maitland as general dealers, and were still in the premises in question in this action. The property was originally four cottages, but witness had altered it to two shops and two houses. In May last year witness leased the property for a year from defendant's husband. The latter had told witness that the property belonged to him. There were two copies of the lease drawn up, but witness's copy was stolen in August last. Under this lease witness had power to make alterations in the property at his own expense, and the option to purchase for £600. Witness did not get possession of the property until June, having first to eject some tenants. The Smarts went to England, but returned in October last, and came to witness's place at the beginning of November. In the meantime wit-

ness's cash-box, containing his copy of the lease, had been stolen. When the Smarts came to see witness the latter said he was prepared to buy the property, and Mr. Smart referred him to his wife. The latter said she would not sell for £600, and, further, that as she was married out of community of property, Mr. Smart had no right to give an option of purchase. She said she would not sell for less than £1,000, and that if plaintiffs would not purchase for that amount she would give them notice; and when witness referred to the lease, she asked to see it. Witness then asked for time to consider the matter. At this time witness had expended a sum of about £100 on alterations to the premises. Witness's partner was present at the discussion referred to, and after consultation with his partner, they decided to buy the property for £1,000. Witness then took a Mr. Yates to see the property, and arrange about a loan. Witness saw the Smarts after that, and offered £800 or £900, but they would not accept that. On the morning of November 11 witness went to the Smarts with £400 (£300 of which he borrowed that same day from Mr. Yates), and then the broker's note was made out and signed by witness and Mrs. Smart, and also by Mr. Smart, as broker. Witness had taken £400 with him, because they had previously told them they wanted £400 cash and the remaining £600 when transfer was taken. The receipt for £400 produced was made out by Mr. Smart and signed by Mrs. Smart, and dated November 11, 1901. Witness paid the £400 and went away. Mr. Smart promised not to hurry witness up with the transfer, and witness tried to arrange a mortgage. He could get £600 easily, but he wanted to raise £700. He arranged to raise £600, but then after November 15 Mr. and Mrs. Smart came out to witness, and said that as he had not taken transfer on a date mentioned in the broker's note, the sale would be cancelled and the money he (witness) had paid lost. Witness said there was nothing to that effect in the broker's note, and afterwards saw his attorney. Mr. Smart got possession of the receipt and broker's note from witness's broker, but after some correspondence he got them back. When the broker's note was made out and the receipt given at Mr.

Smart's house there were only present witness, Mr. Smart, and Mrs. Smart. Witness never suggested that £1,000 should be fraudulently inserted in the broker's note, instead of £600.

Cross-examined: Witness lost his lease in August, and he remembered going after that to Mr. Gretz, a broker, and getting him to write a letter to Mr. Smart. (Sir Henry Juta read the letter, dated August 13, in which plaintiff said that he would exercise the option given in the lease, and asking Mr. Smart to forward the necessary power of attorney, authorising transfer, etc.) Witness never had a reply to that letter, and consequently never showed a reply to Mr. Gretz. When witness went to the Smarts on November 11 he had the £400 all in gold in his pocket. He denied that in the presence of the two Reynhoudts and the two Cardinals, who were specially called in for the purpose, Mr. Smart said to him that he gave him the receipt in order that he could raise money on the property, but that they were to witness that no money had been paid.

Sir Henry Juta: Mr. Smart then said that he had not got any money from you?

Witness: No, he never said a word about that.

But he called these people in for that very purpose, and you replied, "All right, I won't do you?"—I never mentioned such a word.

Then, if three of the persons mentioned say that they were actually present when Mr. Smart said this in your presence, what would you say?—I should say it is a lie.

Did you not arrange that Mr. Smart should make out the arrangement to be a sale for the £1,000, and give you a receipt for £400, so that you could go and raise money on a sale of property at £1,000?—There is not a word of truth in it.

And that no £400 was ever paid by you, and that it was simply a receipt given to you, so as to reduce the price to the original purchase price of £600?—No, I paid £400 cash.

Further cross-examined, witness said that after the sale was concluded he went to several brokers, among them Steyn and Serrurier, Freeman, and Gliddon, to try and raise £700 on the

property. He went to several others, but he could not remember the names.

Re-examined: The £400 transaction passed through witness's books. He had no other transaction of £400 about that time.

By the Court: His books were made up every month by a Cape Town book-keeper from a small book that witness kept during the month. Witness had not now got that small book with the original entries.

Sir Henry Juta: After the Smarts refused to have anything to do with you and the transaction, do you remember going out to where they were camping out at Oudekraal?

Witness: Yes. I went to ask in a friendly way if they would give me transfer, as I had a buyer for a place.

Who was the buyer?—It was a man I met in the street. Further questioned, witness said the man's name was Gross. Witness offered him the property for £1,100, and Gross went out to Maitland to see it. He did not know where Gross lived, and only knew that he dealt in property. He was not sure whether he had seen the man since. Witness did not go to the Smarts about a lease. Witness had destroyed the small book from which his books were made up.

By Mr. Searle: He met Gross in January.

Max Zimmerman said he was one of the plaintiffs, having entered into partnership with Mr. Brest in the beginning of June last year, in the premises at Maitland. After they entered upon the premises they spent about £100 in alterations. It was a good business stand. When the Smarts came out to Maitland, in the beginning of November, Mr. Brest said to Mr. Smart that he was prepared to buy the property, but was referred to Mrs. Smart. Witness corroborated as to Mrs. Smart refusing to recognise the lease and the option to purchase, and to an agreement being arrived at for the sale of the property for £1,000. Witness knew about the £400, they having borrowed £300 from Mr. Yates on a promissory note, while of the other £100 £60 came from a private account. Witness was not present when the money was paid. At the beginning of January he saw Smart with regard to transfer, which Smart refused to give.

Cross-examined: When witness entered into partnership with Brest he (witness) knew of the lease in which he claimed an interest. There was no deed of partnership. He had only met Gretz, and had never spoken business with him; he had not asked Gretz to enclose the lease showing that he (witness) had an interest in it. He saw the lease in June, when he went into the partnership with Brest, but he took no steps to make it clear that he had an interest in it. The stand was a good one for business purposes. The purchase price was £1,000, and they could at that time have got £600 on mortgage, but they wanted £700. The sellers sent them a letter on January 14, in which they said they could have the property for £600 by taking transfer within 48 hours. A couple of days after the receipt of the letter, witness saw Smart, and said he was willing to purchase the property if he had transfer given him. Witness never said a word on this occasion about the £400. Smart said he would not give transfer as the time had expired—the time for taking the transfer was December 15. He did not remember whether Mr. and Mrs. Smart came to see him before or after the letter of January 14. Subsequently witness said the date of the visit was in January. They said the time having expired, the sale should be cancelled, but Brest did not agree to this. Witness did not know whether Brest saw his attorney on the subject. Brest told witness that he was going to get back the £400. Witness and Brest did consult together on receipt of the letter of January 14, but witness could not remember all the details of the transaction as he had nothing to do with matters outside the shop.

Re-examined: Witness left the matter in the hands of Brest.

Joseph Yates stated that at present he was residing at Simon's Town, but last year he had an office at 120, Long-street, Cape Town. At the beginning of November witness met Brest, and in consequence of some conversation they went out to Maitland to see the place where Brest was carrying on business. Witness lent Brest some money on November 11, for which he received a promissory note. The utmost value of the property about the time was about £900. Witness agreed to advance £300, which he gave to Brest entirely in gold. The

interest was 8 per cent. for six months, witness deducting this from the amount advanced. Witness was in the habit of lending money.

Cross-examined: The money was not lent on the security of the property, which witness understood Brest was going to buy. Witness had no security beyond the promissory note, the money not being lent on the security of the property. Witness went to Maitland to see the amount of the business turnover and also the property, but he did not look at the books. He did not know the price of the property.

By the Court: Brest told him that £1,000 was the price of the property.

Cross-examination continued: Brest could have got £700 on mortgage on the property, which witness valued at £900. Witness very frequently lent money without security.

By the Court: Witness kept no books; he was no scholar.

Sir Henry Juta at this stage called attention to the fact that the promissory note was not stamped.

Cross-examination resumed: Witness kept no banking account. The £300 he lent Brest was the result of the sale of some property a couple of years ago. He always kept about £700 or £800 in his possession. Witness could only write his signature, and Brest wrote out the promissory note.

Re-examined: Witness had considerable monetary transactions. He gave Brest a receipt for the interest.

Abraham Solomon, a bookkeeper in the employ of a Cape Town firm, stated that he had made up Brest's books for some months past. The books were kept at witness's place, and were made up at the beginning of each month. All the entries were in witness's handwriting. The November entries were made in the middle of December.

Cross-examined: Witness commenced to keep the books in August or September, several months after Brest commenced business. He made up the books from vouchers, cheques, and slips of paper, but not from books, though sometimes Brest gave him a small memorandum book, from which he made entries.

Mr. Searle closed his case.

Sir Henry Juta called

Max Gretz, who said that Brest came to him and said he had a dispute with

his partner Zimmerman about certain rights to an option contained in a lease, that he (Brest) insisted that Zimmerman had no right to that option, but that Zimmerman had taken the lease from a box, in order to claim that he had something to do with the option, seeing that he had the lease in his possession. Witness advised Brest to go and complain at the Police-station, and put a notice to that effect in the newspapers. Afterwards, some time in August, Brest and Zimmerman came together to witness, bringing with them a lease which they had from Mr. Smart. Witness made an endorsement on that lease. The lease he had seen that morning—that put in by Mrs. Smart—he had at first thought was the one then shown to him, until he saw that his endorsement was not on it. That endorsement was made in consequence of instructions given by Brest and Zimmerman together. Witness received instructions from them to draw up a deed of partnership, which he did at the same time as the assignment was made. He had only seen Zimmerman once, viz., at the time the assignment was made. Brest had spoken to him again after the New Year, but witness had an objection to stating what he then told him.

Mr. Searle objected to witness stating what Brest then told him, as the witness was then acting as Brest's legal adviser.

Mr. Justice Maasdorp said that the witness had not yet said that he was acting as Brest's legal adviser.

Sir Henry Juta said that was just the question he was about to put to witness.

Continuing, witness said that after Brest had seen him once or twice in connection with the subject matter of this action, he understood that Brest had retained Mr. Friedlander as his legal adviser, and declined to have anything further to do with the matter. Witness was not his attorney, as he did not practise in this country. Brest thought he was talking to witness as his legal adviser, and that was the ground upon which witness declined to state what he then said. As to the letter of August 13, witness had written that on Brest's instructions, and Brest had shown him an answer purporting to come from Mr. Smart. The contents, as far as witness recollected, were to the effect that Mr. Smart expected to be in this country

soon, and would leave the matter (the sale of the property) in abeyance until his return.

Cross-examined: Brest had come to witness for legal advice. Witness was not enrolled as a law agent here, but he was an attorney of the Transvaal Courts. Witness kept no records of the fees he charged. Anything relating to court work he passed over to Messrs. Silberbauer, Wahl, and Fuller. He had only been asked at ten o'clock that morning if he knew anything about the correspondence in the case.

Re-examined: Witness was practising as an attorney in the Transvaal, and came down here before the war.

Charles Frederick Reynhardt said he had a brother on active service, who left some time ago for up-country. In November last year witness and his brother were boarding with Mr. and Mrs. Smart at Sea Point. On November 11, between five and six o'clock in the afternoon, witness was called into the parlour. At that time there were present in the parlour witness's brother, the two Cardinals, Mr. and Mrs. Smart, and Mr. Brest. Mr. Smart then said that he had written out a receipt, and was giving it to Mr. Brest, but that he had received no money, and he wanted them to bear witness to the fact that he was just giving the receipt to Mr. Brest, to enable the latter to get some money on the bond. That was said in Mr. Brest's presence, and Mr. Smart spoke loud enough for them all to hear. There were pens and ink on the table when witness went into the room. Witness had no interest in the matter. After he had given the receipt, Mr. Smart said to Mr. Brest, "I hope you are not holding this against me," and Brest replied, "I would not do such a mean thing." That was all witness heard Brest say.

Cross-examined: Witness was still boarding with the Smarts, and he had discussed the case with them from time to time. The broker's note had already been drawn up, and it was also read, but witness did not pay particular attention. He was not asked to bear witness to that also.

By the Court: Mr. Smart spoke in a loud voice.

Christopher North Cardinal said he remembered one afternoon in November being called into a room by Mr. Smart

(his stepfather). There were present in the room witness, his mother (Mrs. Smart), his brother, Mr. Smart, the two Reynhardts, and Brest. Mr. Smart then produced the receipt, and said that he wanted them to witness that it was a receipt, but that no money had passed. Mr. Smart said to Brest that he hoped he would not hold that against him, and Brest said no, that he would not do such a thing.

Cross-examined: Witness did not think there was anything wrong in the transaction.

By the Court: Mr. Smart called in the two Reynhardts and witness to witness that the receipt had been given, but no money passed.

Percy John Cardinal said that he remembered Mr. Brest coming to their house on November 11, last year. Witness showed Mr. Brest into the house, and Mr. Brest asked Mr. Smart if he would give him a receipt to enable him to raise some money, as a friend had promised to lend him some. Mr. Smart said that he would have to call in witnesses to the fact that the receipt was given without any money passing. Then the others were called in to witness that.

Mrs. Smart, the defendant, denied that she ever told Brest that her husband had no authority to make the lease. She knew about it, and was satisfied. She knew about the option. She and her husband went to England in May, and returned in October. She never told Brest after her return that her husband had no authority to give the option, and that unless he (Brest) paid her £1,000 she would give him notice. She had called at his place on her way from the cemetery, but that was just to see how things were going. Mr. Smart spoke to Mr. Brest, and said he had heard he was raising a loan on the property. That was after the giving of the receipt on November 11. She was positive she had not been there before November 11. On November 11 Brest came to her house in the afternoon. Her son showed Brest into the parlour, and witness and her husband were there all the time. Mr. Brest said he had not got the money in cash, and asked if they would mind giving them a receipt to make it appear that he had paid £400. They did not like doing so at first. They afterwards consented, but no money

whatever was passed. The others were called in, and Mr. Smart called upon them to witness that although the receipt had been given, it was just to enable Brest to raise a loan, and no money whatever had passed. The putting in of £1,000 in the broker's note and the giving of the receipt was done on Mr. Brest's suggestion to enable him to raise a loan. She did not on an occasion after that tell Brest that as he had not taken transfer, the sale would be cancelled, and he would lose his £400. About the second week of January they called on Brest, and told him that the sale would have to be cancelled. They asked him for the papers, and he said they were at Gliddon's. He did not want at first to come in with them, but afterwards drove in with them in their trap. At the Early Morning Market he jumped down, saying he wanted to see a friend, and witness and her husband went on to Gliddon's office, where they got the receipt and the broker's note. Brest would not come in with them, but they met him afterwards. He wanted the receipt and the note, but they refused to give them to him, as they did not belong to him. Witness had money coming in from property, and all money she received was paid into the bank for her by her husband. She never had £400 in the house in November or December, and there was nothing on which she spent anything like that amount at that time. After the dispute about the papers, Brest came and said that, if they would give him a three years' lease, he would give up the papers, and let the whole matter drop. Witness would not consent to any such arrangement. Zimmerman came on one occasion, and made a similar proposal, but witness and Mr. Smart would not consent to anything of the kind. If witness had got the £600 in terms of the lease, she would have been perfectly satisfied, as she had never repudiated the lease. Her husband transacted all her business.

Cross-examined: Witness could not remember any other case where her husband had let her property in his own name. She believed, however, that she could produce other leases of her property made out in her husband's name. Witness got a copy of the broker's note. It was similar to that put in by Brest. At the time the receipt was given wit-

ness did not realise that it would be a fraud on the public. She did not then see so clearly through the thing as she did now.

By the Court: Brest knew that they went to Gliddon's to get the documents. He remained downstairs, but they had tried to get him to enter Gliddon's office with them, to witness the handing over of the documents.

George Smart, the husband of the defendant, said they had been married a couple of years. Mrs. Smart owned certain houses, and witness always managed her business for her. In May last year he made out the lease to Brest in his own name. He had leased other properties belonging to Mrs. Smart in his own name. Mrs. Smart was aware of the terms of the lease in question. Witness and Mrs. Smart left in May for England, returning in October. In the meantime he received the letter of August 13, and wrote in reply that he would be returning about the end of October, and would see Brest personally. When he returned Brest called on him, but did not speak about the option, saying that he would see witness later on about business matters, which he did on November 11. Witness and Mrs. Smart never called on plaintiffs at Maitland before November 11. When Brest called on November 11 he was shown into the parlour by Percy Cardinal. Brest then proposed that witness should give him a receipt for £400, although no money was passed, to enable him to raise money on the property. He also suggested the insertion of £1,000, instead of £600, in the broker's note. Witness's idea was that Brest wanted to bring the price to the original figure of £600, taking into consideration the receipt for £400. He proposed the insertion of £1,000 at the same time as he made the proposal about the receipt for £400. Witness at first objected to giving such a receipt, saying that Brest would probably hold it against him. Brest said he would not, but witness said he wanted witnesses, and called in the two Cardinals and the two Reynhardts. Witness explained to them in the presence of Brest that he had sold the property to Mr. Brest for £600, and was giving him a receipt for £400, but was getting no money, and that was clearly understood. Witness never received that £400, or any portion of it. All the rents witness received were paid

into his banking account, and he paid his debts by cheques. This £400 never passed through witness's banking account. Some time in January Brest came out to their place at Oudekraal. At that time witness had received a letter asking him to hand over the title-deeds to Mr. Gliddon, to enable him to raise money on the property. Witness went to Gliddon, and ascertained that Brest was endeavouring to raise a loan of £700 on the property. Witness, along with Mrs. Smart, went straight to Brest, and asked the meaning of his trying to raise £700 on the property, when the property had been sold to him for £600. Witness said that it was not the correct thing to do, and that he wished the sale cancelled at once. Witness wanted Brest to go in with them to Gliddon's to get the receipt and the broker's note. Brest had some objection at first, but eventually came in the trap with them. He would not go upstairs to Gliddon's office, and witness went alone and got the documents. When he came downstairs he had some words with Brest, and told him he wished this matter to drop, owing to his action in regard to the loan. Brest said he would allow witness to retain the papers if he were given a lease for three years, with the same option to purchase for £600. Witness would not do so, because the papers really did not belong to Brest. No money had been paid, and witness thought he had a right to have the papers. On January 14 Mrs. Smart's attorneys wrote saying they were ready to transfer the property on payment of £600, and that a decision must be come to within 48 hours. On February 19 a letter was received from Brest's attorneys, saying that they were willing to cancel the sale. After that, Brest came and asked if they could come to some arrangement, saying that if witness would again give the option and a lease for three years, the whole matter would drop. Witness said that he would do nothing of the sort, and that, according to their attorneys' letter, the sale was cancelled. After that Zimmerman came, and made the same proposal, but they would not accede to it.

Cross-examined: On November 11 Brest never told witness anything about having lost his lease, and made no reference to the fact that property leased by witness really belonged to Mrs. Smart.

By the Court: Before witness married he had a dairy at Sea Point, and recently he had again started a dairy.

Cross-examination continued: Witness never was a broker, and he could not explain why he signed the note as a broker. Witness had the duplicate original broker's note made out so as to have proof that there was a sale. He could not explain why the true purchase amount was not inserted in that duplicate note, seeing that he was not going to raise money on the property. He could understand now why Brest suggested the insertion of £1,000 in the broker's note. Witness had not been in a broker's office before. He had seen broker's notes. Witness had one in the room at the time. Witness was annoyed that Brest was trying to raise £700 on the property, and he went out and brought him in. They went to Mr. Gliddon's office. The papers were not given to witness on the understanding that he returned them to Brest. Brest was standing at the bottom of the stairs. Witness took the papers away. Witness considered that Brest had no right at all to the papers, not having paid. Witness, when he asked Gliddon for the papers, told him that they were cancelling the sale. Gliddon may have understood that witness was going to give the papers to Brest. Witness considered the property to be worth £700; he did not agree that it was worth £900. Property was going up only slightly there.

Re-examined: Witness bought the property for £360.

By the Court: Brest told witness he wanted to raise money on the property, and that he wanted witness to assist him. He said that if witness gave him a receipt he would be able to raise money. Witness would give a false receipt.

Mr. Justice Maasdorp: The only ground upon which you cancelled the sale was because he wished to raise £700 instead of £600?

Witness: Yes, my lord.

Mr. Justice Hopley: When did you first see Brest?

Witness: On the 1st of May.

You saw him for the first time on the 1st of May; and you gave him the lease on the 1st of May. Then you went to England, and you saw him again when you returned on the 3rd of November. And on the 11th of November you had

this conversation, and he suggested this swindle to you?—Yes.

Do you wish the Court to believe that at the suggestion of a man, almost a stranger to you, you went into this fraud?

The witness did not reply.

This concluded the evidence for the defendant.

The plaintiff Brest, recalled by the Court, said that he took the money to Smart's house at Sea Point between eleven and twelve in the morning. He would swear it was not in the afternoon. Witness carried the money in his pocket, and put it on the table.

After counsel had been heard in argument on the facts, judgment was given for the plaintiffs as prayed, with costs.

Maasdorp, J.: In this case the plaintiff sues the defendant for the recovery of £400, which he alleges he paid on account of the purchase price of certain property in respect of a contract of sale which was entered into between plaintiff and defendant, and which contract of sale the defendant is not now willing to perform. The plaintiff claims, and alleges that he entered into a contract with the defendant for the sale of certain property for the sum of £1,000, and he alleges further that he paid on account of that purchase price an amount of £400. In proof of these allegations he puts in a contract, which appears to be in the form of a broker's note, and he also puts in a receipt signed by the defendant. The defendant admits that she did sign the document which contains the terms of this contract, and she also admits that she signed the receipt. Well, if the case ended there then it would be said that plaintiff had given satisfactory proof of his case. He would then have proved the written contract signed by defendant, and he would have proved the admission of the receipt for £400, and if these documents stood unaffected by further evidence, the plaintiff would have been entitled to succeed. Now, the question is whether any evidence has been given in this case to impugn the validity or truth of the documents put before the Court by the plaintiff. The case for the defendant is that these documents were signed, but were so signed for fraudulent purposes. She alleges that the contract put in is not the true contract, and that the receipt which she gave was

given for money which had never been received by her, and that it was given for a fraudulent purpose, and the defendant is therefore placed in this dilemma at starting, that either she must be successful in her defence upon the ground that she has been a party to a fraud, or that she must be unsuccessful because she is now attempting by fraudulent means to withhold from the plaintiff the payment of moneys due to him. If it were necessary to decide upon whom the burden of proof lay, if the Court were compelled to find that upon the evidence it is impossible to say upon which side the truth has been spoken, then I would say that the burden of proof lies upon the defendant that these are not genuine documents, and if she fails in proving that, then the documents stand against her. It is, however, necessary to glance at the evidence, and see how far the statements of the parties are supported. The plaintiff alleges that he held this property under a lease, which gave him the option of purchasing the property. That lease has been put in. Now it appears that subsequently, according to his own statement, he purchased that property for £1,000, and not for £600, consequently there would seem to be a discrepancy between his evidence and one document which has been put in. His explanation is that the defendant repudiated the authority of her husband to grant him that option, and that she refused to allow him to use that option, and threatened to eject him from the property unless he entered into an agreement with her to take the property at £1,000. That is his explanation as to how the subsequent contract was entered into. Then we find that this document of the 11th November is made out by the defendant's husband, and in that, the plaintiff says, the contract is truly set forth. He says that on another occasion he also got another document put in, which alleges, over the signature of the defendant, that he actually paid the sum of £400 to the defendant. That, plaintiff says, was also a true document. After that there appeared to be some difficulty in regard to his getting the £600, and there was an interview, in reference to which there is a strong conflict of evidence. The defendant says that the cancellation was on the ground of the plaintiff's failure to take transfer and to pay the price on 15th December,

and plaintiff says that she told him that under the circumstances the contract having been cancelled by his default, he must forfeit the £400. The plaintiff objected, and said she answered him with these very suggestive words: "My husband was a law agent; I know something of the law in these matters, and it is the case that not having paid your purchase money on the 15th December, you now forfeit your £400." We have the plaintiff's case that there was a genuine sale, as set forth in the document, and that there was payment on account of the purchase price, as set forth in the document, and that it was afterwards cancelled, with the statement that the £400 was forfeited. All the documents that bear upon the case are in favour of the plaintiff. Now the question arises whether the £400 has been paid, and whether there is anything to support the plaintiff's statement in that respect. He said he went to the defendant's house prepared with the £400 in cash, and that he had raised that money by the assistance of friends. We have the evidence of Mr. Yates and Mr. Zimmerman to corroborate the statement that plaintiff had that morning been going about trying to get assistance to pay a portion of the purchase price, and that they assisted him. Mr. Yates said he advanced plaintiff £300, and Mr. Zimmerman said he had advanced him £40. Here we have evidence given by, at any rate, one clearly disinterested person, Mr. Yates. But we are not left there upon this point. It appears that at the time a promissory note was given by Brest to Mr. Yates, and that promissory note for £300 is produced. There is also a receipt for the interest which was deducted, to the amount of £12. Consequently we have here documents in the hands of a disinterested person, showing that part of the purchase price had been borrowed by plaintiff. It may be said that all these documents have been fabricated. On this point I may refer to the book, which was entered up at certain periods. There are entries in the book showing the business done with Mr. Yates and Zimmerman. These may also be false, but they are certainly strongly corroborative of the statements of the plaintiff and of Yates and Zimmerman. Now it may be said that these may all be true, that this money

was raised from these people, but that, on leaving Mr. Yates's place and arriving at Smart's, the plaintiff determined to fraudulently deceive Mr. Smart, and instead of paying over the money so borrowed, kept it in his pocket, and used it for other purposes. All that is possible, but to my mind it is extremely unlikely. It is quite possible all this evidence could be upset by defendant, who might produce very strong proof, which would destroy the weight of the evidence given for plaintiff. What is the evidence produced by defendant? Defendant says that at this time, when the £400 was alleged to be paid, she received no money from the plaintiff, but that at the time there was a suggestion made by plaintiff that they should enter into some fraudulent arrangement by which plaintiff should be enabled to raise money with which to pay the purchase price to the defendant. Now in the plea it is alleged that the sum of £1,000 was falsely and fraudulently inserted in this broker's note. Well, by whom was it falsely and fraudulently inserted? The plea avoids stating this. The fraud which was contemplated seemed to be this: That there should be a document which placed a fictitious and enhanced value on the property, and that this should be used to induce people to give a higher sum of money than they would advance if the real price had been stated. Who are the parties to this alleged fraud? When we have their evidence, it appears that defendant and her husband admitted they were parties to that fraud. That they understood that it was a false document. If the receipt is false, it involves fraud on their part, as well as on the part of the plaintiff; but if the receipt was fraudulently made, the fact that the defendant had been a party to the fraud would not have enabled the plaintiff to succeed, if he also were a party to the fraud. When this alleged fraud was contemplated, a document passed into the hands of the plaintiff which contains proof that he paid £400 to the defendant. The defendant says that she did not wish to put herself into the power of the plaintiff. Well, what was done? One would say that, under these circumstances, defendant would produce witnesses on whose evidence a Court of Justice could rely, and who could substantiate fraud. Has

she produced such witnesses? Has she produced, in the first place, disinterested witnesses, and has she produced in the second place witnesses regarding whose evidence the Court could have no doubt? For my own part, I would say she has failed to do so. Two boarders and two sons are called. We find that the most important witness, if he could be believed, is the younger son, and he says he was present during the whole of the conversation. The conversation would be mainly about the terms of the contract, but he knows nothing about this. His evidence has a bearing on nothing else than this receipt. It is impossible for me to accept his evidence about this receipt when he knows nothing of the circumstances connected with the execution of the contract itself. As to the other two men there is a discrepancy in their evidence. They do not satisfy me that the evidence they give is true. But the most extraordinary evidence is that of the husband. He tells us it was suggested that he should give this receipt. Then it was suggested to him, "Why did you put £1,000 into the contract?" As to that, he was unable to give any explanation. He does not say now it was done at the suggestion of the plaintiff. When asked what was said about that £1,000, he is unable to give any evidence upon that point. He is unable to explain why he put the £1,000 into the document, and all that he must have had in his mind. Under all the circumstances, I come to the conclusion that at that particular interview what took place was what was told to the Court by the plaintiff, that there was no fraud, that these documents were quite genuine, that the money was paid, and that the account given by plaintiff is the correct one. The case for the defendant is this: That the plaintiff had prepared his case to show that he purchased the property for £1,000, and not for £600; that for that purpose he has invented a story, and that he hunted about getting people to swear to a false promissory note. I am not satisfied that the evidence of the defence is of such a character as to convince this Court that the document which was signed by the defendant and the receipt which was signed by the defendant are false documents, and that the plaintiff should not succeed upon them. I may just refer shortly to some other evidence where

discrepancies arise, and where, on the whole, one is inclined to think that the truth lies with the plaintiff. He says that when the contract was cancelled the cancellation was on the ground that he had not taken transfer, and had not paid the balance of the purchase price. Now, we have this extraordinary statement upon the part of the defendant's husband; that he cancelled the contract, not because the plaintiff was using this document to get a loan of £600, but because he was trying to get £700. Now, it would not have mattered at all how much plaintiff could have raised if defendant had once given him a false document to enable him to raise money. Plaintiff says that after cancellation Smart went off, saying he would get these documents. Smart says that at that interview it was arranged that plaintiff should go with him, and get these documents. One would expect the plaintiff would either consent to or prohibit the documents being given to the defendant. He says he was never asked to go. Defendant's statement is that plaintiff was in such a state of fear that he was afraid to go to Mr. Gliddon. Why should he be afraid? Why should he not be prepared to give up the document if it were of no value to him? One could quite understand his being unwilling to give them up if he had paid the £400, and wanted to protect himself by the document. In that case, again, I find that it is impossible where there is a conflict between the statements of the plaintiff and defendant to come to any other conclusion but that plaintiff's statement is right. Plaintiff has produced documents signed by defendant. He bases his claim on these documents. The question is whether that written contract put in has been shown by the defendant to be bad and invalid, and I come to the conclusion that the defendant has wholly failed to do so, that the contract was a good one, that it was cancelled, that £400 was paid, and that, as the contract was not subsequently performed by the defendant, plaintiff is entitled to recover the £400 paid on account.

Hopley, J., concurred. He had not the slightest doubt as to which way the judgment of the Court should go. He was entirely convinced that the case set up by the defendant was not the true

one. All the documents in the case supported the plaintiff's account.

[Plaintiff's Attorneys: Friedlander and Du Toit. Defendant's Attorneys: Silberbauer, Wahl, and Fuller.]

BISHOP V. LYONS. { 1902.
{ May 26th.

Mr. Benjamin mentioned this case, which had been set down for hearing. He appeared for the defendant, and he understood that the plaintiff had withdrawn from the case. There was, however, a claim in reconvention, in which the defendant (plaintiff in reconvention) claimed certain damages, and also a sum for rent. To obviate the calling of evidence, the defendant would forego the claim for damages, and only claim now for the rent, so that the Court could now give absolution from the instance on the claim in convention, and for the defendant for the rent only in the claim in reconvention.

The plaintiff, Helena Bishop, was called, but did not appear, and the Court then said that Mr. Benjamin could mention the case again.

VAN DER SPUY V. VAN SPUY. { 1902.
{ May 27th.

On this case being called, Mr. Wilford, who appeared for the plaintiff, asked for a postponement. It was the third case on the roll, and at one o'clock his attorneys understood that there would be no possibility of it being heard to-day, and that his client had left town. The case arose out of a disagreement between two farmers in the Malmesbury district as to £70 rent, the plaintiff alleging that defendant owed him that amount as rent.

Maasdorp, J., asked: What about the costs of the day?

Mr. Wilford submitted that costs should follow the event, as they could scarcely foresee that the case would be taken that day.

Mr. Gardiner, who (with Mr. C. de Villiers) appeared for the defendant, submitted that the defendant was entitled to costs of the day, as the defendant and his witnesses were waiting there, and had not assumed anything about the case not coming on.

Maasdorp, J., said the postponement would have to be granted, and

the case set down for some other day when the roll was being rearranged, the question of costs of the day to stand over until the trial.

Hopley, J., said that *prima facie* defendant would be entitled to costs of the day, unless some cause was shown to deprive him of these costs when the case was tried.

COHEN V. SCHIEBE. } 1902.
 } May 27th.
 } „ 28th.

Right of pre-emption—Notice—Agent.

This was an action for a declaration of rights in connection with an option of purchase contained in a certain lease.

The declaration set forth that the parties to the action resided in Cape Town, and defendant was the registered owner of a house and shop situated in Waterkant-street, Cape Town. On June 28, 1899, a contract was entered into in writing, whereby the defendant, Mrs. Schiebe, let to the plaintiff, for valuable consideration, the said shop and fixtures on certain conditions, *inter alia*, that the tenancy was to exist for four years, beginning June 1, 1899, and the lessee (the plaintiff) to have the first refusal of the said shop and house, should the lessor wish to sell during the term of the said tenancy. It was alleged that recently, while the said tenancy still existed, the plaintiff had, in breach of the agreement, sold the house and shop for £3,500 to a third party, without first offering it to plaintiff. The plaintiff said that at the time of the sale he was ready and willing to exercise the option, and buy the house and shop for £3,500, and that he had tendered to do so, but the defendant refused to transfer the property to the plaintiff. The value of the property was now considerably more than £3,500. Plaintiff asked for an order compelling the defendant to transfer the said shop and house for £3,500, or in the alternative for £1,000, as damages sustained by plaintiff through defendant's breach of the agreement.

Defendant's plea admitted the lease, but said that in or about the month of September, 1900, the defendant had certain offers to purchase the shop and adjoining house for the sum of £3,500, and as she was desirous of selling for the said sum, she offered to sell it to plain-

tiff for £3,500, which offer was not accepted. Thereafter, about the month of December, 1901, the defendant, as she was lawfully entitled to do, sold the house and shop.

Sir H. Juta, K.C. (with him Mr. Russell), for plaintiff; Mr. B. Upington (with him Mr. Bisset), for defendant.

Sir Henry Juta called

Leopold Cohen, the plaintiff, who said that in June, 1899, he entered into a lease with defendant for the occupation of certain premises in Waterkant-street. Defendant lived next door. In October, 1899, witness, as a member of the D.E.O.V.R., was called out on active service, and before going away, he called while in uniform on defendant, and said good-bye to her. Witness left a man called Siev in the shop, but Mr. Woodhead, of Woodhead, Plant and Co., was to look after all his business matters. Witness came back on leave in February, 1900, and Siev having left his service, witness recommended one Mehl to Mr. Woodhead to fill Siev's place. Witness had a week's leave, and while he was here, Mr. Woodhead engaged Mehl. The latter's instructions were that he was only to be there as a salesman, and all letters which came to the shop he was to hand over to Mr. Woodhead. Witness came back from active service in December, 1900. While he was away witness received no communication from Mrs. Schiebe, nor from anyone on her behalf. The movements of witness's corps were known in Cape Town. Mrs. Schiebe said nothing to him about the sale of the property in December, 1900, or January, 1901. He saw her nearly every day during that time. In February, 1901, she came to witness, and said she had been offered £3,500 for the property, and asked if witness would buy it. Witness said yes, but she would have to give him some time to make arrangements. She said she would, and witness set about making arrangements to get the money, going to Mr. Woodhead about the matter. He arranged a part of the necessary loan. A week later Mrs. Schiebe came to witness, and said that her husband did not wish her to sell, and thought of rebuilding and making another shop. Witness said "All right, Mrs. Schiebe." Mr. Mehl was present during that conversation. The first time witness heard about the property being sold was three months ago. Defendant had not in December,

1900, or before then, said anything to witness about this sale. He was quite prepared in December to buy this property, and was still willing to do so. The property had increased £500 in value since December, because two months ago Mr. B. Cohen, under the belief witness had the option to buy the property, offered him £4,000 for the property. Mr. Levy had also made witness an offer before December last year. He offered witness £3,800. Mr. Levy had the Tramway Hotel, next door to the property. It was very important to witness to have the stand there. Defendant knew that witness was a Volunteer, and that he had gone on active service as such. Witness still occupied the premises under his lease.

Cross-examined: Mr. Woodhead had witness's power of attorney while he was away, and had full authority to act for him. Witness had never received a letter in terms of one now put in. Witness could have raised the £3,500 for the purchase of the property. He could have got £3,000 on a bond, and of the remaining £500 he could have got some hundreds from Woodhead, Plant and Co., who had assisted him.

In reply to the Court, Mr. Upington said their case was that they served a written notice upon Mehl, who was managing plaintiff's shop, and who transmitted that notice to Mr. Woodhead, plaintiff being then away on active service.

Max Mehl said that in February, 1900, he was engaged as salesman of Mr. Cohen's business in Waterkant-street. His instructions were to hand over to Woodhead, Plant and Co. all the letters he received, which he did. He did not open closed letters before handing them over. While plaintiff was away witness saw defendant nearly every day. Witness knew nothing of any letter offering plaintiff the property for £3,500. If any such letter came, it would be handed over to Mr. Woodhead. Defendant never said anything to witness, either in December or before plaintiff came back, about her having offered the property to plaintiff. Until plaintiff came back, witness knew nothing about defendant wanting plaintiff to buy the property. One day after plaintiff came back witness heard defendant telling him that she had an offer for the property, and ask-

ing if plaintiff wanted to buy it. Plaintiff said he did, and would arrange about the money. A few days later witness heard defendant saying that she would not sell the property, as her husband wanted her to alter it. From then, until witness left in August last, he never heard anything more about the sale of the property. In June witness heard defendant say, "Why does Cohen want to take in a partner? I would give him £1,100 for the lease."

Cross-examined: Witness did not remember on the 6th September, 1900, receiving an envelope from Messrs. Berrange and Son, addressed to Cohen. Witness did not show Mr. Berrange, jun., the envelope next day—the unopened letter. Witness did not remember Mr. Berrange then showing him a letter calling on Cohen to exercise the right of first refusal. Witness did not deny that this might have occurred. He could not remember. Witness did not then know Cohen's address. He handed over letters to Mr. Woodhead. Witness had the management of the business. He did not offer to sell the business. Witness paid the rent two or three times after Cohen came home. Cohen left the money. This was in June, July, and August.

Re-examined: Witness paid no rent while Cohen was away. Witness knew Cohen had the option. If witness knew Cohen was called upon to buy, he would have seen Mr. Woodhead about it.

Lawrence Woodhead, partner in the firm of Woodhead, Plant and Co., said plaintiff went to the front in October, 1899, and witness undertook to supervise his business when he was away. Mehl was put in, and was instructed to deliver letters to witness. He was not allowed to open letters. While Cohen was away, witness received no letter from Berrange and Co. Witness had found Mehl very reliable, honest, and methodical. It was easy to communicate with Cohen's regiment—the Dukes.

By Mr. Upington: There was a private arrangement between Cohen and witness. Witness was not certain whether he had a power of attorney. The arrangement was not advertised.

Jacobus Marthinus Theunissen, broker, who said he valued the premises in question at £4,000. Witness believed he could sell at that figure within 48 hours. About twelve months ago Mrs.

Schiebe offered witness to sell for £3,500, with the lease on the property. Witness's buyer wanted the property for £3,500, with the lease cancelled. Witness saw Mr. Woodhead.

By Mr. Upington: Mr. Woodhead had told witness that he had an interest in the property. Witness knew this three or four months before he approached Mrs. Schiebe. Witness did not tell Woodhead that he had a buyer for the property. He did not ask Woodhead for his consent to the sale. The sale fell through because witness's client was not willing to take the property with the lease.

Sir Henry Juta, having put in correspondence, closed the plaintiff's case.

Mr. Upington called

Margaretha H. E. Schiebe, the defendant, who said that in February, 1901, she had offers of £3,500 for the property. She went to see Mr. Berrange about the matter, and the latter wrote on the 6th September, giving notice to Cohen that witness had had an offer for the property, and asking him to advise whether he was going to exercise the right of buying. There was no reply. Witness afterwards went to see Mr. Berrange again. Another similar letter was written on the 7th, and served by a clerk on Mehl. Witness had no knowledge that Mr. Woodhead was acting as Cohen's agent. Witness sold the property in December for £3,500 to Messrs. Parry and Joachim, who agreed to take over the lease. Witness had offered the property to Cohen several times, and he had been unable to buy. Witness's daughter was present at some of the interviews at which witness offered the property to Cohen. Witness had no reason why she should sell to Parry and Joachim in preference to Cohen. From September, 1900, up to the date of sale, the property was in the hands of Mr. Berrange to sell. Anyone who had offered witness £3,500 in February, 1901, for the property, could have had it. The Town Council valuation of the property was £1,300; formerly it was £700.

By Sir Henry Juta: Witness did not know that Cohen was away. By direction of Mehl, witness had sent to Woodhead for the rent. It never struck witness that Mr. Woodhead was Cohen's agent, or that he had anything to do with the property.

Daniel Frederick Berrange said he was an attorney of the Supreme Court, and this property belonging to Mrs. Schiebe was in his hands. In September, 1900, Messrs. Parry and Joachim offered £3,500 for the property. Acting upon Mrs. Schiebe's instructions, witness wrote the letter of September 6 to plaintiff. On September 7, it having been brought to his notice that plaintiff was not in Cape Town, witness wrote a second letter in identical terms, and specially sent his son with it, with certain instructions. He did so to make sure that notice had been given. Subsequently a number of people wanted to purchase the property, but the negotiations dragged on with Parry and Joachim as to how much was to be paid in cash and how much should remain on mortgage, and so forth. That was the only objection. Parry and Joachim wanted Mrs. Schiebe to leave £3,000 on mortgage, and take £500 in cash; while witness advised her to get £1,500 in cash, and leave only £2,000 on mortgage. In December, 1901, the property was sold to Parry and Joachim, the parties who had made the offer in September, 1900. They were giving to defendant the whole of the purchase price. The property was a very small and old one, and witness thought the price, £3,500, to be a very handsome figure, otherwise he would never have advised defendant to sell. It was an old-fashioned place, and it would take a lot of money to convert it into a modern business place. There were several people after it besides Parry and Joachim.

Cross-examined: Parry and Joachim were the only people willing to give £3,500 for the property with the lease on it. When witness sent the letter of September 6 he knew that Cohen was not in town, but he did not know he was on active service. Witness never sent down to his business place and asked where he was. He certainly made no attempt to find him. He had asked his client if she knew the address of the man, and she said that she did not. He did not know how long Cohen had been away, and he did not inquire. It was rumoured that Cohen had gone to the front. His client told him that.

By the Court: If Cohen had been here he would have expected him to de-

cide in the forty-eight hours given in the notice.

John Christopher Berrange said he was now a lieutenant in the D.E.O.V.R., but in September, 1900, he was in his father's office. He got certain instructions from his father in regard to the letter of September 7. He went to plaintiff's place of business, and learned that he was at the front. He inquired who was managing plaintiff's affairs, and the man in the shop said he was. The man then showed witness the unopened letter, which had been sent by witness's firm the previous day. Witness showed him the facsimile letter he had, and read the contents to him. He then made an endorsement of the circumstances on the letter.

Cross-examined: Witness had signed the letter of September 6 himself. Witness might have asked what corps plaintiff was in. He could not remember, but it was possible he did ask. Witness was informed by the man that he thought plaintiff would return for the Jewish holidays—on the 24th of that month. Witness might have told his father that the plaintiff was at the front. He might have considered the endorsement to that effect on the letter as sufficient, as that would be telling him. Witness did not remember whether the rents were paid direct to Mrs. Schiebe. It was only natural that the endorsement had refreshed witness's memory.

Maggie Emily Schiebe, daughter of Mrs. Schiebe, said she remembered Mr. Cohen coming back. He had a conversation with her mother about the property. Her mother told him she had several offers for the property, and asked if he would buy it. He said he had no money, and that if she could sell it she should do so.

Cross-examined: Witness did not know when Mr. Cohen went away, nor when he came back. She did not know he was a Volunteer. She could not say what year, day, or hour the conversation took place. It was a long time ago. She could not remember whether that was the only time she had seen him in her mother's house. Witness was in the doorway at the time of the conversation referred to, but she could not remember what she was doing there.

Eal Parry said he resided at Cape Town, and was a partner of the firm of Parry and Joachim. In September,

1900, they were in treaty to buy a property, with the lease on it, for £3,500. There were long negotiations as to how they were to pay the money, and so on, and they did not buy the property until December, 1901. In March, 1901, before they took possession of the property, they wanted to let the house, and asked Cohen if he would allow them to let it, as he had the option to lease the house for £10 a month. Cohen said he had nothing to do with that, and that it was Mr. Goldman who had the say in the matter. On another occasion, after they had closed the bargain, Cohen said they had paid quite enough for the property.

Cross-examined: Witness might have asked £4,500 for the property, but he was not prepared to sell. He did not buy for speculation, but because he needed the property. He had erected a new building close at hand about the beginning of December last. He would not now sell the property for £4,500, as he needed it himself, and could not get another property in the neighbourhood. But for that he would not pay the price he was paying. Witness had bought the premises he was now in after he had made the offer to Mrs. Schiebe. He had been prepared to buy the property from Mrs. Schiebe at any time, and all she said was that she would let him know. They first spoke about the terms in the month of October. Witness had not got transfer of the property yet. He had asked for transfer to be passed on several occasions, but there was nothing to press for, and they could take their time.

Re-examined: Witness's offer of September, 1900, remained open until they actually purchased in December, 1901.

This concluded the evidence, and after hearing counsel on the facts, the Court gave judgment for the defendant with costs.

Maasdorp, J.: In this case the plaintiff sues defendant for the sum of £1,000, as damages sustained by plaintiff by reason of a breach of contract on the part of the defendant in having failed to enable plaintiff to use the right of pre-emption with reference to the property in question. The plaintiff complains that the defendant has been guilty of a breach of contract in having sold this property in December, 1901, for £3,500 without

having given him the opportunity of exercising his right of the first refusal of buying. The action is based upon the 6th clause of a lease which was then in existence between plaintiff and defendant, which reads as follows: "The lessee shall have first refusal to buy the said shop and adjoining house when the lessor wishes to sell during the aforesaid term," and the plaintiff alleges that in December, 1901, the defendant disposed of this property without having given him notice that an offer had been made for the property, that she was willing to sell, and that he could exercise his option of purchasing the property for the sum offered by the proposed purchaser. Now, it appears to be quite clear that the defendant, in whatever she did in this matter, was very well advised by her legal adviser. She was very well aware of the existence of this clause in the lease and of her legal liability under this clause, and there is no doubt that she entertained all along the intention of abiding by and observing this clause. In September, 1900, it appears that an offer was made by Mr. Parry for this property, and I think, upon the evidence given by Mr. Berrange, and Mr. Parry, and by the defendant, it is clearly proved that this was a *bona-fide* offer, and what might be called a firm offer, of £3,500 for this property. The details of the agreement were not drawn up. In fact, the parties could not have proceeded without having first intimated to the plaintiff that such an offer had been made, and that he himself could become the purchaser on the same terms. It was only after he had exercised his option in the matter that the parties could proceed further, and make some detailed arrangements. Here then is an offer made for the property, and there is no doubt that the defendant was willing to sell. It then became her duty to inform the plaintiff of this, and the plaintiff could then exercise his right, under clause 6 of the lease. The defendant communicated with her attorney, and her attorney then took the transaction in hand, with the result that he wrote a letter on the 6th September, and posted this letter to the place of business of the plaintiff. It appeared that on the following day, when some information had been received that the plaintiff himself was not at his place of business, the attorney, to make doubly

sure that the intimation contained in the letter should come to the notice of the person in charge, sent an open identical letter to be brought to the notice of that person, who, in this case, appears to be Mr. Mehl, the salesman. Now this notice undoubtedly, enclosed in an envelope, came into the possession of Mr. Mehl, and I think, if Mr. Mehl was the person who had power to receive on behalf of his principal such letters, that as soon as the letters came into his hands, they, in law, came into the hands of the principal himself. Now Mr. Mehl had received instructions to receive all letters at the place of business, and see that they came into the possession of the plaintiff, through the instrumentality of Mr. Woodhead. Mr. Mehl was therefore the authorised person to receive this communication, and when it came into his hands, it, in law, came into the hands of the plaintiff. Here, therefore, there was a notice given that the plaintiff was called upon to exercise his right of refusal to purchase the property. I may say that this decision of the legal point is not really of much importance in this case, because of what happened subsequently between the parties. It appears that subsequently to this the facts contained in the letter of the 6th September were personally communicated to the plaintiff himself by the defendant on more than one occasion. It is said that when such intimation was made the effect of it was to cancel the communication of the 6th September, but to my mind, as a matter of fact, it merely amounted to this: that this communication having been delivered, and plaintiff having been informed that he must decide by the 8th, the subsequent communications had the effect of simply extending the time, and if, when this offer was again made to the plaintiff by the defendant to exercise his right of refusal, he had then acted upon it, he would not have been foreclosed by the communication of the 6th September. Now the plaintiff states in his declaration that the property was sold without any intimation to him, and without giving him the opportunity of using the option contained in clause 6. As a matter of fact, not only was this letter written to him on the 6th September, but on several subsequent occasions, as defendant states, she again offered the property to

him at the price which Mr. Parry had offered her. We have most clear proof that defendant, when she became willing to sell, offered the property to the plaintiff, but the answer of the plaintiff to that is that she withdrew that offer; that after she had given him the right to consider the matter for some short period, she withdrew the offer, and said that she no longer intended to sell; and that, consequently, he could not make use of any rights he had under this clause. The whole case therefore turns upon that part of the evidence as to whether the option was ever withdrawn by common agreement between the plaintiff and the defendant. The plaintiff states that in February the property was offered to him, and that he asked for some little time to consider the matter, which was granted; that a week after the defendant informed him that she had changed her mind, and no longer wished to sell. Well if that was true, I think that if the defendant again changed her mind, and again had an offer for this property, she would have had to give him a renewed option in the matter. However the defendant gives a different version. She says that, upon her offering this property to the plaintiff, he informed her that he was wholly unable to purchase it, and that she could proceed with the sale to the other purchaser. The question therefore arises: who are we to believe in this case—the plaintiff or the defendant? Now it seems to me that if the plaintiff had said that he was not in a position to purchase the property, he would have said what was perfectly true. Here we have the plaintiff, a man all whose property seems to have been taken as of a total value of £250—all second-hand clothes. He was indebted to Woodhead for over £100, and all he had in this world was a sum of over £100, and I think it would have been absolutely impossible for the plaintiff at that time to have exercised any option to purchase this property, and I believe that that was communicated by him to the defendant. But we are not wholly dependent upon the evidence of the defendant in this case, because Mr. Parry has come forward, and he says that about the time he closed with the defendant, he informed plaintiff of this, and that plaintiff then said to him that he had given a very good price for the property. The only thing the plain-

tiff could have meant by that was that Parry had given a high price, that he had given a price which plaintiff himself would not have been willing to give, and which plaintiff himself was not in a position to give. But it proves a good deal more. It proves that there was no option in the mind of the plaintiff at the time when the sale of this property to Parry and Joachim was brought to his notice in December, 1901. Under these circumstances, I think that if we were to decide solely upon the question as to whether the option which had been granted was ever withdrawn during 1901, up to the time when this sale was closed, I myself am forced to the conclusion that if at any time during the greater part of that year the plaintiff had come forward and had offered £3,500, there would not have been the slightest objection on the part of the defendant to accepting the money. I think there has been no breach of contract on the part of the defendant, and the plaintiff must fail.

Hopley, J., said he was thoroughly of the same opinion, and had come to the same conclusions as those stated by his brother Maasdorp in his judgment. Nothing had arisen throughout the case to in any way shake his opinion of the entire *bona fides* of the defendant throughout the whole of this transaction. So far as this business was concerned, she was in the hands of her legal adviser, and it was perfectly clear that she made no move without consulting him. Under these circumstances, it was extremely unlikely that she would do anything not strictly in accordance with the terms of the lease, while, on the plaintiff's side, there was considerable temptation to lie by and do nothing, until eventually the property was sold for a good price, to wait then for a time to see if the property was rapidly going up in value, and to then come forward and say that he had not been given a chance to exercise his option, and to claim damages. As to the manner in which the notice had been given, his lordship thought that defendant had served that notice in the best manner possible under the circumstances. There was no other agent than Mehl that anyone knew of, there being no notification by advertisement or in any other way to the outside public that Mr. Woodhead was in charge of plain-

tiff's affairs. His lordship reviewed the evidence, and said that he was of opinion that even after he came back plaintiff had an opportunity of exercising his right of pre-emption had he wished to do so.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Berrange and Son.]

BATTEN V. BATTEN. { 1902.
{ May 28th.

This was an action for divorce by the wife. The respondent, Harry Batten, a carpenter, formerly residing at Observatory, did not appear.

Mr. Benjamin, who appeared for the petitioner, said that personal service had been effected.

The petitioner, Elizabeth Ellen Batten, said she was married to defendant on the 21st May, 1891. They first lived in England, and her husband afterwards came to the Cape, witness following him in 1895. He was employed as a carpenter on the C.G. Railways until the end of that year, then going to Johannesburg. Witness went to England, and defendant returned to Cape Town in 1897, when he was employed at the Royal Observatory. They lived there until November last year, when witness heard something concerning her husband. She charged him with having lived with a woman at Johannesburg. He admitted the truth of this. Witness then refused to live with him, and a deed of separation was drawn up, defendant agreeing to pay £50 and £1 5s. a week for the maintenance of the children. Witness subsequently obtained further information, and instituted proceedings. Her husband, who was then living at the Observatory, wrote a document, in which he pleaded with her to stay proceedings until May, and in the meantime to consider whether she would forgive him. He confessed that he had misconducted himself with a coloured woman, named Rosina Roberts. Witness agreed to stay proceedings until May, and wrote a document, in which she promised to communicate with her husband informing him of her decision. Witness then went to England, and while there she wrote to her husband, who had come to London, saying she could not forgive him.

Mr. Benjamin put in a letter written by the defendant on the 6th February, 1902. Therein he said: "You told me you had done things you are ashamed of, and I know them, but I have never taxed you with them, nor do I intend to; but you thought I knew nothing."

Witness (continuing) said she had never been guilty of any impropriety. There were three children of the marriage, aged ten years, eight years, and nine months respectively. Witness wanted the custody of the children. In the separation agreement defendant undertook to pay £1 5s. a week, but he subsequently told witness he could not afford to pay more than 15s. a week. Witness was satisfied with that.

Evidence taken on commission in regard to the adultery was read.

A decree of divorce was granted, plaintiff to have the custody of the three children of the marriage. Defendant was ordered to pay £1 a month for the maintenance of each child until it attains the age of sixteen, and leave was granted to plaintiff to apply again if further maintenance could be paid; defendant to pay costs.

ILLIQUID ROLL.

BISHOP V. LYON. { 1902.
{ May 29th.

This was an action for the return of certain furniture or payment of its value, viz., £68, and for £70 damages for breach of contract.

Mr. Benjamin, for defendant; plaintiff in default.

Counsel asked for absolution from the instance, with costs, the plaintiff not appearing. There was a claim in reconvention for two items, viz., a claim of £17 for rent and £8 for damages. With regard to the damages claim, the defendant (plaintiff in reconvention) abandoned it, and as the amount of rent admitted in the replication was £16 10s., he was prepared to take judgment for that with costs.

The Court granted absolution from the instance in the claims in convention, and judgment for £16 10s. for rent in the claims in reconvention.

SMART V. ISAAC E. BREST.

Mr. Benjamin moved under Rule 319 for judgment on a declaration for £39 for rent, and for an order for ejectment. There was a claim for £50 for damages, but that would not be proceeded with now.

Judgment as prayed.

CAPE TIMES LIMITED V. BUCHNER AND MEDLICOTT.

Mr. P. S. Jones moved for judgment under Rule 319, in default of plea, for £74 16s. for advertising.

The defendant Buchner appeared in person, and in answer to the Chief Justice, said that his defence was that his partnership with Medlicott had been dissolved, and that the plaintiffs had agreed to take over Medlicott as being solely responsible for all debts. Medlicott had carried on business for two months after the dissolution of partnership, and continued to advertise in the paper, and witness had never been asked for a fraction in the meantime.

The Chief Justice pointed out that the debt was incurred before the dissolution of partnership.

Defendant said that was so, but the plaintiffs took it over. He believed that Mr. Shaw, who acted for them, but was now in England, had that in writing.

The Chief Justice said that in a document defendant had handed in he had offered to pay £30, by instalments of £2 per month, in full satisfaction of the debt.

Defendant said he made that offer without prejudice to avoid trouble and worry. Further questioned, defendant said he was at present secretary of the South African Immigration Employment Bureau. He had put £150 in the partnership business, and on its dissolution he had left Medlicott the furniture and everything. If a verdict was given against him, he would have to go insolvent.

The Court gave judgment against Medlicott, and a postponement in regard in the case against Buchner, until June 12.

ROBERTSON AND CO. V. GRAND JUNCTION RAILWAYS.

Mr. Buchanan appeared in this matter, but as it was in the same position as that mentioned by Mr. Benjamin, where the same defendants were sued, he asked that it be allowed to stand over until June 12.

Postponement allowed.

REHABILITATION.

Mr. Nightingale moved, under section 117 of the Insolvency Act, for the rehabilitation of James Catto, trading as Catto and Co. The usual certificate from the Master was put in.

Order granted.

ADMISSIONS.

Ex parte HOYTEMA. { 1902.
May 29th.

Mr. J. A. R. de Villiers moved for the admission of Johan Pieter Renaud van Hoytema as an advocate of the Supreme Court.

Order granted, and leave given for the oaths to be taken before the Registrar of the District Court at Johannesburg.

Ex parte MCLEOD. { 1902.
May 29th.

Attorney—Admission.

Where an Attorney of the High Court, who had been enrolled in 1895, applied to be admitted as an Attorney of the Supreme Court, the Court granted the order prayed for with costs against the Law Society, which had opposed.

Mr. J. A. R. de Villiers moved for the admission of Arthur James McLeod as an attorney of the Supreme Court. The petitioner stated that he was admitted as an attorney of the High Court of Griqualand West in 1895, and was still enrolled as such, and was under no disabilities to practise. He was also an attorney of the Natal Court, and was now desirous of being admitted an attorney of the Supreme Court.

Mr. Searle, K.C., appeared on behalf of the Law Society to oppose the appli-

cation. He had no affidavit, and as he had only received the brief the previous day, he had not had time to look into the matter, but he was instructed that the admission of petitioner as an attorney of the High Court must have been under the proclamation of 1871. Counsel asked that the matter be allowed to stand over until Saturday. The proclamation of 1871 allowed to be admitted as attorneys persons similar to those who might be admitted as attorneys of the Supreme Court, and also attorneys of Natal, as being attorneys of Natal. The objection of the Law Society was that one who had been admitted an attorney of the High Court, as an attorney of Natal, was not entitled *ipso facto* to be an attorney of the Supreme Court.

The Chief Justice said that the Annexation Act (No. 39 of 1877) seemed to provide for that, and once the man had been admitted under that Act, they could not inquire into what grounds there were for his admission.

Mr. Searle said the section of the Act in question (section 21) seemed to lay that down, and that was the reason he wished for a postponement, so that he might look into the matter. On looking at the petition, however, Mr. Searle said that it appeared that the petitioner was enrolled in October, 1895, and he did not think the Annexation Act was intended to cover persons admitted after the date of that Act.

De Villiers, C.J., said he had assumed that the petitioner was admitted before that, otherwise it was a clear contravention of Act 30 of 1890, which provided under what circumstances Natal attorneys could be admitted to practise in the Supreme Court. The matter wanted looking into, and therefore it would be allowed to stand over until Saturday.

Postea, May 31. Mr. J. E. R. De Villiers renewed the above application, and stated that the applicant was not an attorney of Natal, but of the High Court of this colony. He now wished to be admitted to practice in Natal as an Attorney of the Supreme Court of that colony, but under the rules of that Court his admission as an Attorney of the High Court of this colony did not qualify him for admission. As, however, Attorneys of our Supreme Court are entitled to admission as Attorneys of the Supreme Court of Natal, the petitioner now

sought to be admitted as an Attorney of this Honourable Court, in consideration of his having already been admitted by the High Court.

Mr. Searle, K.C. (for the Law Society), explained that the Society had opposed this admission, as they had incorrectly supposed the applicant to be an Attorney of Natal, and to have applied as such to be enrolled as an Attorney of the Court. See Rule of Court, 362. He would submit to the judgment of the Court.

De Villiers, C.J., said that the applicant having been admitted as an attorney by the Griqualand West High Court, this Court was bound to suppose that everything had been rightly done. It was competent for the Law Society to give evidence to the contrary, but they had not done so, and the applicant would be admitted. He thought the costs should be paid by the Law Society.

Leave was given to the applicant to take the oath before the Registrar of the Supreme Court of Natal.

PROVISIONAL ROLL.

COLONIAL ORPHAN CHAMBER V. C. M. DANTU.

Mr. Upington moved for provisional sentence for £1,900, due on a mortgage bond, with interest at the rate of 6 per cent. from November 1, 1901. The bond originally provided for interest at the rate of 5 per cent., but under an agreement annexed to the bond the rate of interest was altered to 6 per cent. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

S.A. BREWERIES V. GRAND JUNCTION RAILWAYS.

Mr. Benjamin said he had been instructed to move for provisional sentence on certain bills of exchange, but as a provisional order of sequestration had been granted against the Grand Junction Railways, returnable on June 12, he would ask that the application be allowed to stand over until June 12. If the provisional order was then made final, the application would, of course, fall to the ground.

Postponement allowed.

COLONIAL ORPHAN CHAMBER V.
FREDERICK J. GOCH.

Mr. C. de Villiers moved for provisional sentence for £250, due on a mortgage bond, with interest from January 24, 1901. He also asked that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed, and the property declared executable.

VAN DER SPUY, IMMELMAN AND CO.
V. SPENGLER.

Mr. Goch moved for provisional sentence on a promissory note for £209 3s. 9d., less £140 paid on account.

Provisional sentence granted as prayed.

GENERAL MOTIONS.

FILMALTER V. FILMALTER. { 1902.
May 29th.

This was an application for leave to the applicant to sue his wife *in forma pauperis* for divorce, on the ground of her adultery. The matter was before the Court last provisional day, but no order was made, as the applicant was not present.

Mr. Langenhoven stated that the plaintiff was now present.

The plaintiff, in answer to the Chief Justice, said that he lived at Caledon. He was a day labourer, and got £2 10s. per month, without food. His wife also lived at Caledon. She had left him, and he was suing her for divorce on the ground of adultery.

The Court directed that Mr. Langenhoven take the reference.

Re THE ESTATE OF THE LATE THOMSON.

Mr. Rowson moved for leave to mortgage certain property in the above estate for £400. In the estate there was a certain piece of land, on which two houses had been erected at a cost of £1,600, and the application was to raise £400, in order to complete the buildings. The Master reported that no minors were interested, and he had no objection to the application being granted.

Order granted as prayed.

Ex parte CENTLIVRES.

Mr. Currey moved for an order declaring a certain ante-nuptial contract between J. S. van Wyk and H. van Wyk to be valid, although actually entered into after the marriage, to which it referred. It appeared that owing to the unsettled state of the country the power of attorney in connection with the ante-nuptial contract did not reach the notary at Ladismith until after the marriage had taken place, and therefore the contract was void *ab initio*. This power of attorney was in identical terms with the contract. The matter was previously before the Court, and an order was granted for the registration of the contract, but it appeared that the facts were not quite as set forth in that petition.

The Court granted confirmation of the previous order.

Re THE ESTATE OF THE LATE JOOSTE.

Mr. Hull moved for confirmation of the sale of certain property in the above estate to the executor dative. The property had been sold by public auction in terms of the will of the testator, and the Master was of opinion that the sale should be confirmed.

Order granted as prayed.

Ex parte BELL.

Mr. Langenhoven moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

Ex parte MURRAY.

Mr. Benjamin moved that the rule *nisi* granted under the Derelict Lands Act be made absolute, with certain small amendments which had been published.

Rule made absolute as prayed.

Ex parte HUNTER AND OTHERS.

Mr. Close moved for an amendment of an order of Court in regard to the sale of certain property. It appeared that there was another minor interested in the property, whose name had in some way been left out when the former application was made.

Amendment allowed as prayed.

Ex parte RUTHERFORD.

Mr. J. E. R. de Villiers moved for an order authorising the amendment of cer-

tain records in the Deeds Registry by inserting the petitioner's right name, Charles Thomas Rutherford, in place of Charles Rutherford.

In answer to the Court, counsel said that there were mortgages on the property in question, and no notice had been given to the mortgagees.

The application was granted, subject to the consent of the mortgagees being filed with the Registrar.

FOX V. HOFFMAN.

Mr. Searle, K.C., applied for the discharge of a notice of appeal. Counsel said that on the 31st October, 1901, judgment was given in the Magistrate's Court in a case between Fox and Hoffman, and an appeal was noted by the attorneys, but nothing had been done in the matter. After notice of this application was given, the attorneys wrote stating that they had withdrawn the appeal. He (Mr. Searle), therefore, only asked for the costs of this application.

Granted.

NEWDIGATE V. REGISTRAR OF DEEDS. 1902.
May 29th
June 12th

Foreign executor—Mortgage bond
—Cession.

A mortgagee of land in this Colony was domiciled in England where he died. His English executor, after obtaining cession in his own favour, ceded it to the mortgagor's wife. The land having been sold she consented to the cancellation of the bond.

Held, that although the bond was in England at the time of the death of the mortgagee, the debt was an asset of his estate situated in this Colony, and that the Registrar of Deeds could not be ordered to cancel the bond without the consent of an executor appointed or confirmed by letters of administration granted in this Colony.
Eaton v. Registrar of Deeds (7 Juta, 249) followed.

This was an application for an order authorising the cancellation of a certain mortgage bond. The bond was passed to the late Colonel Newdigate, who had no domicile in this country, and who died in England, where his executors resided. There were no executors in this country, there being nothing to administer here. There was a certificate from the authorities in England that executors in the estate had been appointed in England. Counsel, in argument, referred to the case of *Eaton* (7 Juta, p. 249).

The facts sufficiently appear from the judgments.

Mr. Schreiner, K.C. (for applicant): In this case the executor is domiciled in England, and there is no property in this country for him to administer. See *Eaton v. Registrar of Deeds* (7, Juta, 249), particularly the judgment (p. 254). A mortgage bond is a movable, *Mobilia sequuntur personam*. Technically, the bond is therefore in England. It is true that by Act 8 of 1888 the Master may stamp foreign letters of administration, and they will then have full force in this colony. But that provision applies only to cases in which there is an estate of some kind within the Colony to administer; here there is nothing to administer, and I submit that Your Lordships have no control over the Acts of a foreign administrator. If an executor consents to the cancellation of a bond here, that consent would be good. If a bond had been paid a few days before the mortgagee died, and he had not consented to its cancellation, it would be a great hardship were such mortgagor to be left without a legal remedy.

[The Master: The bond is an asset in the estate here.]

In *Eaton's* case it was held that a bond is a movable, and I submit, that that case shows that an executor should not be appointed to administer an estate in this colony unless there is immovable property here.

[Maasdorp, J.: What would you say if there were movable property in the Colony?]

Mobilia sequuntur personam. The Master could not claim succession duty if the deceased were domiciled in England. We represent the estate of the mortgagor, the donee of the bond. No succession duty is chargeable here in respect of estate in England.

Civ. Adv. vult.

Postea, June 12.

De Villiers, C. J.: The petitioner asks for an order to compel the Registrar of Deeds to cancel a bond which was passed by the petitioner's deceased husband in favour of Colonel Newdigate, who was domiciled in England. Colonel Newdigate died in England, and his son, F. Newdigate, took out probate as executor under his will. He obtained cession of the bond to himself and afterwards ceded it to petitioner, in fact, made a present of it to her. She, as executrix of her husband, has sold the land under mortgage, and, in her individual capacity, has consented to the cancellation of the bond, but the Registrar of Deeds refuses to cancel the bond without the authority of an executor of Colonel Newdigate confirmed as such by the Master of the Supreme Court. The process for obtaining such confirmation is simple and inexpensive, but, of course, if the Registrar is not entitled to insist upon this requirement the Court would order him to cancel the bond upon the petitioner's written consent alone. A similar question was fully discussed in this Court in the case of *Eaton v. Registrar of Deeds* (7 Juta 249), and it was there decided that the confirmation of the executor in this colony is necessary. In that case the bond was in the Colony at the time of the mortgagee's death, whereas in the present case the bond was in England at the time of Colonel Newdigate's death. This circumstance cannot, however, affect the result. The important facts are that in both cases the debtor resided in this Colony, the land was situated in this Colony, and the Deeds Office is an institution for registering transfers and bonds passed in this Colony. Even if the bond be treated as a moveable asset, it was an asset in this Colony at the time of the mortgagee's death, because the debtor lived in this Colony, and could not be sued here except by an executor whose appointment had been confirmed by the Master of the Supreme Court. It is not necessary to repeat the reasoning upon which the decision in Eaton's case was founded, and it is sufficient to say that the Court sees no reason for departing from it. The application must, therefore, be refused.

Buchanan, J., said he concurred in the judgment. The question was fully

considered in the case of Eaton, and in that case it was clearly laid down that the Courts of this Colony could not recognise foreign administration unless there was ratification in this Colony.

[Applicant's Attorneys: Van Zyl and Buissinne.]

COLONIAL GOVERNMENT V. VOS.

Rebel—Attachment of property
ad fundandum jurisdictionem.

Mr. Howel Jones moved for leave to sue by edictal citation, and to attach certain property *ad fundandum jurisdictionem*. The respondent had lived in the district of Carnarvon, and it was alleged that he was an absconded rebel, at present with the Boer forces.

The application was granted, the citation being made returnable on the 1st August. Personal service was ordered to be effected, failing which, service by publication once in the "Government Gazette" and once in the "Victoria West Messenger."

Re THE PROVISIONALLY SEQUESTERED ESTATE OF MAY.

Mr. Buchanan moved for the appointment of a *curator bonis*, with power to sell certain perishable articles which had been attached.

The Court pointed out that the estate had not been finally sequestrated, and that May might object to the sale of the goods if he had notice.

Mr. Buchanan said that the goods were perishable, being apples shipped to this country.

The Chief Justice asked if the goods were becoming bad.

Mr. Buchanan said that he was not instructed that this was so, but the applicants wished to sell, in order to prevent them from becoming bad and unsaleable. He submitted that May, under the circumstances, would not object to the sale.

The Chief Justice said that May might be able to show that they should not be sold.

The matter was ordered to stand over until the 12th June, applicants being given leave to apply in the meantime if May's consent were obtained.

Ex parte TRUSTEES OF BOYS' MISSION SCHOOL, SIMON'S TOWN. { 1902.
May 29th.

**Alienation — Prohibition of —
School Property.**

Where certain parties interested in certain property which had been left for the purpose of a mission school, subject to a prohibition against alienation, asked for leave to sell or mortgage the said property and to devote the proceeds towards the acquisition of other property to be applied to the same uses: the Court granted a rule calling upon all concerned to show cause why the said application should not be granted.

This was a motion for leave to sell or mortgage certain premises at Simon's Town which had been bequeathed by one, A. Vincent (now deceased) for use as a mission school. The bequest had been made subject to a prohibition against alienation. The petitioners stated that their object was to raise money either to enable them to purchase a more suitable site for the said mission school, and erect a new building thereon or to repair the existing premises.

In support of the application, it was stated that the premises were now in disrepair, and further, they are now in the centre of the town, and are unsuitable for a mission school.

Mr. Schreiner, K.C. (for applicants): The only three parties interested in this matter are: (1) The congregation of the church at Simon's Town; (2) the congregation of the mission church; (3) the public of Simon's Town. All and each of these several parties have consented to the sale. It is true that under the trust deed there is a prohibition against alienation, but this is a general prohibition which is quite inoperative. Mr. Steytler declines to join us in this application, because he says that in some remote eventuality some heirs or other might have claims.

[Maasdorp, J.: Is the property in a perishing condition? Because if it be the Court will order a sale, the prohi-

bition against alienation notwithstanding.]

I cannot say that it is in a perishing condition, but it certainly is in disrepair. Something must be done to it, and all interested parties have consented to the sale. All we ask for is permission to sell, subject to the condition that we must purchase other property subject to the same trusts.

De Villiers, C. J.: I think the utmost that the Court can do for the applicants is to grant a rule calling on all concerned to show cause on the 12th June, 1902, why the applicants should not be allowed to sell the land, for the purpose of buying other land, which is to be subject to the same conditions; the rule to be published once in the "Cape Times," and to be served on the executors of the late A. Vincent.

[Applicant's Attorneys:]

**IN THE ESTATE OF THE LATE THOMAS
F. FALKINER.**

Mr. Jones moved, on behalf of the petitioner, who is the wife of the late Thomas F. Falkiner, for authority to the Master to pay out certain moneys. There was a sum of £273 11s. 5d. in trust for the minor daughter, and the petitioner asked for an order authorising the Master to pay out the sum of £70 in order to enable the minor to complete her education in France. The Master's report was favourable.

An order was granted in terms of the Master's report.

DE BEERS MINES V. MCCARTHY. { 1902.
May 29th.
" 30th.
June 6th.

Mining facilities.

The plaintiff, by agreement with the L. & S.A.E. Company, acquired from the said Company certain mining claims at some distance from Du Toit's Pan Mine, and the L. & S.A.E. Company undertook to give him "ordinary mining facilities."

Held, on appeal, that this undertaking did not entitle the plaintiff to claim from the E. Company, in derogation of the

rights of claim-holders in that mine, any portion of the reserve of that mine outside the statutory reserve as a depositing site for ground from his claims, although the only other available land tendered to him for that purpose was two miles distant from his claim.

At the time of the agreement the defendant Company held claims in the Du Toit's Pan mine and after the date of the agreement purchased all the assets of the E. Company, and became liable to fulfil its obligations.

Held, that the plaintiff had no greater rights against the defendant Company than it had against the E. Company, notwithstanding that the defendant Company was the chief claim-holder.

This was an appeal from a decision of the High Court of Griqualand West in a case in which McCarthy sued the appellants (De Beers Consolidated), and in which the Court granted judgment for the plaintiff with costs, to the effect that he was entitled to the use of a certain area on the Du Toit's Pan Mining Reserve as a hauling, washing, and depositing site. There was litigation in 1893, when the L. and S.A. Exploration Company sued De Beers for the right to go on their depositing site to ascertain whether certain ground was diamondiferous, and in 1899 the London and South African Exploration Company made a contract with McCarthy, on which litigation took place in 1900, between him and De Beers, after the latter had bought all the rights of the London and South African Exploration Company, and McCarthy was given an extension of time and certain facilities. McCarthy then appeared to have asked for twenty-five claims of the 100 which by his agreement with the London and South African Exploration Company he was entitled to. The present action arose in connection with the form of

lease which the defendant company should grant to him for the twenty-five claims which he got under the contract. A form of lease was tendered to him, to which he took exceptions, and eventually a form of lease was drawn up which he accepted, with certain reservations. He admitted that he had been tendered twenty-five acres as a depositing site, but alleged that this was insufficient, and not in compliance with the contract between him and the London and South African Exploration Company. The judgment appealed against was given on April 15, and it was against that judgment that the appeal was made.

The plaintiff filed the following declaration in the Court below:

1. The plaintiff is a prospector, residing at Beaconsfield, and the defendants are a joint-stock company, duly incorporated within this colony, and carrying on business in Griqualand West.

2. On or about the 18th January, 1899, the plaintiff entered into an agreement in writing with the London and South African Exploration Company, Limited (then the registered owners of the farm Dorstfontein, in the division of Kimberley), their successors and assigns, whereby the plaintiff obtained from the said company the sole right, for twelve calendar months, dating from the 2nd of January, 1899, to search for diamonds upon the said farm by underground working from a certain spot thereon, known as the Alice Syndicate ground, which ground was part of a certain depositing floor in the occupation of the defendants, but was surrendered by them to the said Exploration Company by order of the Supreme Court, dated the 6th of September, 1893.

3. Under the said agreement the plaintiff had the further right, in terms of paragraphs 3 and 9 thereof, of obtaining, at any time within the twelve calendar months aforesaid, or any extension thereof, a lease for five years, renewable from time to time, of an area upon the said farm in one block equal to any number of claims of 30 feet square each, not exceeding in all 100, at a rental of 30s. (thirty shillings sterling) per claim per month, which claims the plaintiff was at liberty to select and locate by means of trial pits.

4. At the time of making the said agreement, and subsequent thereto, it

was further agreed upon and understood between the plaintiff and the said Exploration Company that, in the event of the plaintiff taking out the lease of claims as in the last paragraph hereof described, he should obtain the use of sufficient ground in the vicinity of such claims for hauling, washing, and depositing sites upon the said farm, as well as for all necessary easements for the proper working of such claims.

5. Subsequent to the date of making and during the currency of the said agreements, the defendants purchased and took over the assets and undertakings of the said Exploration Company, including the said farm Dorstfontein, with the full knowledge of the existence and terms of the agreements, whereof the plaintiff also gave them due notice before transfer of the said farm to themselves; and the defendants are liable for the fulfilment of the obligations undertaken by the said Exploration Company in the said agreements.

6. The plaintiff, by virtue of the rights conferred upon him in the said agreements, proceeded to dig and search for diamonds upon the said farm by underground working, and at divers dates during the year 1899 discovered diamondiferous ground and diamonds both in the said Alice Syndicate ground and also in certain tunnels made by him under certain depositing floors upon the said farm, which were in the possession of the defendants, and of which they then had only the superficial right for depositing and other mining purposes.

7. By an order of the Hon. the Supreme Court, dated the 27th November, 1900, the plaintiff was permitted to make trial pits within a certain defined area upon the said depositing floors, for the purpose of selecting and locating the claims mentioned in the agreement "A," and such claims were to be selected and located within a period of six months from the 14th of September, 1900, to which period the operation of the said agreements was by the said order extended.

8. Thereafter the plaintiff proceeded to make certain trial pits within the defined area upon the said floors, and on or before the 13th of March, 1901, applied to the defendants for a lease, in terms of the said agreements, of 25 claims selected and located by him upon the said floors, and for the allotment of

hauling, washing, and depositing sites in the vicinity of the said claims, and for other easements necessary to the proper working of the same.

9. The defendants, however, did and do neglect and refuse to grant the plaintiff a lease of the said claims upon equitable, reasonable, and proper terms, and insist upon his signing a certain lease, which the plaintiff says contains unusual and inequitable conditions, such as the defendants are not justified in imposing, especially in clause 6 of the proposed lessee's covenants, clause 4 of the lessors' covenants, and in the proposed general provisions.

10. The defendants also neglect and refuse to allow the plaintiff the use of suitable or sufficient ground, in the vicinity of the claims applied for by him, for hauling, washing, and depositing sites and refuse to grant him the usual and necessary easements required for the working of the said claims.

By reason of the premises, the plaintiff claims: (a) That the defendants may be ordered to execute a lease to him of the said twenty-five claims upon fair, proper, and equitable terms, having regard specially to the terms of his said agreements with the defendants' predecessors in title; (b) that the defendants may be ordered to grant him the use of sufficient and suitable ground in the vicinity of the said claims as hauling, washing, and depositing sites, and generally to give him all the mining facilities and easements necessary to the proper working thereof; (c) a declaration of his rights as against the defendants in connection with the said claims; (d) general relief; (e) costs of suit.

The defendants' plea was as follows:

1. Defendants admit paragraphs 1, 2, 3, 6, 7, and 8 of plaintiff's declaration, but deny so much of the remaining paragraphs thereof as is not hereinafter expressly admitted.

2. Defendants deny the allegation as to vicinity contained in paragraph 4, and say that it was not in the power of the London and South African Exploration Company at the time of the contract or afterwards to have given plaintiff sufficient ground nearer than that offered by defendants and hereinafter more fully referred to.

3. Defendants admit paragraph 5 of the declaration save that they deny any agreement or knowledge of it on their part to give plaintiff sufficient ground nearer than that offered by defendants to him.

4. As to paragraph 9, defendants deny the allegations therein contained, but have tendered and hereby again tender him an amended lease, with costs to date of tender.

5. As to paragraph 10, defendants have tendered and hereby again tender plaintiff the nearest available twenty-five acres of ground as a depositing site with all facilities for hauling, tramming, and washing.

6. Defendants specially say that at the time of the plaintiff's agreement with the London and South African Exploration Company all ground nearer to plaintiff's so-called claims than that tendered by defendants as a depositing site, was let or given out by the said London and South African Exploration Company to various mining companies having claims in the Du Toit's Pan Mine for depositing floors, or other purposes and such ground and rights have never been abandoned by the said mining companies or their cessionaries or reverted back to the owners of the soil.

Wherefore defendants pray that plaintiff's claim, save as to the lease and ground tendered, may be dismissed with costs.

The plaintiff's replication was as follows:

1. The plaintiff admits that the defendants have tendered him a lease of which copy is annexed to the pleas and marked "A," and the plaintiff accepts such lease subject to paragraphs 2 and 3 hereof.

2. The plaintiff admits that the defendants have tendered him 25 acres of ground as a depositing site, with such facilities for hauling, tramming, and washing as appears from the annexure "B" to the pleas, but says that such tender is insufficient and bad, and not in compliance with the terms of the agreement between the plaintiff and the London and South African Exploration Company (Limited).

3. The plaintiff says that the defendants have sufficient ground nearer to the plaintiff's claims than that referred to in the said tender, which they could, and

under the said agreement are bound to allot to him for hauling, washing, and depositing sites.

4. Except as aforesaid, the plaintiff joins issue with the defendants upon their plea, except in so far as the same contains admissions, and again prays for judgment with costs.

After hearing evidence, the High Court granted judgment for the plaintiff with costs, declaring him entitled to the use of an area in the direction indicated, on the Dutoitspan Mining Reserve, unless otherwise arranged between the parties, of not less than 5 acres in extent, as a hauling, washing, and depositing site, with all reasonable facilities for its use for those purposes, on his executing the amended lease tendered by the plea. The plaintiff to have further right, during the currency of his lease, or of any renewal thereof, of claiming, when required, an additional area not exceeding 20 acres, as a depositing site, either on the spot indicated on the defendant's plan or elsewhere, as the parties may agree.

Against this judgment the defendants appealed.

[Mr. Schreiner K.C., (with him Mr. Sampson, K.C., and Mr. Buchanan), for the appellants. Mr. Burton (with him Mr. Close) for the respondents.]

Mr. Schreiner, K.C.: The order of Court of November 27, 1900, was, I submit, somewhat indefinite as to the locality within which respondent was authorised to sink his trial pits; but admittedly it was in the direction of the reserve. The question then is, could the De Beer's Company be bound to anything to which their predecessors in title, the London and South African Exploration Company were not bound? I submit not.

[De Villiers, C. J.: It was held that the De Beers Company were bound to give a convenient depositing site; are they not then bound to do all they can to meet the requirements of the appellant?]

No the Court would never impose more upon them than the London and South African Exploration Company were bound to. As to "ordinary mining facilities," see section 34 and 35 of Act 19 of 1883, and *De Beers v. Colonial Government* (9 Juta 101). A reserve is necessary for the efficient working of a mine, and these reserves were established to relieve the

great inconvenience caused by the accumulation of debris in the vicinity of the mines. The reported cases show that the Bulfontein and the Du Toits Pan mines have always had more depositing ground than they were entitled to under the statute. The Court will never compel the De Beers Company to do what their predecessors were not bound to. It is impossible to give the respondents a depositing site nearer to their claims without cutting off other claimholders from their depositing floors. They are entitled at least to a *via necessitatis* to these. The Court has decided in former cases that our depositing site cannot be interfered with, and now it is asked practically to reverse this decision. *Bulfontein Mining Board v. Armstrong* (6 H.C., 57, and 8. Juta, 236) showed that as the Mining Board were not owners of the debris they could not claim to control the mining area as the representatives of the claim holders. *L. and S.A. Exploration Company v. Bulfontein Company* (8 Juta, 55) referred to the extension of a mine, and shows that claim holders may not erect machinery on ground not within the mining area.

[De Villiers, C. J.: How do you define the limits of your mine?]

Its extent is proclaimed by Government, and the proclaimed area is the joint property of the claim holders *De Beers Mines v. Colonial Government* (9 Juta, 101). Even the Governor has no power to restrict these areas, though he may extend them. The L. and S.A. Company had no power to resume any portion of either the depositing site or of the reserve and give it to an outside miner, *De Beers Mines v. Liley* (6 H.C., 55). This case has never been appealed against. See also *De Beers Mines v. Colonial Government* (9, Juta, 108). The distinction which respondent wishes to draw between the wasting of "yellow ground" and that of "blue ground" is not founded on any intelligible principle. The site we have offered is the only one legally available, and to get from respondent's claims to the other site suggested it would be necessary to cross the ground of the Griqualand West Company, and this we can neither do ourselves nor give anybody else a right to do.

Mr. Burton (for respondent): I will first discuss this matter from the point of

view that the De Beers Company are not bound to do more for my client than the L. and S. A. Company. McCarthy's contract is set forth in the pleadings, and he claims that there was a special contract with Currey that he (McCarthy) was to have ordinary mining facilities. The plea only denied that the washing ground was to be given in the vicinity of respondent's claim. "Mining facilities" include ground required for hauling, washing, depositing, site, etc. In the previous case (before the High Court) Currey was called, and the Court found as a fact that there was proof that the L. and S.A. Company had bound themselves to do "the best they could." That company fostered the opening of new mines, and the view taken by the High Court is fully supported by the evidence. Now let us suppose that the L. and S.A. Company was still in existence. McCarthy would have found his diamonds and located his claims, and then he would have gone to the L. and S.A. Company to ask for mining facilities, and they would have bound to do all they possibly could. De Beers are under the same obligation to give ground conveniently situated for washing purposes. If McCarthy could only get ground two miles away he would have no alternative but to abandon his claims. The owners of the soil of a depositing site could resume the ground if it proved diamondiferous.

[Buchanan, J.: But could they take possession of this ground for hauling?]

Yes, or for any other purpose connected with mining. If we are entitled to a hauling site appellants cannot prevent us from washing our yellow ground there. Again, McCarthy requires a depositing floor. Where, then, could the L. and S.A. Company have conveniently given this? He does not ask to go on the De Beers depositing site, but he does object to go two miles away for the purpose. He left the selection of an alternative site open. The "reserve" was only for the accommodation of the claim-holders collectively. They had no individual ownership. I found my argument on *Bulfontein Mining Board v. Armstrong* (1. Sheil, 192), and in view of that the L. and S.A. Company never divested themselves of the ownership of the soil: as long as the permission did not interfere with the exercise of rights granted to other people they could allow these sites to be used for any purpose.

[Maasdorp, J.: Take the case of a commonage; may anybody appropriate a part of that to his own exclusive use.]

No, that would interfere with the rights of other people.

[Buchanan, J.: It is on evidence that it might be very inconvenient to the other claim-holders to give the respondent a part of the depositing floor.]

I would suggest that the whole policy of the De Beers Company is to keep other people out and to restrict the output of diamonds.

[Buchanan, J.: Your claim comes to this, that the L. and S.A. Company must keep every inch of their ground till you tell them what you require. Suppose they had given the De Beers leave to sink a shaft, do you say that they must now withdraw that permission?]

If the L. and S.A. Company had retained their ownership this dispute would never have arisen. Again, it has been argued for the appellant company that if they are not bound to grant a depositing site *a fortiori* they were not bound to grant space in the reserve, but these are totally different questions. Claim holders have only a right of access to the reserve, and a right to move about freely therein. As to the depositing ground they are tenants who pay rent. I quite admit that when there were some hundreds of claim holders in the one mine, a holder might be prejudiced by a grant such as I contend for; but that state of things no longer exists.

[De Villiers, C. J.: How does that affect the question? The De Beers Company have absorbed the other companies, including the L. and S.A. Company, and have stepped into their shoes.]

I quite admit that now, practically speaking, the only claim holders are the De Beers Company. Another point is that the expression "Mining Reserve" is by no means obsolete. Yellow ground has been given out to wash (according to Nind's evidence) on the mining reserve. It is most unusual for yellow ground to be taken two miles to wash. The case of *De Beers v. Colonial Government* (9 Juta 101) cited for appellants does not apply in this case. I base my argument on *Armstrong's Case*. Further, can we only demand from the De Beers Company what the L. and S.A. Company had bargained to give us? From the latter company we could not have demanded

specific performance, but only damages; but now that the two companies have amalgamated the De Beers Company can give, and is bound to give much more than the L. and S.A. Company could have done. Suppose that some of these depositing sites had reverted to the owner of the soil, could the L. and S.A. Company have then resisted our claim to depositing sites. We look to the L. and S.A. Company to fulfil their contract, and by the action of the appellants and merger of interests they now stand in the position of that company. They are in a position to grant what we ask, and they are bound to do so.

[De Villiers, C.J.: When the De Beers Company purchased from the L. and S.A. Company were they aware of the obligations of the latter company?]

I think that is admitted on the pleadings. If the De Beers Company take over the rights of the L. and S.A. Company they must also accept their liabilities.

[Maasdorp, J.: Can the reserve ever fall vacant?]

I am not prepared to argue that.

Mr. Sampson, K.C. (in reply): In paragraph 4 of his declaration, the plaintiff (now respondent) said he was entitled to ground for hauling, washing, and other purposes in the vicinity of his claim. But the evidence in the Court below does not support this claim. There is no evidence that Currey promised to do the best he could. His letter of page 37 of the evidence is inconsistent with any such general promise. All that he promised was that he would endeavour to procure an extension of the time granted for prospecting. See letter No. 1 of December 23, 1898. That letter disclaims any power to give surface rights, unless the ground proved diamondiferous. Even in that case the L. and S.A. Company could not give surface rights for depositing purposes. The respondent's tunnel extends in the very direction in which Currey said he could not give surface rights. In the Court below that disposed of the plaintiff's claim to ground in the vicinity of the mine, Currey promised nothing save ordinary mining facilities: and what were these, what did Currey give plaintiff a right to expect? Plaintiff knew that he could not get a depositing site, and if the reserve was contemplated, why was it not mentioned? The limits of the min-

ing area of the Du Toit's Pan mine were defined by a Government Proclamation issued in May, 1895.

[Buchanan, J.: The whole question turns chiefly on the mining area.]

Yes, but I want to show how this works out. In practice and by contract the mining reserve was over 200 yards from the edge of the mine. Respondent's counsel admitted that the contractual reserve could not be interfered with, but that the statutory reserve could.

[De Villiers, C. J.: Where is the contract?]

That point was never raised, or we should have gone over the whole ground covered by *Armstrong's Case*. Lastly, if a man places his house, etc., in a position where he must expect disadvantage to accrue he cannot complain: and so with a mine. If a man locates his mine in an inconvenient site he has no right to complain of the inconvenience, and yet the Court below grants him five acres of ground to help him out of his difficulty. As to this, compare the evidence of the case with the judgment. The Court granted a portion of the reserve, and this grant was wholly illegal and constituted a serious infringement on the rights of previous miners.

Cur. Adv. Vult.

Postea, June 6th.

De Villiers, C.J.: The question to be determined in this appeal is whether the London and South African Exploration Company would have been bound under its agreement with the plaintiff to give him a portion of the "reserve" of the Du Toit's Pan mine as a depositing site for yellow ground, to be taken by him out of certain twenty-five claims in the neighbourhood of Du Toit's Pan mine. It is admitted on both sides that the obligations of the Exploration Company have been taken over by De Beers Consolidated Mines. One of these obligations was that the Exploration Company should give the plaintiff ordinary mining facilities for the purpose of working certain claims leased to him. Those claims did not form part of the Du Toit's Pan mine, and he could not, therefore, claim any portion of the depositing sites attached to that mine for the purpose of hauling, depositing, or washing the ground taken out of his

claims. The defendant company offered him twenty-five acres of land outside the Du Toit's Pan depositing sites, but as that land is situated about two miles from his claims, he objected to it as not giving him the "ordinary mining facilities" that had been promised. The High Court of Griqualand West appears to have considered that the plaintiff could not object to the land they offered, so far as the blue ground from his claims was concerned, but as to the yellow ground, awarded to him, five acres of land falling outside the statutory or inner "reserve" of the Du Toit's Pan mine, but inside the outer reserve. The inner reserve is referred to in the 35th section of Act 19 of 1883, which enacts that to every licensed claim there shall be attached the right to an acre of ground as a depositing site in the neighbourhood of such mine, "but so as not to encroach on a reserve of two hundred yards around the margin of such mine." In regard to the outer reserve, Mr. Justice Solomon, in the case of *Bultfontein Mining Board v. Armstrong* (8, Juc. 326), has given an instructive account of its origin. That judgment referred to the Bultfontein mine, but it has been accepted by counsel on both sides as a fair statement of what took place in regard to the Du Toit's Pan mine also. In that case, the Exploration Company, as the owners of the farm on which Bultfontein mine is situated, had given leave to Armstrong, who was not a claimholder, to erect washing machinery in the reserve outside the inner reserve and wash debris, which had been abandoned by the claim-holders who had taken it out of that mine. It was held by the High Court—and that judgment was affirmed by this Court—that in the absence of proof that the washing would prejudice the claim-holders in the mine, the Mining Board had no right to restrain Armstrong from washing the debris. "The trespass," said Solomon, J., "in the present case complained of is situated outside of the original reserve of 300 feet round the mine, but within the extension of the reserve. Some point was made of this fact by the defendants"—namely, Armstrong and the Exploration Company—"but if Kilgour's evidence with regard to the extension is correct, the fact seems of no importance. For I take it that when Kilgour extend-

ed the reserve he intended to give to the Depositing Sites Committee exactly the same power of control over the extended areas as he had already given to them over the original reserve. Mr. Curry, the manager of the Exploration Company himself says that he considers that the Depositing Sites Committee had power of control over the outer zone as well as over the inner zone. . . . It appears to me, therefore, that the plaintiff has established that the alleged trespass was committed within a certain area round the mine, which area was set apart by the Exploration Company for the use of the claim-holders of the mine, and was placed by the said company under the control of the Depositing Sites Committee." He then proceeds to discuss the question whether the Mining Board had acquired all the rights and powers of the Depositing Sites Committee, and comes to the conclusion that, although the Mining Board had a general power of control over the reserve analogous to that of a Municipal Board over a municipal area, it had not such extensive possession and control over the reserve as to enable it to bring an action for trespass against persons entering upon the area. He adds that "this case does not decide that the owner of the soil has the right to enter upon the mining area to the prejudice of the claim-holders in the mine; it merely decides that the Mining Board is not the body to restrain him from entering upon the area." The judgment of this Court was based, among other things, on the distinct ground that the washing of debris which has come from the mine is a mining operation connected with the Bultfontein mine, which ought not to be restrained without proof that the rights and privileges of the claim-holders are affected thereby. That case, therefore, is no authority for the view that the Exploration Company would have been justified in using any portion of the outer zone for purposes unconnected with the Bultfontein mine. The washing of debris taken out of that mine by claim-holders is clearly an operation connected with that mine, although the person allowed to wash it might not be a claim-holder. In the present case the plaintiff, to whom the High Court has awarded a depositing site for yellow ground on the outer reserve, proposes

to deposit and wash on that site yellow ground not taken out of Du Toit's Pan mine, but from land outside that mine. In my opinion that was not such an "ordinary mining facility" as was contemplated by the parties to the agreement between the plaintiff and the Exploration Company. The claim-holders might have reasonably objected to such a use of an area reserved by tacit agreement for mining operation in connection with Du Toit's Pan mine. The fact that the defendant company at the time of the plaintiff's agreement with the Exploration Company held, or subsequently acquired the greater number of the claims in the mine, cannot add to the obligations which the defendant company took over from the Exploration Company. Those obligations must be judged of as if the claims were still held by the original claim-holders. Such claim-holders might not have been entitled to object to the washing of debris from the Du Toit's Pan mine taking place on the outer reserve, but they would certainly have been entitled to object to a portion of such reserve, situated between the mine and some of their depositing sites, being used as a depositing site for yellow ground from another mine. It would appear, in the present case, that the proposed depositing site is so situated that it would have prevented some of the original claim-holders from having access for depositing purposes to the sites which they held by virtue of their claims in the mine. The defendant company, by its plea, has tendered to the plaintiff a site about two miles distant from his claims, and the Court will vary the judgment of the Court below by giving judgment for the plaintiff, in terms of the tender, with costs up to the date of tender, but the plaintiff will have to pay the costs in the Court below, subsequent to the tender, as well as the costs of appeal.

Buchanan, J., and Maasdorp, J., concurred in the above judgment.

[Appellant's Attorneys: Scanlen and Syfret; Respondent's Attorneys: G. Trollip.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice HOPLEY
and a Jury.]

THOMPSON V. SEALE. } 1902.
May 30th.

Landlord and Tenant — Sub
letting—*Mala fides*—Damages.

This was an action for damages for breach of contract brought by William Thompson, against Henry Francis Seale. There was a claim in reconvention that a certain lease be declared cancelled.

The plaintiff's declaration was as follows:

1. The plaintiff, William Thompson, carries on business as a general commission merchant at Cape Town, under the style or firm of William Thompson (late Thompson, Ratcliffe and Co.). The defendant is a retail jeweller, carrying on business at Cape Town.

2. On or about the 14th day of December, 1898, the plaintiff and defendant entered into a written agreement of lease, copy of which is hereunto annexed, whereby plaintiff hired from the defendant certain three floors of certain premises situate at the corner of Adderley-street and Longmarket-street, Cape Town, and hired by defendant from one Mcritz Pickler, the then owner thereof.

3. The said agreement of lease was for a period of three years, reckoned from the 1st day of January, 1899, and on the 9th day of February the said period was further extended until the 1st day of January, 1903.

4. Prior to and at the time of entering into the said agreement of lease, the defendant had full notice and knowledge that the plaintiff required the premises so let and hired for the purpose of dividing the said floors into rooms and offices by means of partitions and sub-letting the said rooms and offices for his (the plaintiff's) profit.

5. On or about the 1st day of January, 1899, the plaintiff entered into possession of the said premises, under the said agreement, and at considerable cost subdivided the said floors into thirteen rooms and offices as aforesaid, and thereafter

sub-let the said rooms and offices to divers persons with the knowledge and consent of the defendant.

6. Thereafter, in or about the years 1900 and 1901, the plaintiff submitted to the defendant from time to time the names of divers persons of good standing and respectability who were willing and had agreed to hire the said rooms and offices from the plaintiff, but the defendant wrongfully and unlawfully, unreasonably and vexatiously, refused to allow the plaintiff to sub-let the said rooms to the said persons or at all, in consequence whereof the said rooms and offices became vacant, and have so remained, and the plaintiff has thereby been deprived of all profit and benefit from the said rooms and offices.

7. By reason of the premises the plaintiff has suffered damage to the extent of £2,000, particulars whereof have from time to time been supplied to defendant.

Wherefore the plaintiff claims: (a) £2,000 as and for damages as aforesaid; (b) alternative relief; (c) costs of suit.

For a plea the defendant says as follows:

1. He admits the allegations in paragraphs 1, 2, and 3, and denies those in paragraph 4 of the declaration, and begs to refer this Hon. Court to the written lease which constitutes the contract entered into by the parties.

2. He admits that on certain occasions he gave his approval to the sub-letting by the plaintiff of certain rooms and offices to certain persons as is alleged in paragraph 5.

3. As to paragraph 6, he admits that during 1900 and 1901 the plaintiff has from time to time asked his approval of proposed sub-leases of parts of the property hired by the plaintiff, and he admits that he has refused to grant his approval, but he says that such refusal has been in all cases lawful and in accordance with his rights, as reserved in clause 6 of the written lease, but save as aforesaid, he denies the allegations in the said paragraph.

4. He denies all the allegations in paragraph 7.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a claim in reconvention the defendant (now plaintiff) says as follows:

1. In terms of clause 10 of the written lease entered into between the parties it is provided as follows: "That the rent

of the premises hereby leased is payable monthly, and should the lessee fail to pay any one month's rent within twenty-five days after it falls due, or commit any breach of this agreement, the lessee shall have the right to cancel this lease and take possession of the premises hereby let."

2. The rent for the month of January, 1902, fell due at the end of that month, and the plaintiff (now defendant) failed and neglected to pay the same within twenty-five days after it fell due—wherefore the defendant (now plaintiff) was entitled to cancel the lease.

3. Thereafter the defendant (now plaintiff) gave lawful notice to the plaintiff (now defendant) that the lease was cancelled under clause 10 for his aforesaid default in the payment of the said rent, and demanded possession of the said premises, but the plaintiff (now defendant) wrongfully and unlawfully refused and still refuses to quit the said premises and give up possession thereof, and wrongfully and unlawfully remains in possession thereof.

4. The defendant (now plaintiff) is entitled to a decree of ejectment.

Wherefore the defendant (now plaintiff) prays for: (a) An order of ejectment, compelling the plaintiff (now defendant) forthwith to deliver up possession of the leased premises; (b) alternative relief; (c) costs of suit.

For a replication to the defendant's plea, the plaintiff says as follows:

Save for admissions he denies all and singular the allegations of fact and conclusions of law in the plea contained, joins issue with the defendant thereon and again as before prays for judgment with costs.

And for a plea to the claim in reconvention the plaintiff (now defendant) says as follows:

1. He admits paragraph 1, and craves leave to refer to the terms of the lease.

2. As to paragraph 2 he admits that the rent for January fell due at the end of that month, and that it was not then paid, nor within twenty-five days thereafter, but he says that in or about the month of February, 1902, and prior thereto, the parties were negotiating for a cancellation of the said lease, as will more fully appear from the correspondence annexed to an application

to this Honourable Court by the plaintiff in reconvention for ejectment, to which the defendant in reconvention craves leave to refer when produced at the trial.

3. The defendant in reconvention does not admit that the plaintiff in reconvention is entitled to claim a forfeiture of the said lease without notice to the defendant in reconvention of his intention so to do and without affording the defendant in reconvention an opportunity of paying the rent; and says further that the plaintiff in reconvention by his conduct in and about the said negotiations and offers in relation thereto waived any right he might otherwise have had to claim any such forfeiture.

4. As soon as defendant in reconvention became aware that the plaintiff in reconvention intended to claim a forfeiture of the said lease, to wit, on or about the 28th February, 1902, he tendered to the plaintiff in reconvention the amount of rent then due; but the plaintiff in reconvention refused to accept same. Save as above he denies paragraphs 3 and 4.

5. The defendant in reconvention hereby again tenders to pay the rent now due to the plaintiff in reconvention.

Wherefore the plaintiff (now defendant) prays that the claim of the defendant (now plaintiff) may be dismissed with costs.

For a replication to the plea of the defendant in reconvention, plaintiff in reconvention admitted that after the 25th February, 1902, he did, in connection with the correspondence referred to in paragraph 2 of the plea in reconvention, consider a request by defendant for a cancellation of the lease, but the plaintiff in reconvention in so doing gave express notice that he reserved all his rights under the lease. He admitted in regard to paragraph 4 that the defendant in reconvention did on the 28th February tender the amount of rent which was then due for January, and that plaintiff in reconvention refused to accept the same.

Clause 6, referred to in the pleadings, was as follows: The lessee is not entitled to sublet the premises or any part of them except to such tenants and for such purposes as the lessor may approve.

Mr. Searle, K.C. (with him Mr. Upington) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Close) for defendant.

Mr. Schreiner said the lease was an absolute prohibition of sub-letting without the approval of the landlord, and there were no qualifying phrases providing for such approval not being unreasonably or arbitrarily withheld. There were many cases in the English Courts which showed that a distinction was made between the absolute prohibition without the approval of the landlord, and such approval with the qualifying phrases. Therefore he would object to any evidence being put before the jury as to whether the persons whom Mr. Seale refused to approve of were respectable or not. Mr. Seale was not called upon to give any reasons for his refusal to approve of the proposed sub-tenants, and counsel submitted that that was an absolutely legal defence.

[Hopley, J.: You say this is a matter of law that the jury shall have nothing to do with?]

Mr. Schreiner said that was so.

Mr. Searle said the proper course would be to ask the jury certain questions, and then if there was a question of law it could be reserved. He was quite prepared to take it upon the point of law that the only proper construction must be that the man must exercise some discretion, especially when he knew that the object of the letting was to get tenants. Therefore he could not come forward and say, "I am not going to approve of any sub-letting at all." Proceeding, counsel said he must put a strong case to show that the defendant did not exercise the discretion which he ought to have done in the matter, and they could not decide that until they heard the evidence. He submitted that it was a *mala fide*, and not a *bona fide* refusal at all.

[Hopley, J.: You go so far as to say that you can prove that he would not allow any tenant in at all.]

Mr. Searle said that was the position they took up, and he submitted they were entitled to put that case before the jury.

Mr. Schreiner said they must take the lease as it stands, and in it there was an absolute prohibition as to sub-letting without the approval of the landlord being obtained. Their case was that the giving of approval was entirely in the hands of the landlord, and evidence which would go to vary the lease or evi-

dence as to the respectability of the persons proposed as tenants could not be called.

Mr. Searle said that the clause about the partitions showed that it was contemplated that the premises should be sub-let. The evidence as to respectability of the persons was only intended to show that the defendant would not allow sub-letting at all.

Mr. Schreiner said that Mr. Seale took up the position that there were occasions when the windows were left open, and when the police had to come late at night and see the property, and in January, 1901, he took up the position that he was not going to allow any more sub-letting.

After hearing counsel, Mr. Justice Hopley said it might be better to reserve the legal point as to absolute prohibition of sub-letting without the approval of the lessor for the decision of the full Court, and go on now with the proof of the damages. There would be some way of bringing the legal point before the Court.

William Thompson said he was a commission agent in Cape Town, and had carried on that business for about nine years. In 1898 the premises now in question were advertised as to let. Witness was then the lessee of the Mercantile Chambers, Myburgh's Buildings, St. George's-street. There he had an office for himself, and let the other four offices. He knew Mr. Seale, who was carrying on business in his present premises, and also in Church-street. Witness received a letter opening negotiations in regard to the lease.

Mr. Schreiner said he would at once raise the objection that this letter was anterior to the lease, and therefore not admissible.

Mr. Searle said the letter had an important bearing on the subject, as it was the letter which opened the negotiations. He asked that it be taken down that he tendered the letter to prove the allegations in paragraph 4 of the declaration.

This was noted.

Witness was proceeding to state the object for which he was leasing the premises, of which Mr. Seale had knowledge, when

Mr. Schreiner objected to this evidence, and the Court held that it was inadmissible.

Examination continued: A lease was entered into, and witness immediately

proceeded to put up the partitions. He got possession on December 31, and on January 1 he commenced to put up these partitions, dividing the three floors into thirteen rooms. That cost altogether between £200 and £300. Work was commenced on the first floor at the Adlerley-street end. The partitions were finished towards the end of January. During 1899 and 1900 the offices were occupied. During 1899 the actual amount of rent witness received was £710 10s., and he paid rent £360, and therefore the first year's profit was £350 10s. During January, of course, most of the rooms were unfinished, and therefore unoccupied, and during February and March also some of the rooms, principally on the top story, were vacant. During the latter half of the year, however, all the rooms were occupied, and he had to turn people away. During 1899 and 1900 the rooms on the top floor were used as bedrooms, it having been found that it was difficult to let them as offices. Witness received verbal permission from Mr. Seale to let these rooms as bedrooms. About the end of 1900, however, Mr. Seale objected to the bedrooms, and the tenants were given notice to quit, which they did by January 31, 1901. By that time the premises had become known as offices, and therefore witness had no difficulty in letting these rooms as offices and getting a higher rental than he received for them as bedrooms. The gross rental in 1899 was £782, and the gross profit £428. Up to that time no exception had been taken to the tenants, and anyone was allowed to come in. In January all the rooms were let, and the rental was £69 15s. After January 14 Mr. Seale refused every application until the place gradually became empty. Witness had applications for all the rooms, and could have had them all let during 1901. There was a good demand for offices in 1901. On March 23 witness began to send accounts to Mr. Seale showing the loss witness had sustained by the refusal to accept the tenants. Witness charged Mr. Seale in those accounts with the rent of the rooms vacant. Since January last witness could have let all the rooms to desirable tenants. He did not submit the applications in January and February to Mr. Seale on account of the action

pending. The rooms could easily have been filled up. The offices could have been let for higher rentals than the two previous years. He first had negotiations with Mr. Seale in regard to the cancellation of the lease on December 31, 1900. Mr. Seale came to see witness, and mentioned that he was in treaty with the executors of Pickler to purchase the premises, and as he wanted to remove all his business from Church-street, he asked if witness would consent to the cancellation of the lease. Witness said to Mr. Seale that he knew he had taken the rooms with a view to making revenue from them, and he asked Seale to come again after New Year. Mr. Seale came again on January 3, 1901, and witness showed him a statement he had drawn up, showing the rentals he had received, to convince him that he had made between £400 and £500 the previous year out of the lease. The partitions alone had cost witness between £200 and £300, and all that Mr. Seale offered was £300 for the lease, which had two years to run with the option of four years' renewal. Witness said that if he got £1,000 he was willing to cancel the lease at once. Mr. Seale then looked at the top floor, and asked how much witness would let him have it for, as he thought of putting his workmen there. Witness said he would let it for £15 a month, which was less than he was getting for it. Seale wanted it for £10, but witness told him he must make something out of it. Witness subsequently had his offer of £1,000 to cancel the lease, or £15 a month for the hire of the top floor, put in writing. In May, 1901, Mr. Seale bought the premises from Pickler's executors and offered witness £350 to cancel the lease, but witness said that he would not take less than £1,000. On February 25 he saw his attorney (Mr. Tennant), and a letter was written offering to cancel the lease and agreeing to pay the rent up to March 1, but without prejudice to his action for damages for breach of contract. A cheque for the rent was sent on February 28, but the position taken up by defendant's attorney was that the lease was cancelled owing to non-payment of the rent on February 25. Witness had no notice or idea that the de-

fendant would take up that position. He understood that the matter of rent would remain in abeyance pending the litigation.

Cross-examined: Witness asked Mr. Berrange to allow the rent for the time being to remain in abeyance. He did not remember Mr. Berrange saying that he could do nothing apart from his client, and that whatever proposition witness had to make must be put in writing. From September to December, 1901, witness only drew £19 a month from the rooms, for which he was paying £30 per month. Witness occupied one office himself. He was still in possession, remaining there to take care of the place. Witness saw Mr. Berrange on January 8, and then said he was going to sue for damages. He did not say he was going to sue for cancellation of the lease. Witness asked if that matter could be arranged pending the action that was to be brought. The impression witness gathered from what Mr. Berrange said was that the rent would be in abeyance until then. Witness remembered something about seeing Mr. Berrange on February 25. Witness was suffering from an attack of influenza at that time and could not remember any particulars in connection with that interview. Witness had threatened to take action in June, 1901, but had waited until the end of the year until the amount of the loss he had sustained through Mr. Seale's action should exceed the £350 offered by the latter. Witness was further cross-examined in regard to complaints which Mr. Seale had made.

Re-examined: Throughout the whole of his tenancy witness had made every effort to take care of the premises and secure proper tenants. Every objection Mr. Seale made was attended to at once. With regard to a window in the front door having been broken when witness discovered that he had it at once repaired. The window had been broken by one of the tenants, Miss Bell, who had forgotten her key and foolishly broke the window to get at the catch-lock. Witness put in plate-glass instead of common glass so that the property was actually improved to that extent. In a letter of January 8, 1901, there was a reference to windows left open. That was after Mr. Seale

had had the conversation with witness about the cancellation of the lease. All the complaints culminated in January, 1901. There was no connecting door between the premises witness leased and those occupied by Mr. Seale. In 1899 and 1900 witness had silk goods, etc., of the average value of £1,000 in his office.

By the Court: Mr. Seale occupied the premises on the ground floor where he entered into the lease.

William Lambert Kidney said he was a broker and general commission agent, and was well acquainted with the letting value of chambers in Cape Town. The prices fixed by plaintiff for the chambers could be got now as well as last year. The premises were good, and the rents were reasonable.

Cross-examined. He did not think £7 10s. a month was too much for a room on the third floor. It was a good room and the stairs were easy to go up. Adderley-street chambers would always be sought after.

Harry Lambart deposed that he was one of the applicants for one of these chambers on January 24, 1901. He applied to Mr. Thompson in answer to an advertisement. Witness was managing a manicure and chiropody business. He was willing to lease a room on the top floor for £7 10s. Mr. Thompson gave witness a letter to Mr. Seale. Witness saw the latter, who said on learning witness's business that he would stop Mr. Thompson's little game. Witness asked Mr. Seale if he could let him know then, and Mr. Seale told witness to come back at two o'clock, and he would let him know, as he was going to see his solicitor. He then started to enter into some particulars regarding a personal quarrel he had with Mr. Thompson, but witness informed him that he was a perfect stranger to both, and had nothing to do with their private affairs, and simply wanted the office. At two o'clock witness went back to Mr. Seale, and the latter told him he could not have the office. Witness asked Mr. Seale if he had any objection to the respectability of the business, and Mr. Seale said "No." Witness now had an office in the Board of Executors' Buildings.

John William Wood deposed to applying for two of the rooms from Mr. Thompson, viz., one room at £15 a

month and another at £5 a month. He wanted the rooms for twelve months certain. His offer was not accepted. He was perfectly surprised when he was declined as a tenant.

William Cowling, late of the firm of Skead and Cowling, Percy M. Rosemont, optician, and Henry Horace Knox, architect, also gave evidence to the effect that they applied for some of the chambers in question, and were refused.

George Hankinson gave evidence as to the value of the partitions erected for plaintiff.

Alfred King Hiller said he was a builder, living in Cape Town, and hired one of the rooms on the third floor in 1899 for nearly a year. He occupied it as a bedroom, and during the time he was there he never saw anything objectionable in the way the place was conducted.

After reading the evidence of a witness who had wished to hire one of the rooms, taken on commission, Mr. Seale closed his case.

Mr. Schreiner called

Daniel F. Berrange, defendant's attorney, who said that on January 8 Mr. Thompson came to him and said that he had just called next door on Mr. Tenant, but found he had gone to Colesberg, and would not return until the 23rd. He said he would like to know if there would be time to bring his action next term against Mr. Seale. Witness asked him what action, and he said, "For the cancellation of the lease and for damages." Witness said, "Have you asked Mr. Seale whether he would refuse to cancel the lease?" Thompson said "No," and witness said that it might be done just for the sake of asking. Witness gave Thompson no ground for inferring that the rent for December, then unpaid, nor the rent for January, was to remain in abeyance. That was never mooted. If it was witness would have given the same reply as he gave in February, when Thompson came again. Witness's affidavit made in the previous application was absolutely correct.

Cross-examination: Witness was positive that on January 8 nothing was said about the rent remaining in abeyance. Witness would impute no bad motives to Mr. Thompson whatever.

Mr. Schreiner closed his case, saying that there was no use in calling Mr.

Seale, as he could not give any evidence as to the damages.

Counsel then addressed the jury on the facts of the case.

Hopley, J., in directing the jury, said that his opinion in regard to the sixth clause of the lease was that, where a lessee allowed such a clause to stand against him, and put himself at the landlord's mercy for any such sub-lessee as he tried to get, unless there was *mala fides*, malice, or such entire bad faith as to cause the Court to interfere, it seemed to him that the Court was bound by the wording of the lease, and that the lessor might without any explanation refuse to approve of any sub-tenancy. If he (Mr. Justice Hopley) were right in his contention, then Mr. Thompson had suffered no damage at all, and if the jury took the same view they must bring in a verdict of no damages. But supposing the jury were not inclined to be so directed, they could find damages and the legal point could come before the full Court, which would perhaps be a useful thing to do, because although he felt so in the matter, he had not had time to consult authorities or to think over this case, and he might be wrong, in which event it might be possible that the full Court would not support him in his first impression. The jury might find damages if they liked, and if so, they must be careful in assessing the damages. After referring briefly to the evidence as to the damages, his lordship said that the jury might consider that there was another element which should enter into their minds beyond the question as to whether the premises could have been let for the whole period or not, and that was whether the plaintiff had behaved in a reasonable way. Did the jury think that Thompson should have come to the Court in order to have the contract construed when the first tenant was rejected? If the matter had come before the Court on that point the whole case would have been decided. It was for the jury to consider whether Thompson acted as a man reasonably should in sitting down writing letters. After all, what was Seale to do? He could not come before the Court and ask for a declaration of rights, because he was being threatened with an action for damages. The question was whether a man who had been damnified should not

have come to the Court, and the matter which the jury had to decide was whether Thompson should have allowed the damages to go on accumulating, or should have come to the Court at once. What damages did the jury think should be awarded to Thompson if he should have the legal right, and was entitled to say he had been improperly kept out of possession of these premises? That was a question for them to consider. His lordship then dealt with the claim in reconvention for the cancellation of the lease, and after reviewing the evidence on that point said that if the jury found that the conduct of Mr. Seale was such as to mislead Thompson in regard to the rent being left in abeyance, then they would find that Seale did as a matter of fact for the time being waive his right to cancellation, and it was not possible for him to go back on that, and put on the final screw, and say, "Out you go, because you did not pay in time." If they found that, and also that there was an absence of notice on the part of the lessor, such as to disentitle him to judgment, they would find that the lease had not been cancelled.

The jury retired, and after an absence of twenty minutes, returned with the following verdict: "On the claim in convention, if Seale acted legally, there were no damages, and if he acted illegally in prohibiting sub-tenants from taking possession, we find that the amount of damages due to Thompson is £400. On the claim in reconvention, we consider that the lease should not be cancelled, and that Thompson is still legally in occupation of the premises."

After hearing counsel,

His Lordship said: His opinion being that Seale had acted legally in regard to withholding approval of sub-letting, he would enter judgment for the defendant in the claim in convention, and for the plaintiff (defendant in reconvention) in the claim in reconvention. The plaintiff in convention could bring the matter before the full Court, by way of motion, under rule 35, if he wished to do so. As to costs, His Lordship said that as both parties were in fault, each would have to pay his own costs.

[Plaintiff's Attorneys, D. Tennant, Jun.
Defendant's Attorneys, Berrange and Son.]

BENNETT V. SHAW.

1902.
May 30th.

Hotel-keeper—Traveller.

A hotel-keeper, who has let a room to a traveller, is not justified in turning him off the premises without lawful cause.

This was an action by Jacob Bennett against George Hamilton Shaw, for delivery of certain articles of stock and clothing, which it was alleged defendant had illegally detained, and also for damages for having been thrust out from the defendant's hotel, and for the profit which might have been made from the stock detained, and for having had to buy certain articles of clothing on account of the personal clothing of the plaintiff being detained. Plaintiff was a trader and a general dealer, carrying on business at Cape Town and elsewhere, and defendant was a hotel-keeper at Victoria West. It was alleged in the declaration that on the 9th March plaintiff made arrangements with the defendant to obtain accommodation for a week at his hotel. Plaintiff conveyed goods to the value of £112 to his room at the hotel, but on the night of the 11th March, the defendant, in breach of his duties, under Act 28 of 1883, and in breach of contract, removed the goods from the room, and denied plaintiff access thereto, and threatened him with personal violence if he did not leave the hotel. Plaintiff had to sleep on a bench at the railway-station that night. He had been deprived of his means of livelihood, owing to the detention of the stock. He claimed £150 as damages, and the delivery of the stock and effects, or payment of their value, £112. In his plea, defendant said that plaintiff unlawfully, and without consent, placed his goods and chattels in a room in the hotel. He (defendant) removed them from the room, and contended that he was justified in so doing, the room having been lawfully let to a third person, as the plaintiff well knew. He denied that he had agreed to let the room for a week. He had always been ready and willing to deliver the plaintiff's goods.

Mr. Buchanan for the plaintiff, Mr. Benjamin for the defendant.

Mr. Buchanan called

Jacob Bennett, the plaintiff, who said he carried on business as a trader in curios, feathers, etc., up-country. In February last witness went to the defendant's hotel and occupied room No. 4. Witness on that occasion made arrangements with the defendant's manageress (Mrs. Berry) and the defendant to take the room for a week at £3 10s. a week. There was no other hotel or boarding-house in the place. Witness went to Deelfontein, and on Sunday, March 9, at 12.30 a.m., he returned to Victoria West. He went to the hotel and took his personal baggage with him. Witness saw Mrs. Berry, who said he could have room No. 4. Witness went to that room. A gentleman named Pearson—a military captain—was in the room, which contained two beds. Witness asked Captain Pearson whether he had any objection to witness sharing the room with him, and he replied that he had not. Witness saw defendant in the morning, and told him he had come back to the hotel for a week. He tried to get defendant to give him a cheque for cash in order that he could post to Port Elizabeth. Witness had his meals in the house, and obtained the cheque from defendant on the Monday, giving defendant cash for the amount of the cheque (£30). Captain Pearson left on Monday morning. Witness slept there on Monday night, and on Tuesday afternoon, after having gone into the village, he returned and found that some of his goods had been placed outside the room. He put them back into the room. At about nine o'clock witness found Shaw in front of the door of his (witness's) room. Witness's goods were all outside the door. Shaw told him he could not go into the room as it had been commandeered by the Commandant. Witness went to see the Commandant, and on returning to the hotel he told defendant that the Commandant said he had not engaged the room. The Rev. Father Glynn was then in the room. Defendant refused witness access to the room, and said that if he did not go he would get his Kafirs to turn him out. Defendant appeared to be excited, and seemed to have had a drink or two. It was a wet night. Witness got permission from an officer to sleep on a bench at the railway-station. He borrowed a blanket from a soldier. Next day witness got a permit to come to Cape

Town, as he knew that if he stayed he could not get any room in which to sleep. Witness's attorney had written to defendant asking for the delivery of the goods, and defendant had replied stating that he had tendered personal delivery at the time to witness, and had had the goods stored at his cost. The value of the goods was £116 8s.

Cross-examined by Mr. Benjamin: On the morning of the 9th defendant did not tell witness that a Captain Pearson was occupying the room, and that the witness must give it up. There was never any such conversation. On the evening of the 9th witness did not occupy the room unknown to defendant. Shaw said witness could have the room for a week. Witness did not refuse to take possession of the goods. Defendant refused to give him possession. He refused to give witness his overcoat. Mr. Shaw was not sober at the time. During the week that witness was at the hotel previously witness had not seen Shaw in liquor.

Re-examined: The Commandant, Captain Wedgwood, told witness that he had not commandeered the room, and that witness was justified in retaining it. Witness told that to Shaw.

Mr. Benjamin called

George Hamilton Shaw, the defendant, who said he reserved four rooms in the hotel for visitors. The room in which plaintiff slept was 12 feet by 8 feet. Witness put two beds in the room for use when there was a crush in the hotel. Witness first saw plaintiff on the Monday morning—the 10th, and told him the room had been engaged for Captain Pearson, who wanted it for himself. Witness said that he (plaintiff) could not use the room. Nothing was said by plaintiff about engaging the room for a week. He slept in the room that night without witness's knowledge. Captain Pearson also occupied the room that night. Witness received a telegram from Father Glynn on the Tuesday afternoon, and told plaintiff that he must leave as Father Glynn wanted the room. He asked plaintiff to leave without any bother. Father Glynn was a military chaplain, and witness had had a letter from the Commandant warning him that preference must be given to military people in the matter of accommodation, and that if necessary the hotel accommodation must be reserved entirely for military lodgers. On the

Tuesday afternoon witness found Bennett's things in the room, and told a servant to take them out. That evening plaintiff said he would refuse to take possession of the goods. Witness at no time refused to give the goods up. Bennett used to sell goods in his room. Bennett did not tender to pay his account. He told witness nothing about having seen the Commandant.

Cross-examined by Mr. Buchanan: Plaintiff did not say he wanted the room for a week. The witness generally denied the allegations of the plaintiff as to what occurred on the Tuesday.

The Rev. Father Glynn was called, and said that he heard plaintiff refuse to take his goods. Witness's impression was that Shaw wished Bennett to take the goods. The room was a small one, and in witness's opinion there was not room for two. Shaw said that he had told plaintiff to go on the previous day.

Edward W. A. Young, postmaster at Victoria West, said that on the night of the 11th March, plaintiff told him that he had been turned out of the hotel, and had refused to take his goods, which had been placed in the passage. He said he was going to Cape Town, and would make Shaw pay for it.

Corroborative evidence was given by a clerk at the Post-office.

Mr. Buchanan (for plaintiff): This is an action to recover damages for the illegal retention of goods, and for unjustifiable extrusion from a hotel. Defendant admits that he was a hotel keeper, and as such he was bound to supply accommodation both by Common Law, and also by section 67 of Act 28 of 1883. Defendant admitted that he had 4 rooms.

[De Villiers, C.J.: How many rooms is he obliged to have by the terms of his licence?]

I do not know, but he admits that he has 4, but says that he reserves them for military travellers. A hotel keeper is bound to provide reasonable accommodation. Plaintiff (with the manager's consent) occupied a room in common with the Rev. Father Glynn on the Sunday night, and twice thereafter. On the morning following the last of these occasions defendant said to plaintiff: "What, are you back again?" and asked for a cheque. Defendant had confirmed the letting of the room, and he

must have known that plaintiff was there. I submit that the contract of letting and hiring has been fully proved. Defendant says that he tendered delivery to plaintiff of his goods, and that plaintiff refused to accept: that is a most improbable story. What is certain is that defendant thrust out his lodger at a time when he could not get other accommodation. Even if the Court should hold that the £150 claimed are excessive damages, I submit that the plaintiff is entitled to substantial damages of some kind.

Mr. Benjamin: Burge (Vol. 3, 695 (who refers to *Bell's Commentaries*) is against the contention of plaintiff's counsel. As to whether the defendant ever really accepted plaintiff as a lodger, there is considerable conflict of evidence, but apart from this there is really nothing to support the plaintiff's contention that the hotel-keeper is bound to provide accommodation for all comers, even though he may have to put two or more travellers in the same room in order to do so. As to the goods, we tendered delivery, but the plaintiff refused to accept them. I submit that on the pleadings the defendant is entitled to judgment.

De Villiers, C.J.: If the only question in this case were relative to the delivery of the goods I doubt if the Court would have given judgment in favour of the plaintiff, because I think that the weight of the evidence shows that there was a willingness on the part of the defendant to deliver up the luggage belonging to the plaintiff at the time when he left the premises. The important question in this case is whether there has been any breach of contract on the part of the defendant in turning plaintiff out of the premises as he did on the occasion in question. Now, on this point plaintiff has given his evidence, and he has stated that on his arrival at the defendant's hotel he saw Mrs. Berry, the manageress of the premises, and asked for a room, and that she showed him to No. 4 room. On his arrival at No. 4 room he found it already occupied by Captain Pearson, but there was another bed, and, with the consent of Captain Pearson, he occupied the other bed, and slept in that bed for two nights. He goes further, and says that on the following morning he saw the defendant himself. The defendant then said: "Hullo! are you here?" and the

plaintiff replied: "Yes, I have come here for a week." Plaintiff says he clearly understood that the engagement was for a week. But the evidence given on this point is denied, and I prefer to give my judgment on the undisputed facts in the case. Mrs. Berry has not been called to deny the statement that she showed the plaintiff into the room. The case is, therefore, one of a traveller coming to an hotel, engaging a room, and being shown into a room. In my opinion, whatever the civil law may be in regard to the liability of the hotel-keeper who refuses to give any room at all, that law is not applicable to the present case, because the plaintiff had engaged a room, and, in my opinion, he was entitled to remain in that hotel so long as he behaved himself, and so long as there were no reasons of necessity why he should be turned out of the premises. The plaintiff alleges that the defendant is an hotelkeeper, and this allegation is not denied by the defendant. We may take it, therefore, that he is an innkeeper or an hotelkeeper, and I am of opinion that by our law if once a traveller engages a room the hotelkeeper is not justified in turning him out of the premises without lawful cause. Mr. Benjamin has referred to a passage in *Burge*. Unfortunately, neither counsel has gone into this question of the civil law, but I am not at all prepared to accept the statement of *Burge* as a correct statement of the civil law. He refers, amongst others, to *Bell's Commentaries*, but see *Digest* (47, 5, 1), and *Van Leeuwen* (4, 2, 10, and 4, 39, 3). This authority is sufficient to me not to accept the statement of *Burge* as an accurate statement of the civil law without further consideration. I say, therefore, nothing about the law as to the right of an innkeeper to accept or reject a traveller, but I say this: If once he accepts a traveller he has no right to eject that traveller, who had engaged a room, without sufficient reasons. I am of opinion that in this case there was not sufficient reason. The defendant had had a communication from Father Glynn, and he thereupon told the plaintiff that he must leave his room. There were two beds in the room, and no attempt was made by the defendant to ask Father Glynn if he objected to the plaintiff sleeping in the same room. Father Glynn can-

didly says that although he objects, as most people do object, to having another traveller, particularly a stranger, in the same room, still under the circumstances of this case he would not have objected if his permission had been asked, knowing that this gentleman had been there before him and had occupied the room. But defendant did not ask the permission of Father Glynn, and I am therefore unable to hold that there was necessity in obliging the defendant to tell the plaintiff, whom he had received as a traveller, to leave his premises. There has therefore, in my opinion, been a breach of contract, and under the circumstances we are of opinion that damages to the amount of £10 should be given in favour of the plaintiff. The £10 will, of course, only include the personal annoyance and personal breach of contract. In regard to the goods I do not think plaintiff can claim for detention, because I am of opinion that he could have had the goods at the time. I think that he is bound to receive the goods at Victoria West. Judgment will, therefore, be that the defendant deliver the plaintiff's goods at Victoria West Station, and that he pay the plaintiff £10 damages with costs.

Buchanan, J., concurred.

[Plaintiff's Attorneys: Silberbauer, Wahl, and Fuller; Defendant's Attorneys: Van Zyl and Buissinné.]

PROVISIONAL ROLL.

HOWSE V. WARNER. { 1902.
May 31st.

Mr. J. E. R. de Villiers applied for provisional judgment on a certain acknowledgment of debt, and asked that the return day of the summons be extended until August 1.

The Court extended the return day to August 1, on condition that personal service be effected.

VAN HEERDEN V. KNOLTZE.

Mr. Langenhoven moved for provisional sentence upon a mortgage bond for the sum of £60, with interest at 6 per cent.

Provisional sentence was granted.

HARMSE V. CLAASSEN.

Mr. P. S. Jones moved for provisional sentence for the sum of £37 8s., which was due on a promissory note.

Provisional sentence granted as prayed.

RODERBERG V. GRAND JUNCTION RAILWAYS.

Mr. M. Bisset appeared in this matter, but a provisional order of sequestration having been granted against the Grand Junction Railways, returnable on June 12, he asked that the application be allowed to stand over until June 12.

Postponement allowed.

S.A. MUTUAL LIFE ASSOCIATION V. THERON.

Mr. P. S. Jones moved for provisional sentence for interest due on a mortgage bond, amounting to £39, together with costs.

Provisional sentence granted as prayed.

HANSEN AND SCHRADER V. GRAND JUNCTION RAILWAYS.

Mr. Buchanan, who appeared in this matter, asked that the application be allowed to stand over until June 12.

Postponement allowed.

AFRICAN BANKING CORPORATION V. GRAND JUNCTION RAILWAYS (LTD.).

Mr. Currey moved for provisional sentence for £5,000, being the interest on 500 debenture bonds of £100 each. He explained that the Grand Junction Railways (Limited) was a different concern from the Grand Junction Railways, one being a partnership and the other an incorporated company. He put in one of the debenture bonds.

Provisional sentence granted as prayed, subject to the 499 other debenture bonds being handed to the Registrar.

SHEA V. WADNER AND ERIKSON.

Mr. Langenhoven moved in this case for provisional sentence for the sum of £27.

Provisional sentence granted as prayed.

ILLIQUID ROLL.**FOSTER AND OTHERS V. HYLAND.**

Mr. Langenhoven moved for provisional sentence under Rule 329d. for the sum of £18 1s.

Provisional sentence granted as prayed.

HOWARD AND OTHERS V. WEINGARTEN.

Mr. Schreiner, K.C., moved for judgment for £1,761, with £136 interest.

Judgment granted as prayed.

HUDSON AND OTHERS V. GRAND JUNCTION RAILWAYS.

Mr. P. S. Jones asked that the matter be allowed to stand over until June 12.

Postponement allowed.

REHABILITATIONS.*Ex parte* **MERCER.**

Mr. Buchanan, on behalf of the insolvent, moved for his rehabilitation.

Rehabilitation granted as prayed.

Ex parte **DE KLERK.**

Mr. Upington, on behalf of insolvent, moved for his rehabilitation, Mr. C. de Villiers opposing on behalf of the trustee and principal creditors.

Mr. Upington stated that the estate was surrendered at Queen's Town on February 5, 1897. The liabilities, according to the schedules, were £238 19s. 11d. and the assets £74 9s., including outstanding debts amounting to £3, there being a deficiency of £214. Two creditors proved against the estate, their total claims being £162 8s. 7d.; there were no preferent creditors. A dividend of 1s. 4d. in £ was paid, the accounts being confirmed on December 30, 1898.

Mr. De Villiers opposed the application, on the ground that in the winding-up of the estate the insolvent rendered no assistance, and gave no information, so that the estate could not recover from his father, who was a debtor.

In an affidavit insolvent attributed his bankruptcy to assisting his father with funds from time to time, which the latter was unable to repay; also to the failure of his crops, and loss on sale of

live-stock. His father owed him about £200, and this insolvent considered a bad debt.

The application for rehabilitation was refused with costs, but leave was given to apply again within three months.

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. ^{1912.}
HOLT AND OTHERS. (May 31st.

This was a motion to set aside the attachment of certain sleepers.

Mr. Schreiner, K.C., was for the applicants, and Sir Henry Juta, K.C., for respondents.

Sir Henry Juta asked for a postponement to allow of affidavits being received from Port Elizabeth.

Mr. Schreiner offering no objection,

The case was ordered to stand over until Friday.

MILLER V. MILLER.

This was an application for a decree of divorce.

Mr. Buchanan, for the petitioner, asked for a decree, respondent not having returned to or received petitioner within the time ordered by the Court. Mr. Buchanan read an affidavit to the effect that every effort had been made to effect service at Birmingham, England, where respondent's parents reside.

The decree was granted.

CAMP. V. CAMP.

Mr. Schreiner, K.C. (with him Mr. Benjamin), applied for a decree of divorce

Mr. Schreiner mentioned that there appeared to have been some difficulty in effecting the service of the order of the Court, granted in February last, which had been sent to East London for service, but it had evidently been lost in the post.

Respondent was ordered to return to petitioner by August 1, and to show cause on August 31 why a decree of divorce should not be granted.

GAY V. GAY.

Mr. Benjamin applied for a decree of divorce

The Court granted the application, subject to the production of a copy of

the newspaper containing a notice to respondent to return to the petitioner.

SALFELD V. Salfeld.

Mr. Buchanan moved for a decree of divorce, respondent not having returned to petitioner, as previously ordered by the Court.

Mr. Buchanan read an affidavit from England, showing that service had been effected on respondent's brother in London.

Decree of divorce granted.

TERBIEN V. TERBIEN.

Mr. Wilkinson moved for a decree of divorce.

Efforts had been made to effect service in London, but without success, so the order of the Court had been published in certain London newspapers.

Decree of divorce granted, with costs against respondent.

MACDONALD V. MACDONALD.

Mr. Benjamin moved for a decree of divorce, respondent not having returned to petitioner as previously ordered by this Court.

Decree of divorce granted as prayed.

MARITZ V. WORCESTER BUTCHERY COMPANY.

This was a motion to fix a day for trial by jury.

Mr. Benjamin for applicant; Mr. Schreiner, K.C., for defendants.

Mr. Benjamin stated that Mr. Schreiner offered no objection to the application. The action was one for damages for alleged wrongful dismissal, there being a claim in reconvention.

The Court ordered the case to be set down for trial on Tuesday, August 5.

STANFORD V. WILLIAMS AND OTHERS.

Mr. Schreiner, K.C. (with whom was Mr. Upington), applied in the matter of Stanford v. Williams and Others for an order compelling the respondents to hand the negative of certain photographs to the plaintiff.

It was stated that Stanford had on December 24 been compelled to sign a dishonouring document, which was photographed by the respondents. Stanford now applied that the negatives of this and

other photographs and all copies should be returned to him. The respondents were said to be away on active service. The attorneys who acted for defendants when the case was originally before the Court had not at first refused to accept service in the present matter, but subsequently they had written, stating that they refused to have anything further to do with the case.

The Court granted an order calling on the respondents to show cause by August 1 why they should not be compelled to return the photographs to the applicant.

KANNEMEYER V. HAVINGA AND OTHERS.

Mr. Searle, K.C., moved that the award of the arbitrator in this case be made a rule of Court.

The matter, which concerned the partition of a farm in the division of Albert, had been previous before the Court on November 1, 1901.

Mr. Searle asked for costs of bringing the matter into court against respondents, on the ground that they insisted upon this, and would not come to any terms.

The Court gave an order for costs, except such costs as are necessary to the partition, which must be borne *pro rata*, according to the share of the farm.

Re ESTATE LATE HARDING. { 1902. May 31st.

This was an application for an order authorising the Registrar of Deeds to allow of transfer being passed from the petitioners in their capacity as executors testamentary in the estate of the late Stephen Harding to Stephen Joseph Harding and Seymour Collins Harding, in their individual capacity of the farm Queen's Park, situate in the division of Queen's Town, and as per two deeds of transfer in favour of the late Stephen Harding, dated October 25, 1870, and August 31, 1880.

The petition stated that it had become necessary to liquidate the said estate, and to sell the landed property therein. That the said sale was duly advertised. That the said property had been sold at a public auction to two of the petitioners in their individual capacity at the highest terms offered, and that the heirs of the late Stephen Harding (all being Majors) were satisfied with the prices obtained. On the motion of Mr. M. Bisset the Court granted an order as prayed.

Ex parte HOOGENDOORN. { 1902. May 31st.

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain property situate in Rose-street, Cape Town.

The petition set forth that the petitioner was the executor dative of the estate of his father, the late Willem T. Hoogendoorn, and the executor testamentary of the estate of his mother, the late Alida Hoogendoorn. That the above-named property, part of the said estate, had been purchased by petitioner for £2,300. All the major heirs of the late W. T. Hoogendoorn and of Alida Hoogendoorn, had consented to this sale at the price aforesaid. There were, however, three minors interested—children of Willem Joshua Johannes Hoogendoorn, the petitioner's brother. That it would be for the benefit of the estate to sanction the sale to the petitioner.

The Master recommended that the sale should be confirmed.

The Court, on the motion of Mr. Russell, granted an order as prayed.

[Applicant's Attorney, G. Trollip.]

Re ESTATE OF LATE DE WITT. { 1902. May 31st.

Mortgage bond—Cancellation.

This was an application for the cancellation of a certain mortgage bond. The petition showed that the said bond had been passed by De Wit to one Willem du Plooy for £375 in part settlement of the purchase price of the farm Springfontein, within the division of Beaufort West, C.C. That thereafter one Vincent Rice, on behalf of the said Du Plooy, ceded and transferred the said bond to James Christie, of Beaufort West. That the said James Christie endorsed notice of various payments on account of the capital and interest of the said bond on the cover thereof, and on January 7, 1862, endorsed a receipt in full for the same, and thereafter the said bond was returned to the said Michiel for de Wit by the petitioner. M. J. de Wit, however, neglected to have the said bond cancelled in the Deeds Registry of the Colony. Petitioners have disposed of the said property, and wish to effect transfer to the purchasers; but are unable to do so, owing to the said bond remaining uncanceled and particularly owing to the fact

that there is no proof of the qualifications of the said V. Rice to effect transfer and cession of the said bond on behalf of the said Du Plooy. The said Rice appears to have acted from Records in the Deeds Office, as agent of the said Du Plooy, but the petitioners are unable to trace the power under which he acted in effecting the said cession. Owing to the lapse of time, all parties whose names appear in connection with the transaction are now dead.

Wherefore the petitioners pray for an order authorising the Registrar of Deeds to cancel the said bond.

On the motion of Mr. Bisset the Court granted a rule *nisi*, calling upon all persons concerned to show cause on June 12, 1902, why the bond aforesaid should not be cancelled. The Rule to be published once in the "Beaufort West Courier."

[Applicant's Attorneys: Tredgold, McIntyre, and Bisset.]

Ex parte VELENSKI. { 1902.
May 31st.
Mortgage bond—Cancellation—
Trustees of insolvent mortgagee.

This was an application for the cancellation of a certain mortgage bond.

The applicant was one Abraham Phir-eas Velenski, whose petition showed that on or about December 13, 1883, he had passed a bond in favour of Herbert Wilman and Johan George Leeb, in their capacity as trustees of the Western Province Administration and Trust Company, Ltd., for £225 upon mortgage of a certain Lot C with the buildings thereon situated at Beaufort West. That the said sum of £225 has now been paid, and that the bond was returned to the petitioner, but, by an oversight, no consent to cancellation was endorsed thereon, nor were any steps taken to have the same cancelled at the date of repayment. The said Trust Company went into liquidation in or about 1893, and is no longer in existence. That the trustees of the said company at the time of liquidation were Pieter Gerhard Wege and Johan Carl Smith. These trustees now state that as the company no longer exists, and as they are no longer in possession of the books and papers thereof, they are not in a position to perform any duties in connec-

tion with the same. Petitioner has sold the said property, and the purchaser is pressing him to give transfer. He therefore prays for an order directing the Registrar of Deeds to cancel the said mortgage bond.

On the motion of Mr. Bisset, the Court granted a rule *nisi* calling upon all persons concerned to show cause on June 12, 1902, why the bond in question should not be cancelled.

Postea, June 19, on the motion of Mr. Bisset, the petition was amended by the substitution of Peter George Leeb for Johan George Leeb, and the rule was made absolute.

[Applicant's attorneys: Tredgold, McIntyre, and Bisset.]

Re ESTATE NIAY.

Mr. Buchanan moved for the appointment of Mr. Maynard Nash as provisional trustee in the above estate, with power forthwith to sell the perishable articles in the estate.

The Court appointed Mr. Maynard Nash *curator bonis*, with power to sell the perishable articles, pending the election of a trustee, and to carry on the operations of a certain steam trawler for the benefit of the estate.

ELLEFSEN V. STEPHAN. { 1902.
June 2nd.
„ 4th.

Charter party—Demurrage—Lay days.

The owner of a vessel undertook by charter party that she would proceed to Cape Town and there discharge the cargo alongside any craft, store, wharf, pier, arsenal, steamer or depot slip, or elsewhere as ordered, where the vessel can always discharge afloat, and that the cargo would be discharged at a certain rate from the time of her being ready to unload. The day after her arrival in Table Bay the plaintiff, as master, gave notice to the defendant, as charterer, that he was ready to unload, and thereupon the defendant

ordered the master to proceed to a suitable berth in the only dock in Cape Town. Owing to the crowded state of the shipping there was considerable delay in obtaining a berth.

Held, in an action for demurrage that the charter party should be construed as if the Alfred Dock had been named therein as the place of discharge, and that the lay days commenced on the day the vessel was berthed.

This was an action brought by Oluf Ellefsen, master of the Norwegian ship Sterling, against Hendrik Rudolph Stephan, carrying on business under the style or firm of Stephan Brothers, for the recovery of the sum of £1,069 15s., as demurrage payable under a charter party.

The plaintiff's declaration was as follows:

1. The plaintiff is Oluf Ellefsen, master of the Norwegian barque Sterling, and sues on behalf of the owners thereof. The defendant is Hendrik Rudolph Stephan, trading in Cape Town under the style or firm of Stephan Brothers.

2. On or about August 12, 1901, one Fred. H. Howe, of Newport, Monmouthshire, Wales, acting as agent for defendant, chartered the said ship Sterling to convey a cargo of coal from Newport aforesaid to Cape Town; the said cargo was consigned to the defendant, and the terms and exceptions contained in the charter party, which was dated August 12, 1901, are incorporated in the bill of lading held by the defendant, who is bound by all the obligations of the said charter party.

3. Under the terms of the said charter party, it was provided that the vessel should proceed to Cape Town, and there discharge alongside any craft, store, wharf, pier, arsenal, steamer, or depot ship, or elsewhere, as ordered, and it further provided that the cargo was to be discharged, weather permitting, at the rate of not less than 100 tons of coal per working day, from the time of the vessel being ready to unload and reported at the Custom House abroad; and that if the said vessel was not discharged

within the time stipulated, the charterers should be at liberty to detain her any days on demurrage, over and above the said lay days or time, at 4d. per register ton per day.

4. The said vessel arrived at her destination on or about December 4, 1901, and on that day the plaintiff gave written notice to defendant that he was ready to unload the cargo, and that the lay days would commence from that day; the said vessel was reported at the Custom House on arrival, and the notice was a legal notice, in terms of the said charter party.

5. In accordance with the said notice, the lay days expired on December 31, 1901; the defendant not having discharged the cargo of the said vessel or any portion thereof during the period between December 4 and December 31, thereafter demurrage at the rate specified in the charter party commenced to run against the defendant, who was from time to time supplied with a detailed account thereof.

6. The amount of the said demurrage up to the date of summons in this suit is the sum of £1,069 15s., but although the said sum has been demanded from the defendant, he has refused to pay the same or any portion thereof.

The plaintiff claims: (a) The sum of £1,069 15s., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows:

1. The defendant admits the allegations in paragraphs 1 and 2 of the declaration.

2. As to paragraph 3 of the declaration, the defendant begs for greater certainty to refer to the charter party when produced, and says that in reply to a notice received on December 4, 1901, in writing, he ordered the plaintiff to proceed to the Alfred Docks, Cape Town, to a suitable berth there, where the defendant would receive the cargo.

3. According to the charter party, the defendant was entitled to order the plaintiff to discharge at a berth in the Alfred Dock, which is a dock in the port of Cape Town, having the necessary piers and wharves at which the discharge of the said cargo could be properly effected.

4. Until the said vessel was in its berth in the said Alfred Dock, the lay

days and the time stipulated according to the charter party did not commence to run.

5. Owing to the congested condition of the shipping in the port of Cape Town, and to circumstances over which the defendant had no control, and despite all efforts on his part to secure for the said vessel earlier admission to the berth, she was not admitted to the berth till the 22nd day of February, on which date, and not before, lay days commenced to run, according to the charter party, and the plaintiff was ready to unload.

6. In the meantime, without abandoning his right to insist on discharge in the said Alfred Docks, the defendant made all reasonable efforts to aid the plaintiff in obtaining discharge of, at any rate, a portion of the cargo by lighters while lying at anchor in Table Bay.

7. The defendant admits that the plaintiff has from time to time claimed demurrage in detail, as alleged in the declaration, and admits that he has refused to recognise such claims or to pay any portion of the amount demanded, and says that his refusal is justified according to the charter party, under which no demurrage is payable by reason that the vessel was discharged before the expiration of the lay days and time therein stipulated.

8. The defendant also admits that the said vessel was reported at the Customs-house on arrival.

9. Save as aforesaid, the defendant denies all allegations in paragraphs 4, 5, and 6 of the declaration.

Wherefore he prays that the plaintiff's claim be dismissed with costs.

The plaintiff's replication was as follows:

1. He admits paragraph 2.

2. With regard to paragraphs 3 and 4, he admits that the defendant under the said charter party had a right to order him to discharge the cargo alongside any craft, store, wharf, pier, arsenal, steamer, depot ship, or elsewhere where the vessel could discharge always afloat, and that the Alfred Dock is a place within the meaning of the above, if and when access thereto can be obtained, but he contends that the lay days commenced as soon as the vessel was ready to unload in Table Bay, and had been reported at the Customs.

3. He admits paragraph 5, save that he denies that the lay days did not commence to run till February 22, and that plaintiff was on that date, and not before, ready to unload.

4. He admits paragraph 6, and says that it was possible by reasonable efforts for the defendant to have obtained lighters wherewith to discharge the cargo, and, further, that the defendant had vessels of his own by means of which the discharge could have been effected in the Bay.

5. Save as above, he denies all the allegations in the plea, except in so far as the plea admits any of the allegations in the declaration.

The charter party mentioned in the pleadings, after dealing with the manner of loading at Newport, proceeded as follows: "And being so loaded, the vessel shall therewith proceed to Cape Town, and there discharge the cargo alongside any craft, store, wharf, pier, arsenal, steamer, or depot ship, or elsewhere, as ordered, where the vessel can always discharge afloat. . . . Cargo to be discharged, weather permitting, at the rate of not less than 100 tons of coal per working day at — —, from the time of her being ready to unload, and reported at Customs-house abroad. And if not discharged within the time herein stipulated, the charterers shall be at liberty to detain the ship any days on demurrage, over and above the said laying days or time, at fourpence per register ton per day."

Mr. Searle, K.C. (with him Mr. Close), for plaintiff; Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), for defendant.

Mr. Searle, K.C., in regard to the question whether, in terms of the charter party, the lay days commenced when the ship had given the notice mentioned to the Customs-house and while she was still in the Bay, or whether the lay days began only after the ship had been berthed as contended by the defendant: —

The Chief Justice said that it appeared from the pleadings that the only question was one as to the construction of the charter party. He asked if there was any evidence as to questions of fact.

Mr. Searle said that although not pleaded definitely, he took it that, if admitted, evidence might be brought to show that it was impossible to discharge this vessel by lighters, and the only evi-

dence he had to put before the Court was to prove that it would have been possible to discharge the ship in the Bay by lighters. He did not know whether there was any dispute as to the figures or as to the lay days, if the plaintiff's contention were correct, commencing to run on December 4 and expiring on December 31, thus allowing twenty-one working days and a few days for Sundays and other times, when, through weather, etc., they could not work.

Mr. Schreiner said there was no dispute as to the number of lay days and the figures. He would certainly have taken exception to the declaration if the charter party had been annexed to it at first. As it was, they pleaded construction of the charter party, and pointed out that it was the main issue in the case, and only added that they had done all they reasonably could do on their part, apart from their legal rights.

The Chief Justice said the better course would be to hear the argument on this legal question, and then they might possibly find it unnecessary to hear evidence.

Mr. Searle, K.C. (for plaintiff): We base our contention on the construction of the charter party. The whole question at issue turns on the construction of this document. My contention is that under this charter party the consignees were bound to discharge the vessel within 20 days after her arrival was reported at the Custom House of this port. If a charter party says that so many tons are to be discharged a day, that amounts to the same thing as if it were agreed that the ship should be discharged in so many days. This charter party is not in a very usual form. A condition usually expressed is that if the ship is not discharged within so many days, demurrage shall run; but in this case defendants say they were not bound to discharge within a given number of days. But see *Hick v. Tweedie* (63, L.T.N.S., 765), particularly the judgment of Charles, L. J. To be sure that was a case of loading and not of discharging, but the principle is the same. The condition: "The ship being ready to discharge," means that the ship is in, not that the Dock people are prepared to give facilities for discharge. In *Nelson v. Dane* (12 Ch. D. 568) one month was considered an unreasonable time for a ship to await discharge. In this case the

ship was detained 2½ months. No doubt that where the clause "as ordered is inserted in a charter party, much more latitude is allowed. See *Tharsis Sulphar Co. v. Morrell* (Q.B., 1891, V. 2, 647). The option of the charterer amounts to this, that he must chose a berth for the ship which will be vacant within a reasonable time. See the judgment of Bowen, L.J., in the above case. He thought one month an unreasonable delay, but now we are claiming from January 1 up to the date of summons.

[De Villiers, C.J.: But here there is only one dock.]

Nelson v. Dahl covers such a case. See the judgment of Esher, M.R. I admit that this case is not precisely on all fours with that, but here the charterer took a risk, and said that if he did not discharge within 20 days he would be liable for demurrage.

[De Villiers, C.J.: Was not the ship bound to wait until a suitable berth was pointed out?]

No, see *Tupscott v. Balfour* (8, L. Rep., C.P., 46). There the lay days did not commence till the vessel was in dock; but the charter party was not in the same terms as in this case. See also *Bullman and Brother v. Fenwick* (1, Q.B., 1894, 179), where at p. 183 the case of the *Tharsis Co.* was quoted *Nelson v. Dahl* (C., Apl. 12, Ch. D., 568, and H.L., 6 Ap., 38). See particularly the judgment of Brett, L.J. (12, Ch., D. 582.)

[De Villiers, C.J.: In that case what guide had the Court as to their rule of law?]

I am not prepared to say.

[De Villiers, C.J.: In deciding what is reasonable, must not the Court be guided by the circumstances of the case?]

Yes, but if the Charter party allows discharge by lighter, why should not the captain have a right to insist upon that mode of discharge?

[De Villiers, C.J.: But what is to guide us here, the state of the weather of the Docks, or what?]

They certainly could not put us at a quay, where they knew that we should not be able to discharge for months.

[At the request of the Court, Mr. Searle read the report of *Nelson v. Dahl* (12, Ch. D., 568), and again called attention to the judgment of Brett, L.J.]

[Maasdorp, J.: Do you say that the ship was ready to unload while she was lying in the Bay?]

Yes, she was ready to unload whenever she came to anchor, and the question of reasonable time only comes in from that moment. No doubt the vessel was discharged within 21 days after she came into dock. We do not say that defendants were guilty of any want of diligence in berthing the vessel in dock, but we do say that she ought never to have been brought into dock at all. See *Scrutton on Charter Parties* (Art 131, p. 242, of 4th Edition; also Art 31.) In this case no exceptions are made in the Charter Party.

[De Villiers, C.J.: An option must be exercised reasonably. Suppose there is only one dock at a port, and that dock overcrowded?]

There are other ways of discharging, viz., by lighter in the Bay, and these are usual at this port. *McAloney v. Spilhaus* (xi., Sheil 509; *Jaques v. Wilson* (7, Times L. Rep., 119); *Carlton Steamship Co. v. Castle Steamship Co.* (App. C., 1898, 496); *Agden v. Graham* (31, L.J. N.S., 24). Defendants could have got lighters if they had made timely application for them. *McAloney v. Spilhaus* (judgment of Buchanan, A.C.J.). See also judgment of Tenterden, C.J., in *Samuel v. Royal Exchange Co.* (8, B. and C., 119). In that case there was so much ice at the Dock gates that the vessel could not get in, and yet the consignee was held responsible.

Mr. Schreiner, K.C. (for defendant): Counsel for the plaintiff has argued as if the words "as ordered" had been struck out of the Charter Party. He assumes that as soon as the ship arrives the consignees are bound to see into the future condition of the Docks, and at once to arrange to take delivery from the ship by lighter, or otherwise. These words, "as ordered," must mean something; and in this case the order was to go into the Docks. The conditions were every whit as hard on the one party as on the other. In *McAloney v. Spilhaus*, *Spilhaus* had no power to order the ship to go anywhere. He asked to have discharge by lighters, and then changed his mind, and wanted to have the vessel docked. The Court said he could not do that. If the Dock had been destroyed either by a natural convulsion or by artificial means, of course, we could not have been ordered to go into it.

[De Villiers, C.J.: What is the difference between the cases you put and a

case in which the vessel will have to wait three months for her turn?]

The whole question would be whether there was a *bona fide* exercise of the option or not. If a consignee orders a ship to go into docks, which had been already destroyed, such an exercise of option would be *mala fide*. The consignee is not bound to find a berth for a vessel for *lex non cogit ad impossibilia*. In *McAloney's* case the consignee was not protected by the Charter Party, as he was in this case. *Carver on Carriage by Sea* (sec. 623 to 627; also 460). In parag. 615 to 618 he discusses *Wright v. New Zealand Shipping Co.* and *Postlewaite v. Freeland* (5, Ap. C., 562). Carver gives a fair summary of these cases, and is supported by the *Tharsis* case. *Ashcroft v. Crow-Orchard Co.* (9, Q.B., 549), is in effect overruled by the *Tharsis* case, *Fryman v. Dreffus* (24, Q.B.D., 152 and 56, L.T.; Rep. N.S., 724), which, in view of the judgment of Huddleston, B., is as strong a case as counsel, for the plaintiff could have referred to. But in this case there was an implied right in the charterer to direct as to whether the discharge should take place at an inner or the outer berth; but, having elected the outer berth, they could not thereafter choose the inner berth. If the Charter Party gives express power to select a place of discharge; that place, once selected, becomes as much a part of the Charter Party as if it were written therein.

[Maasdorp, J.: Suppose the consignee orders discharge at a dock already full?]

Whose interests are to be considered, those of the shipowner or of the consignee? No consignee would stand in his own light. It is for the consignee to exercise his option (if the Charter Party allows him an option), when he gets notice that the ship is ready to be discharged. Counsel for plaintiff has relied upon *Dahl v. Nelson*, but see *Carver's* remarks on that case (Sec. 625). In *Dahl v. Nelson* the decision of the House of Lords was based on the words of the Charter Party, "so near as she can safely get," but our charter has no such words. See also *Scrutton's* remarks on the words, "so near thereto as she can safely get." Our whole contention is that under this Charter Party we had authority to direct where the ship should be discharged. A consignee may order a ship to go into dock, if the charter party gives him the

right to direct the place of discharge; but as soon as he has exercised his option he cannot change his mind and order her to discharge somewhere else. *Murphy v. Coffin and Co.* (12, Q.B.D., 87.) In that case *Davies v. McVeagh* (4 Ex. D., 265) was fully discussed. See *Scrutton* (p. 93, 3rd Edit.).

[Maasdorp, J.: What if a ship is ordered to go to a certain berth, and consents to go, could it afterwards complain of the length of time taken to discharge?]

The consent to go to such berth would only show the *bona fides* of the order. See *Harris v. Jacobs* (15, Q.B.D., 247). The "*Felix*" (2, Adm. and Eccles, 273). In this case there were two docks, and it was held that after going into the one dock the captain could be ordered to remove to the other dock on the consignee paying the expenses. Carver (p. 51) is said by counsel for plaintiff to strongly disapprove of this decision, but he is so far on my side that he says that if the words "as ordered" had been inserted into the Charter Party, the case would have been different. All I contend for is that the option must be expressed in the charter. The case of the *Tharsis* proves that, and I do not say with *Scrutton* (Sec. 39) that an implied option is sufficient to justify the charterer in selecting the place of discharge.

[De Villiers, C.J., cited *Carrer*, 511 and 512.]

I would like to see *Scrutton* on these cases. He seems to deal with the question at p. 230. See Sec. 623, and *Carver's* remarks on *Kell. v. Anderson* (10 M. and W. 498). So here the ship could not say as soon as she arrived in Table Bay that she was ready to discharge. She had to go to the usual place of discharge, and lay days could not commence when she was lying in the open Bay. It has been argued as if the charterer undertook a part of the risk between the arrival of the vessel at the port, and at the ordinary place of discharge, but this is not so. The ship was bound to go into docks and at the date of the charter everybody knew of the crowded condition of the docks. When the ship arrived on December 5, how was the consignee to know whether it would pay him to lighter or not. We were not bound to lighter. This case cannot be argued as if it were on all fours with *McAloney v. Spilhaus*. It would

be absurd to say that the consignee was bound to find lighters and discharge at the rate of 100 tons a day. Where the charter makes use of the terms "craft or depot ship," certainly lighters and discharge thereby were not contemplated. How again is the consignee to judge as to what is a reasonable time?

[Maasdorp, J.: Let us suppose the consignee had to act reasonably. How is the Court to find out whether he acted reasonably?]

It could never be unreasonable to ask a ship to take her proper turn in going into docks. Bowen, L.J., was not contemplating the case of a port being blocked by traffic, but of one blocked by natural causes. See *McLachlan on Shipping* (55, 4th edition), where several cases are cited. If the *Sterling* had got into dock she might have begun to count her lay days; but she could not do so while laying out in the Bay. The case of the *Carisbrook* (15, Prob. 98) was the high water mark in favour of the argument for the plaintiff, but that judgment was very unfavourably criticised by Bowen, L.J., in a subsequent case. The *Sterling* came in in her turn, and there is no suggestion on the pleadings that she did not then discharge within a reasonable time. If it be contended that the ship was bound to go into dock and discharge 100 tons per diem, the consignee was not bound to provide appliances, etc. *Postlewaite v. Freeland* (5 Ap., 599). We fully discharged our duty as charterers, and had a right to order the vessel to go into dock. The question is not what would now be a reasonable time for discharge, but what was a reasonable time a year ago. In *Hick v. Tweedie* (63, L.T., 765) the clause "as ordered" does not occur. In *McAloney's* case the Court was influenced by the fact that Spilhaus had lighters, though he pleaded unavoidable hindrance in the use of them. That case is not on all fours with this. Discharge by lighter, is by craft hulk, magazine, etc. In *McAloney's* case Buchanan, A.C.J., said that as to coal cargoes, the customary mode of discharge was by lighter in the Bay, as much as in dock. We were not bound to mention literage in the declaration. According to *Scrutton* (p. 97, 4th edit.), citing *Sanders v. Jenkins* (2 Com. cases, p. 12), "ready to unload must be looked at from the point of view of the ship."

[De Villiers, C.J.: If you had been bound to discharge in the docks, you could not have urged that the docks were full.]

Yes, see *Scrutton*, p. 96, citing *Pincham v. Dreyfus* (24, Q.B.D., 152, and *Carver*, sec. 624 (a). As to the wording of the Charter Party, "when the ship is ready to discharge, and is reported to the Customs House abroad." See *Carrer*, sec. 628. As to the charterer's right to select a berth. See *Scrutton*, Art 40, as to the readiness to load, that is always referred to the ship. A short delay is an advantage to the consignee, but a long delay would be to our advantage. They do not mind paying £19 a day for a few days rather than pay for literage, etc., but it is not to their interest to pay at this rate for any length of time.

[De Villiers, C.J.: No question as to reasonable time is raised on the declaration.]

I submit that it was for them to raise that question, and for us to reply in our replication. We say that under this charter party there was an absolute obligation, as in *McAloney v. Spilhaus*. The bulk of the cases cited do not apply to a charter party such as this. No date from which demurrage is to run is mentioned in such cases. *Postea*, June 4.

De Villiers, C.J.: This was an action for demurrage under a charter party entered into between the owners of the ship *Sterling* and the defendant. The cargo consisted of coal, and the shipowner undertook that the vessel should "proceed to Cape Town, and there discharge the cargo alongside any craft, store, wharf, pier, arsenal, steamer, or depot ship, or elsewhere, as ordered, where the vessel can always discharge afloat." It was further provided that the cargo was to be discharged, weather permitting, at the rate of not less than 100 tons of coal per working day from the time of her being ready to unload and reported at Customs House, and that if the vessel was not discharged within the time stipulated, the charterers should be at liberty to detain her any days on demurrage over and above the lay days at 4d. per register ton per day. The vessel arrived in Table Bay on the 4th of December, 1901, and on that day the plaintiff, who is the master, gave written notice to the defendant that he was ready to unload the cargo, and that the

lay days would commence from that day, and he reported the vessel at the Customs House. On the 5th of December the defendant, in answer to the notice which he had received, ordered the plaintiff, by notice in writing, to proceed to the Alfred Dock, Cape Town, to a suitable berth, where the defendant would receive the cargo. Owing to the congested condition of shipping in the port of Cape Town, and to circumstances over which the defendant had no control, and despite all efforts on his part to secure for the vessel earlier admission to a berth, she was not admitted to a berth until the 22nd of February, 1902. The plaintiff claims that the lay days began on 4th of December, when he gave the notice to the defendant, and that demurrage commenced to run from the 31st of December, 1901. The defendant, on the other hand, contends that the lay days only commenced on the 22nd of February, 1902, being the day on which the vessel was admitted to a berth, and that, as the cargo was unloaded within the prescribed time, no demurrage is payable. On behalf of the plaintiff reliance is mainly placed on the words, "from the time of her being ready to unload" in the charter party, but these words must be read in connection with the previous clause, which gives the charterers the option of selecting the place of discharge. In the case of *Hick v. Tredy* (63 L.T.R., 765), a vessel was held to be "ready to receive cargo" when she had arrived in the port of loading, and had given notice of her being so ready, although not moved alongside the quay, but there was no condition in the charter party giving the charterers the right to order her to any particular place of loading, nor was a place specified in the charter party. The English cases seem clearly to establish the proposition that when a particular wharf is named as the place of loading or discharging, the lay days do not begin to run until the ship is ready alongside that wharf. When the place named is a port, the lay days begin when the ship is ready and at the freighter's disposal, within the port, though she may not be at the wharf or dock to which the charterer may have properly required her to go. If, however, the place named is a port, but the charter party expressly authorises the charterer to order the ship to a parti-

cular wharf or dock, the wharf or dock so ordered becomes the place of loading or discharge, as though it had been named in the charter party. In the case of *Tharsis Sulphur and Copper Company v. Morel* (2 Q.B., 647), the vessel was to proceed to the Mersey, and deliver her cargo at any safe berth, as ordered in the dock at Garston. On arrival a berth was ordered, but, owing to the crowded state of the dock, delay occurred, which prevented the vessel being berthed for some time after arrival. On a claim by the shipowners for demurrage arising from the delay, it was held by the Court of Appeal that the obligation of the charterers to unload did not commence till the vessel was berthed. Bowen, L. J., in his judgment, adopted the view that "where the place at which the carrying voyage is to end is not stated in the charter party, but is to be named by the charterer, the selection of a dock has precisely the same effect as if that dock had been originally named in the charter party." He further remarks that the case of the *Carisbrook* (15 P.D., 98), so far as he could see, was wrongly decided. On reference to that case, it will be seen that it bore a strong resemblance to the present case. By the terms of the charter party the ship was to load a cargo of coals at Glasgow, and therewith proceed to Odessa, or so near thereto as she might safely get, and deliver the same alongside any safe wharf, craft, steamer, depot ship, or arsenal, as ordered by receiver. Then followed the words: "Time for loading and unloading to commence from the time the steamer is ready, and intimation has been given in writing." It was held that the time for discharging commenced from the time when intimation of the ship's readiness to discharge in the port was given, and not from the time of arrival alongside the quay. "The charterers chose," said Butt, J., "to exercise the option given to them by the charter party, and ordered her to a quay which was crowded with vessels, and to which she could not get at the time. The charterers had a perfect right to take this course, but they are liable in consequence to pay demurrage." It is this decision which Bowen, J., considered to be wrong, and if it was wrong, it could not be right in the present case to hold that the defendants are

liable because of the words "from the time of her being ready to unload." In the case of *Pyman Bros. v. Dreyfus Bros.* (24 Q. B.D. 152) the charter party did not expressly entitle the charterer to order the ship to a particular wharf or dock, but he had an implied right to order the vessel from the outer to the inner harbour, where the cargo was. The place of loading chosen by the charterers was a place where she could not load, as it was a part of the port then crowded by other ships, and she had to wait for a considerable time. It was held by a Divisional Court that the lay days were to be computed from the time of the arrival of the vessel in the outer harbour. As it was the case of an implied and not express right of exercising an option, the case is not on all fours with the present case, but if it is consistent with the subsequent case of the *Tharsis Company* in the Appeal Court, it must be considered as having been overruled by that case. Mr. Searle has cited certain expressions of Bowen, L.J., in the latter case in support of the view that the defendant, in exercising his option, was bound to choose a berth that was free or was likely to be so in a reasonable time. The learned judge could not, however, have meant to say that the mere fact that there has been a delay proves that the choice was an improper one, for in that very case there appears to have been considerable delay. The present action is founded upon the mere fact that there had been a long delay. The defendant then pleads that the delay was caused by the congested state of the Docks, and the plaintiff, by his replication, admits that the delay was occasioned by the congested state of the Docks and by circumstances over which the defendant had no control, but it was not alleged that the condition of the Docks was such as to make his choice unreasonable. The question does not, therefore, really arise on the pleadings whether the defendant has exercised his option in an unreasonable manner. He exercised his option as soon as he was told that the ship was ready, and if it was intended to prove that the choice of a place of unloading was unreasonable, an allegation to that effect ought to have been made. Without now deciding whether proof of such an allegation would have altered the

defendant's legal position, I am of opinion that the plaintiff is not entitled to succeed in the present action, and there will therefore be absolution from the instance with costs.

Justices Maasdorp and Hopley concurred.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's Attorneys, Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
the Hon. Justice MAASDORP and the
Hon. Mr. Justice HOPLEY.]

S.A. BREWERIES V. MARTIENSSEN. { 1902.
June 4th.
" 5th.
" 10th.

Purchase and Sale—Re-opening
settlement.

The defendant sold his brewery premises, goodwill and all property connected therewith, to the plaintiffs, stipulating that the amounts to be paid for stock-in-trade and for outstanding debts were to be reckoned according to the actual value of the stock and to the debts taken over as good by the purchasers. Part of the property sold consisted of two hotels. The defendant had previously disposed of the goodwills of the businesses carried on in these hotels to the tenants, but had not received the whole of the purchase price. The balances due were brought up at the adjustment of accounts between plaintiffs and defendant, but were not taken over as good outstanding debts. A final settlement then took place between the parties. Defendant afterwards recovered from the debtors, and the plaintiffs now claimed the amounts so re-

covered on the grounds that the goodwills were included in the property sold. The Court, however, refused to re-open the settlement, there not being any fraud or concealment or mistake of fact.

This was an action brought by the South African Breweries (Limited) against Ernst Heinrich Martienssen for declaration of rights and account.

The plaintiff's declaration was as follows:

1. The plaintiff is a company duly registered with limited liability, and carrying on business in this colony, at Cape Town and elsewhere in South Africa, and in manner hereinafter more fully set forth. The plaintiff took over the business theretofore carried on by the defendant as brewer in and in the neighbourhood of Cape Town.

2. On the 1st March, 1899, the plaintiff and defendant entered into an agreement of sale and purchase in terms of a broker's note, copy whereof is annexed.

3. On the 4th April, 1899, and in completion of the said agreement, the parties entered into a deed of sale, which was executed by the plaintiff.

4. Among the licensed premises and buildings sold by the defendant and purchased by the plaintiff, with all interests, leases, goodwills, etc., as aforesaid, was included the Roma Hotel, situated in Waterkant-street, Cape Town, which was on the 19th May, 1897, let by the defendant by written lease upon terms and conditions not necessary to set forth, but amongst which was the condition that the tenant should pay to the defendant, as landlord, the sum of £700 sterling for the goodwill of the business carried on in the said licensed house.

5. On the 1st March, 1899, and thereafter the said lease was still in force, and there remained then outstanding and unpaid by the tenant the sum of £500, being part of the said sum of £700. Some portion of the said sum of £500 is said to have been paid by the said tenant to the defendant, and the balance remains still unpaid.

6. In terms of the said broker's note and deed of sale, the plaintiff purchased all rights of the defendant under the

said lease, and became entitled to receive, *inter alia*, the said sum of £500 outstanding and unpaid in respect of the goodwill of the Roma Hotel, but the defendant wrongfully and unlawfully disputes the right of the plaintiff to the said sum, and refuses to account for and pay, together with interest at 6 per cent., such portion as has been paid to the defendant by the tenant as aforesaid.

7. The plaintiff further says that, among the licensed premises mentioned and referred to in the aforesaid broker's note and deed of sale, was the Princess Royal Hotel, in Riebeeck-street, which, with four cottages and two stores, formed, on the 4th April, 1899, a block of buildings under contract of purchase, together with the liquor licence, for £9,500, from one Flannagan to the defendant, by within agreement, dated the 15th February, 1899.

8. Pursuant to clause 9 of the aforesaid deed of sale, dated 4th April, 1899, the plaintiff paid over the sum of £10,000, and the defendant by the said clause ceded to the plaintiff all his rights in respect of the agreement with the said Flannagan.

9. The said block of buildings, together with the liquor licence, were purchased from the said Flannagan under the said contract, but on the 8th April, 1899, after the cession by the defendant of his rights as aforesaid to the plaintiff, he, or others purporting to act on his behalf, entered with one Corlett into a lease of the said Princess Royal Hotel, upon terms and conditions not necessary to set forth in full, but amongst which was the condition that the said Corlett should pay to the defendant the sum of £1,250 for the goodwill of the hotel business carried on at the said hotel.

10. To the said hotel and goodwill thereof the defendant on the 8th April, 1899, had no right by reason of the premises, but the plaintiff subsequently recognised the lessee, the said Corlett, and his successor, by assignment to one Gourlay, as tenants under the said lease.

11. By reason of the aforesaid broker's note and deed of sale, and of the matters set forth in the four last preceding paragraphs hereof, the defendant became and is bound to account for and pay over to the plaintiff all sums of money by him received from the said Corlett in payment or part payment of the said sum of £1,250, being the price of the good-

will of the said hotel, and also interest on such sums from the dates upon which the same have been received.

12. The defendant has received from the said Corlett sums amounting to £450 at different times, and has wrongfully and unlawfully failed and refused to account for and pay over the same to the plaintiff, and the defendant, moreover, wrongfully and unlawfully claims to be entitled to a sum of £750, paid by the said Gourlay in satisfaction of a judgment of this Honourable Court in an action by the said Corlett against the said Gourlay, which sum represents a portion of the aforesaid sum of £1,250, to which the plaintiff is entitled as aforesaid.

Wherefore the plaintiff prays for: (a) An order declaring the South African Breweries (Limited) to be entitled, as against the defendant, to an account of all sums by him or any person on his behalf received in payment or part payment of (1) the sum of £500, being the balance outstanding and unpaid of the sum of £700 agreed to be paid as aforesaid for the goodwill of the Roma Hotel; (2) the sum of £1,250 agreed to be paid as aforesaid for the goodwill of the Princess Royal Hotel. (b) An order compelling the defendant to render and debate with the plaintiff such an account, and to include therein interest at the rate of 6 per cent. per annum from the date upon which any sum to be accounted for shall have been received, and judgment for the amount found due at foot of such account when duly debated. (c) An order declaring the plaintiff entitled to the sum of £750 mentioned in paragraph 12. (d) An order granting plaintiff such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of Court.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, 3, 5, and 7 of the declaration, subject to what is hereinafter set forth.

2. The defendant says that at the date of the execution of the broker's note and deed of sale, he had already sold certain goodwill rights in connection with the Roma Hotel and the Princess Royal Hotel, as well as in connection with the Oriental Hotel and the bottle-store in Buitenkant-street, all being his property, and numbered respectively 4, 7, 3, and 2 in the deed of sale, for the

sums respectively of £700, £1,250, £800, and £100.

3. At the date of the execution of the broker's note and deed of sale the plaintiff was fully aware of the above, and it was expressly agreed upon between the parties to the broker's note and deed of sale that the right to the amounts set forth in paragraph 2 hereof should form no part of the transaction between the parties, and the said amounts were not included in any of the assets or rights purchased by the plaintiff as aforesaid.

4. The goodwill rights sold in terms of the said deed of sale in connection with the said Roma Hotel and Princess Royal Hotel were such as were vested in the defendant at the date above mentioned, namely, the rights remaining after the expiration of the leases held by the then licensees of the premises above mentioned, the said licensees having purchased the goodwill rights of their respective premises for the currency of their respective leases.

5. Thereafter, in or about the month of June, 1899, a further written agreement with regard to purchase and sale of defendant's assets was entered into between plaintiff and defendant, and at the said time the agreement referred to in paragraph 3 hereof was ratified and confirmed by the plaintiff company, through its manager and secretary, at a meeting with defendant's representative, Mr. Hodgson.

6. The plaintiff's said representative at the said meeting apportioned and appropriated, as is shown on the copy of schedule hereto annexed, such of the outstanding loans as were taken over by the plaintiff, and such as were reserved to the defendant as aforesaid, including *inter alia* in the latter the amounts due by the lessees of the Roma Hotel and Princess Royal Hotel. The defendant craves leave that the copy of the said schedule which was drawn up at the date of the agreement last mentioned may be considered as inserted herein. The italicized portions in the said schedule marked D indicate the portions of the original schedule which are in the handwriting of the plaintiff company's representative.

7. The defendant craves leave specially to refer this Hon. Court to paragraph 4 of the deed of sale, wherein an estimate of £8,000 is given as the sum at which

the good outstanding debts were to be put in, subject to adjustment or to the purchase price to be paid, and the defendant says that in the month of June, 1899, the adjustment was made between the parties, and the sum of £7,179 was agreed upon as the correct amount. In the said adjustment the amounts due to defendant, as set forth in paragraph 2 hereof, were not taken into account, by reason of the premises.

8. Subject to the foregoing, the defendant admits paragraphs 4, 8, and 9 of the declaration, save that he specially says as to paragraph 9 that, although the lease to Corlett was dated the 8th April, 1899, the contract to let the premises and to sell the goodwill of the hotel had been verbally completed prior to the date of the broker's note above referred to, to the knowledge of the plaintiff as aforesaid.

9. As to paragraphs 6 and 12, the defendant admits that he has disputed plaintiff's right to, and has refused to pay to plaintiff or to account to him for, the sums of £500 and £1,250 mentioned in the said paragraphs, or any portion of the said sums, or any interest thereon, but he denies that he acted wrongfully or unlawfully in this regard, being justified in his action by reason of the premises, and the defendant otherwise admits the allegations in the said paragraphs, subject to what is set forth above in this plea.

10. The defendant denies paragraph 10 of the declaration, save that he admits that the plaintiff company recognised the lease of the Princess Royal Hotel to Corlett and the assignment thereof to Gourlay, as the said company was bound to do.

11. The defendant denies paragraph 11. Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

In his replication, plaintiff denied knowledge of the sale of the goodwill rights of the Roma and Princess Royal Hotels before the date of the execution of the broker's note and deed of sale, and denied the ratification and confirmation of the further written agreement alleged in paragraph 5 of the plea.

The following is a copy of the broker's note referred to in the pleadings: Broker's Note, Cape Town, 1st March, 1899.—Bought from E. H. Martienssen, sold to the South African Breweries

(Limited).—The buildings as they now stand, with all interests, leases, goodwill, etc., viz.: (1) Brewery buildings, stables, two cottages in Long, Keerom, and Queen Victoria streets; (2) bottle-store, store, and house in Buitenkant-street, now occupied by Joseph Schuinman; (3) Oriental Hotel, in Leeuwen-street; (4) Roma Hotel, in Waterkant-street; (5) eight years' lease (or thereabouts) of the Alabama Hotel, Bloem-street; (6) four years' lease (or thereabouts) of the Altona Hotel, Woodstock; (7) block of buildings in Riebeek-street, containing the Princess Royal Hotel and four cottages and two stores; (8) plant, stock, and outstanding debts. For a total sum of £75,000. The stock being now put in at £7,500 will be taken over at its proper value as it stands on the day when the property is taken over. And this also refers to the outstanding book debts, now standing at £8,000, which are guaranteed to be good. Sellers' books to be examined by an accountant to be appointed by the buyers, the buyers to pay £10,000 on 4th April to sellers as first instalment and part payment of purchase amount. Sellers to pay interest on this amount at the rate of 5 per cent. per annum to the buyers until date of final payment in cash on 1st August, 1899, as is hereby agreed upon. The business to be carried on by and for account of vendor until the date the business is taken over by the buyers. The vendor further undertakes not to engage in similar business, either directly or indirectly, in the country, and promises to use his goodwill in favour of the buyers to further promotion of the business.

The deed of sale referred to in the pleadings set forth in detail the agreement contained in the above broker's note.

Mr. Schreiner, K.C. (with him Mr. Gardiner), for plaintiff; Mr. Searle, K.C. (with him Mr. Close), for defendant.

Mr. Schreiner called

Charles B. Chidell, who said that he was the general manager in South Africa of the plaintiff company, and had held that position in 1899. Before any business was done by the company in Cape Town, business was carried on by them in Johannesburg, East London, and Natal. Witness knew about Mr. Hackblock coming out to South Africa in February, 1899, and negotiating this con-

tract with Mr. Martienssen. Witness was in Johannesburg at the time, and he did not come to Cape Town until May 28, 1899. He had nothing to do with any negotiations anterior to that time. He knew about the purchase being made. He had access to most of Martienssen's books. Hodgson was manager here at the time. Hodgson was Martienssen's manager, and he had been appointed manager for the plaintiff company by Mr. Hackblock before he went back to England, with a view to there being no break in the continuity of the management. On the 16th June witness signed a certain contract. Between May and that date witness was investigating business matters. Witness had not seen the lease. He might have seen the cover. The agreement referred to in reference to the Princess Royal and Roma was never ratified by witness, as alleged in the plea. If witness had been informed of such a thing, he would have written to London to know whether it was correct. Witness recognised the document produced. He made notes on the document. Witness put down notes in connection with loans from information given him by Hodgson. Witness was perfectly certain that Hodgson did not tell him when the Princess Royal lease began. Witness understood that the amounts were loans by Martienssen to enable the tenant to purchase the goodwill, etc. Witness refused to take over certain loans, as they had been made to the tenants of witness's firm. The object of a loan was to tie the trade. If witness had taken over the loan, the firm would have to pay Martienssen. Witness's information was that the security for a loan was the goodwill. In regard to the Oriental, that was on a different footing to the Roma. The tenant of the Oriental bought out his predecessor, the man who had the lease. The tenants of the Princess Royal and the Roma took possession from Martienssen. The houses were tied to Martienssen by the loans. Mr. Hodgson produced the document in the Gourlay case, and gave evidence as to the figures. Until then witness had not seen the document after it was made. Witness returned to Johannesburg on the 17th June, and Hodgson remained as manager. Afterwards Mr. Hackblock jun., came, and he was succeeded by the present manager, Mr. Gerald Orpen.

Cross-examined by Mr. Searle: Under the agreement the Breweries could not take over until August. Witness came down in order to effect the taking over earlier. The Breweries had a lease with Louw. Witness claimed in respect of the Roma as soon as he knew Martienssen had sold the goodwill. The money in regard to the Roma witness regarded as coming under the lease, and as part of the rights appertaining to the taking over by the Breweries. Witness did not tell Hodgson that Martienssen could recover from Corlett, and Barrett would be protected, and that, if necessary, witness would go so far as to give a written guarantee to that effect. Witness made the charge that Hodgson removed the lease from the papers without witness's knowledge or consent. Witness alleged that Hodgson deliberately concealed the fact that Corlett had paid Martienssen £1,250 for the goodwill.

[Buchanan, J.: And yet you say you had the document in your possession, from which you could have ascertained the fact. If you had looked at the document you would have seen it. Yet you charge him with deliberately concealing from you a fact which you could easily have ascertained by looking at the papers. It is a very rash charge to make without any foundation.]

Witness: I trusted him, my lord.

[Buchanan, J.: He assumed that you had access to all the books and documents. You have no right to make a charge of that sort without having any foundation for it. What right have you to say he deliberately concealed a fact which you could have ascertained from papers in your possession?]

The witness said he could not swear that he (witness) had the lease.

In re-examination witness said that all he meant to convey was that Hodgson did not bring this fact to his notice. He did not make any charge against Hodgson.

Mr. Searle: But you have already charged him.

Mr. Schreiner handed in a copy of a certain contract referred to as the Flanagan contract.

The witness said he did not have this contract before him at the time.

Gerald E. D. Orpen, present Cape Town manager of the S.A. Breweries,

said he succeeded Mr. Hackblock, jun., in March, 1901. Witness had gone into the books of Martienssen. He first inspected the books ten days ago. Witness copied entries in the ledger, marked as Corlett's account and Princess Royal account. (The ledger was put in.) Louw was a tenant of the S.A. Breweries. There were considerable differences between Louw's case and the case of the Roma.

Cross-examined by Mr. Searle: Witness had only got the lease at present in existence. He knew there was another lease, the original one, but he could not find it. Witness also put in the Roma Hotel lease. An order of ejectment had been obtained against Barrett, the lessee.

Re-examined: Witness had no entry in his book regarding either the £500 or the £1,250.

By the Court: They had now leased the Roma Hotel for ten years, at a rental of £30 per month, £2,000 being given for goodwill.

Johan Jansen said he was a broker, carrying on business in Cape Town, and his firm passed the broker's note in this suit. Before that note was drawn up there were negotiations in February, witness being present at several interviews between Martienssen and Hackblock, in the former's office. Before March 1 witness had heard nothing of any agreement to the effect that the goodwill of the Princess Royal Hotel was to be excluded, and that Martienssen was to have that. If there had been any such agreement, it would have been in the broker's note. He had heard nothing about balances of goodwill to be drawn by Martienssen. At first £85,000 was asked by Martienssen for all his interests, but eventually £75,000 was accepted. As far as witness was aware, everything agreed upon was put in the broker's note.

Cross-examined: Witness did not know under what circumstances the reduction of price from £85,000 to £75,000 was agreed upon. He was present at some of the conversations, but not at them all. Mr. Hackblock and Mr. Martienssen agreed upon that reduction between themselves.

Evidence taken on commission was then read. In this, W. H. Hackblock stated that he was chairman of the plaintiff company, and arrived in this coun-

try on February 23 or 24, 1899. A few days after his arrival he had an interview with Mr. Martienssen with regard to purchasing the latter's business. Mr. Martienssen showed him a list of the leases attached to the Brewery. With regard to the Roma Hotel, witness was led to believe that the money for the goodwill was paid down. With regard to the Princess Royal Hotel, Mr. Martienssen had told witness that he had recently purchased it, and paid a portion of the money, but had not got transfer at that time. He did not tell witness anything about the terms on which Corlett held the house, and said nothing about repairs to the house. That was all the information witness had as to the Princess Royal Hotel before the contract was passed. At one interview before the contract was entered into, witness called Martienssen's attention to the state of the hotel, and defendant said that no doubt a large amount of money would have to be spent before they would get a good tenant at a reasonable goodwill. When witness left for England on April 26 or 27, no question was left over for settlement, except the removal of stock and the adjustment of prices if the stock did not amount in value to the figure fixed in the contract. He was not aware before the signing of the contract that Mr. Martienssen had sold the goodwill of the Princess Royal Hotel. Witness knew Mr. Hodgson, who was Mr. Martienssen's manager. Witness afterwards arranged that Mr. Hodgson should continue his post of manager under the company, the same as he had done for Mr. Martienssen. The document put in, which was said to be a portion of the agreement between plaintiff and defendant, witness knew nothing about. The plaintiff knew nothing about the sale of the Princess Royal Hotel until November, 1899. In cross-examination, witness said that nothing was said about the reduction in price from £85,000 to £75,000 being on account of the Princess Royal Hotel and other goodwills being sold. Nothing was said about the goodwill of some four houses being sold.

Mr. Schreiner, having put in the lease and licence of the Princess Royal Hotel, closed the case for the plaintiff.

Mr. Close then read the evidence, taken on commission, of Mr. Martienssen, the defendant. The witness said that

the goodwills were mentioned at the time of the negotiations, and that the goodwill of the four houses in dispute belonged to the tenants.

Mr. Schreiner, K.C. (for plaintiffs): We claim the Roma Hotel under the contract. It was excluded by Chidell. Defendant says he lent money on it. But there was no loan. The money was the outstanding balance of £100, due for goodwill. No doubt Chidell was negligent in not looking at documents, but his neglect cannot prejudice us. Chidell considered that £500 had been lent to Barritt, and naturally objected to take over this debt with the Roma. Hackblock says Martienssen told him that the goodwill of the Roma Hotel had been sold, but that he was not told that a part of the purchase money was outstanding, and he now contends that he has bought all rights on the books, including the debt of £500. "Outstanding book debts" surely do not cover the outstanding balance of a bill. Suppose there was a part of the February rent outstanding, and that we purchased on March 1 we should have purchased that balance, because that would have been an outstanding book debt. The contract of June 16 clearly distinguishes outstanding book debts from loans. Hackblock had never thought of including anything under this term save trade debts. Chidell agreed to take over the loans advanced to the tenants of some of the houses, but only of those tenants who were tied down to the Breweries; but, of course, that distinction made by him cannot affect the legal position of the parties. The small schedule also distinguishes between outstanding book debts and loans. The only accounts open to adjustment when we purchased these properties were those in respect of (1) stock in trade and (2) book debts. It is true that we did not appraise every item of the business we bought. It was a big transaction, and we bought in block, leaving the apportioning to various accounts of the sum paid for further discussion.

[Hopley, J.: Let us suppose that Barritt had gone out of the hotel business altogether, would he not have been liable to Martienssen?]

Yes.

[Hopley, J.: Then if Martienssen says to him, "Instead of paying me cash you may give me a bill," would that change the nature of the transaction?]

I submit it would entirely. It is one thing to support a man in business by granting credit, and quite a different thing to make a loan.

[Hopley J.: Suppose Barritt had sold off and gone away?]

He could not do that without the landlord's consent, and if the landlord granted that it would have been equivalent to ceding certain of his rights to Barritt. The defendants must admit that this £500 was included under either the £15,500 or the £8,000. The fact is that the matter of the Princess Royal Hotel is at the root of all this litigation. That hotel we bought out and out from Flannigan for £9,500, and yet Mr. Martienssen claimed from Hackblock that he (Martienssen) having bought the goodwill of the Princess Royal for £1,250, was entitled to put that sum into his own pocket. The case, however, of the Princess Royal was very different from that of the Roma. That lease was granted on 8th of April, that is before the deed of sale was passed. The actual purchase took place in March, and it is contended that the lease formed no part of the purchase. Clearly, in the absence of an express clause in the deed of sale, defendant has no case. Clause 3 of the plea sets up an impossible defence. There was a lease here at the date of purchase as in the case of the Roma, and it is quite incredible that what is said to have taken place between February 26 and March 1 should really have happened. Jansen, the broker, and Corlett were present at many of the alleged interviews, and if the understanding pleaded by the defendant was arrived at, it is surprising that the broker should not remember anything about it. Hodgson saw the lease, but neither Hackblock nor Chidell saw it. From March 15 to early in April the S.A. Breweries had no representative here, save their attorneys. The deed of sale was not executed by the Breweries. Messrs. Van Zyl and Buissinne knew nothing of the lease, and we are not bound by Hodgson's knowledge. He was not our agent, he was really acting for both parties. The lease was an improper lease. In May Chidell (our general manager) came down, and met Hodgson (who was then acting as our local manager here). Chidell trusted to Hodgson's statements. His attention was not drawn to the terms of the lease, and he knew

nothing of the rights of the lessee until the case of *Corlett v. Gourlay* (10, Sheil, 612) came before the Court in November, 1900. If Chidell did not know the terms of the lease, he clearly could not ratify it. All he did was to adjust certain accounts. The conclusion of arrangements with Corlett was long after March 1. The defendant says that in April he sold the goodwill of the "Princess Royal" for £1,250, £100 of which was paid in cash, and £300 by a post-dated cheque, and says that he told Hackblock of this. The latter admits that he knew that the goodwill of the Roma and of the Oriental had been sold, but he denies having had any knowledge as to the sale of the goodwill of the Princess Royal. It is significant that a witness like Mr. Martienssen should be contradicted by so many witnesses. Hackblock, jun., never knew the date of the lease (as his letter of January, 1900, showed). He did not know of it till the case of *Corlett v. Gourlay* (10 Sheil, 612) was heard in November, 1900. He simply went on the statements of Martienssen and of Hodgson, and had no idea of the length of the lease, or of giving up the rights of his firm for the £1,250 (paid in part) in respect of it. A written agreement cannot be varied by any mere understanding such as defendant alleges in his plea. As to the "Princess Royal," there are no outstanding book debts to adjust; and yet the defendant says that this £1,250 is to be adjusted out of the lump sum of £3,000. We claim, therefore, £500, the unpaid balance of £700 for the goodwill of the Roma, £450, which Martienssen admits having received for the goodwill of the Princess Alice, together with the outstanding balance of £750.

Mr. Searle, K.C. (for defendant): Though the plaintiffs have had every opportunity of ascertaining the true state of affairs, they have delayed making their claim for two years. They now say that leases (of which they have had the fullest benefit) have been entered into under concealment, which amounts almost to misrepresentation on our part. As to the Roma, Hackblock says that when he bought it, he understood that Barritt had paid the whole of the purchase money for the goodwill to Martienssen, and yet he now claims an outstanding balance for which he gave no con-

sideration whatever. Counsel for the plaintiff argued, as if in this transaction between plaintiff and defendant, a definite price had been agreed upon for each thing bought; but both the broker's note and the deed of sale show that both parties contemplated an adjustment. The broker's note is, no doubt, a very rough document, but it quite agrees with the deed of sale, and represents the respective views and intentions of the parties. It has been assumed on behalf of the plaintiff that the £500 owing by Barritt was not a trade debt, but a loan. But it is quite immaterial whether this debt was a part of the purchase price of the goodwill or money owing for beer. The point is, that this money was a debt to be recovered from Barritt, and all such outstanding claims were subject to adjustment. Then how came it that Hackblock junior refused to be answerable for Pearson's loan of £600, and others which were treated merely as outstanding debts? This loan was taken over in June, and then repudiated; and yet we are told that this is a debt due to the Roma Hotel, and is a right appertaining to the lease. As to the Roma, plaintiff's case is quite inexplicable. They were in touch with Barritt. The lease dated as far back as 1897, and yet it is only now that they have moved in the matter, though Chidell knew all the circumstances in June, 1898.

As to the Princess Royal, they say that in that case the lease was made after the deed of sale. We say on Hodgson's evidence that the lease was in existence when they took over the premises. Corlett intended to take them over from Flannigan in February. The S.A. Breweries bought on February 15, and the manager's letter of February 23, and the action of Chidell, show that the Breweries had adopted the lessee. The whole *raison d'être* of *Corlett v. Gourlay* was that Gourlay was acting in concert with the S.A. Breweries. Corlett sued for £750, and the Court agreed that the breweries should be responsible for that sum to Corlett. Mr. Chidell says that he did not understand the deed of sale. It is simply incredible that the general manager of a company like plaintiff's should not understand it, or should sign it without understanding it. He understood it, and so did Hackblock, as his evidence in *Corlett v. Gourlay* shows. He did not then say that he thought

these matters had been settled in account. Plaintiff's counsel sees this difficulty, and now attacks the lease; but plaintiffs fully recognised the lease in *Corlett v. Gourlay*. Now they say that we improperly concealed facts from Chidell. We acted in the most open way possible, even to the extent of leaving all our books and papers at the offices of the S.A. Breweries. We have no wish to go against the documents, for the whole gist of these is that there was to be a subsequent settlement of the various items.

Mr. Schreiner was heard in reply.

Cur. Adu. Vult.

Postea, June 10th.

Buchanan, J.: The plaintiffs bought from the defendant the brewery business which he was carrying on in Cape Town, together with all the buildings, interests, leases, goodwills, etc., connected therewith, for the sum of £75,000. The parties were introduced by Mr. Jansen, the broker, and the negotiations were conducted by Mr. Hackblock, the chairman of the plaintiff company, on the one side, and the defendant, assisted by his manager, Mr. Hodgson, on the other. The broker, though present at some of the interviews, did not himself arrange the details of the contract, but took from the parties the terms of their agreement, which he embodied in a broker's note, dated March 1, 1899. Included in the landed property specified in the broker's note were, *inter alia*, the Roma Hotel, in Waterkant-street, and a block of buildings in Riebeeck-street, containing the Princess Royal Hotel and four cottages and two stores. The broker's note also included the plant, stock, and outstanding debts of the business, and for the purposes of the sale, the stock was put in at £7,500, and the debts, which were guaranteed as good, at £8,000. On the 4th April a deed of sale was drawn up between the parties, amplifying the broker's note, and providing that the seller was to remain in possession, and to carry on the business for his own account until the 31st July. This deed, which was prepared by a law agent, stated the Riebeeck-street property as being "at present under option to the seller." This was not correct, as this property had, on the 15th February previously, by agreement in writing, been purchased by the defendant from one Flannigan for £9,500, though pos-

session was only to be taken on the 15th March, and transfer to be passed by the 1st July. To make the transaction between plaintiffs and defendant clear, an addendum was made to the deed of sale, explaining that the price payable to Flannagan was payable by the defendant, and that, on his receiving transfer, he was simultaneously to retransfer to plaintiffs. The deed also specified as having been sold "the plant, stock-in-trade, and goodwill, including all outstanding debts, assets, and rights appertaining to the business at present carried on by the seller, of every nature and description." Referring to the price of £7,500, at which the plant and stock-in-trade had been put in, and the £8,000 for good outstanding debts, the deed stipulated that, if it should be found that these figures were not correct when the property and business was taken over, the purchase price should be amended accordingly. The Roma Hotel had, by written agreement, been let by defendant in 1897 to one Barritt, one of the conditions of the lease being that the tenant should pay £700 for the goodwill of the business. An account was opened in defendant's books, in which Barritt was debited with £700 for the goodwill, and credited with a payment of £200. Numerous entries appear in the books subsequently, but the balance of £500 remained due when the adjustment of accounts between plaintiffs and defendant, which will presently be referred to, took place. As to the Princess Royal Hotel, in the month of February, after the defendant had purchased the Riebeek-street property, and before negotiations were commenced with plaintiffs, the defendant had agreed with one Corlett to lease the hotel to him, Corlett to give £1,250 for the goodwill, and the tenancy to commence on the 1st April. The written lease was not executed until the 8th April, 1899, in which month Corlett paid £400 off the price of the goodwill. As in the case of Barritt, an account with Corlett was opened in defendant's books, the £1,250 being debited on one side and the £400 credited on the other. The balance of £850 was still outstanding in the books when the adjustment of accounts between plaintiffs and defendant took place. The first disputed issue of fact in this case is whether or not these transactions were disclosed to Hackblock.

Shortly after the sale Martienssen, being in ill-health, left for Europe, and Hodgson, while continuing to manage the business for defendant, was also taken into the plaintiffs' employ. In May plaintiffs' general manager, Chidell, arrived in Cape Town, and in order to prevent any breach of continuity in the business, it was agreed between him and Behrman, who then held the defendant's power of attorney, to anticipate the time for taking over the business. Accordingly stock was taken, and was found to be worth some £800 more than the estimated price. Hodgson also prepared two lists of all outstandings, one representing trade debts and the other he headed loans. On this latter list were the balances of £850 due by Corlett, and of £500 due by Barritt, together with other debts, amounting in all to some £4,000. As the defendant had guaranteed the outstandings, Chidell selected from this list certain of the claims, amounting in all to £2,589 10s., leaving the remainder to defendant, and among the accounts not taken over were the debts of Corlett and of Barritt. Chidell laid no claim to these debts as already belonging to plaintiffs, but rejected them because the plaintiffs did not wish to have loans outstanding on trade houses over which they had already acquired complete control by purchase, though they were willing to take over the loans outstanding due by the owners of so-called "tied houses." The accounts on both lists, approved of by Chidell, amounting in all to £7,179 19s. 4d., were brought up in two schedules, and annexed to a written document, dated the 16th June, which stipulated for the immediate payment of two-thirds of the total, leaving the balance for final adjustment on the 21st December, the plaintiffs being allowed six months within which to collect these outstandings, and to decide whether or not those not recovered within that time would be taken over by them as good or otherwise. In December additional amounts were rejected from both schedules, and the balance remaining was finally adjusted and paid by plaintiffs to defendant, and the transactions between the parties closed. Defendant afterwards sued Corlett for the balance unpaid on the sale of the goodwill. Corlett had in the meanwhile, with plaintiffs' assent, assigned his lease to one Gourlay, who had undertaken to pay certain

of Corlett's liabilities in connection with the hotel. Defendant stayed proceedings to enable Corlett to take action against Gourlay, which he did, and recovered judgment for £750, as being due on Corlett's liability to defendant, the Court finding that this was one of the liabilities which had been taken over by Gourlay. As Corlett was not ultimately entitled to the amount recovered from Gourlay, it was directed that the money should be paid into Court, where it still remains. Defendant had also recovered £200 of the debt due by Barritt. In this action the plaintiffs claimed an account, and on debate of such account, judgment for all sums recovered by defendant for the goodwill of both the Roma and the Princess Royal Hotels. The pleadings filed are somewhat complicated and involved, but the issue may shortly be said to be, whether the moneys recovered from these two debtors after the sale of the business on the 1st March belonged to the plaintiffs or to the defendant. It must be noticed that fraud is not specifically charged, though allegations of misconduct on the part of defendant or of his agents have been made. The plaintiffs in their declaration base their claim entirely upon the construction they put on the broker's note and the deed of sale. Their counsel has argued the case from the standpoint that the goodwill of these two hotels were included in the general terms of these documents, and must be considered as part of the consideration for the purchase price other than that part appropriated to the stock-in-trade and outstanding debts. The defendant's counsel, while admitting that the claims were covered by the contract of sale, contended that they then stood in the position of outstanding debts connected with the business, and had to be considered in adjusting the accounts. The declaration alleged that the defendant had no right on the 8th April, 1899, to the hotel and goodwill, leased to Corlett by the contract of that date. In one sense this was the case, for the defendant had not yet acquired the *dominium* by transfer of the property, but he had a valid agreement of purchase, which was afterwards carried into effect before he handed the business over to the plaintiffs. Moreover, he had sold the goodwill, and had undertaken to grant a lease of the hotel to Corlett before any contract was made between him and the

company. The effect of the agreement between defendant and Corlett was to convert the price of the goodwill into a debt. The lease of April, on the date of which the plaintiffs so strongly rely, was simply an embodiment in writing of the agreement made in February, before Hackblock came upon the scene, though no doubt some of the terms had not before been definitely fixed. As a matter of fact, we find not only that the goodwill of the Princess Royal Hotel was sold to Corlett before the date of the contract with plaintiffs, and that mutual obligations between Corlett and defendant had in consequence arisen; but we find further that this was fully disclosed to Hackblock before he purchased the business. Hackblock states that he inquired into and had explained to him the mode of dealing connected with the goodwill purchase system, and we are satisfied on the evidence that he was in terms informed of the sales both to Barritt and to Corlett of the goodwills of the Roma and of the Princess Royal Hotels. There seems to be no valid reason to distinguish between the effect of the sale of the goodwills of the two premises. Hackblock denies that he was informed of these sales. It is not necessary to impute more than a lapse of memory to him, while if the disclosure had not been made it would be difficult to avoid imputing fraud to the defendant, and a fraud not only without object, but liable to immediate detection. Hodgson is clear and distinct on the subject, and the conduct of the parties points in the same direction. Hodgson is not now in any way interested in this dispute, and his evidence is, in our opinion, deserving of the fullest credence. The defendant and Hodgson appear to have acted throughout with perfect *bona fides*. All the facts connected with the business were disclosed, and plaintiffs had full access to all the books—indeed, they appear to have been left at the business premises for some time after the plaintiffs took over. When the plaintiffs took over the business, Corlett's lease, with the other documents, were given them, and it is strongly against them that they never questioned or repudiated the lease, but adopted and acted upon it, and it was nearly a year after the final settlement before they first raised any question. In their replication the plaintiffs alleged that when the adjustment of ac-

counts was made in June, defendant's representative, Hodgson, concealed the fact that the date of the lease was subsequent to the date of the broker's note, and that the defendant had wrongfully and unlawfully, for his own benefit, sold the goodwill of the hotel; and that these facts were only ascertained by plaintiffs after, and in consequence of, the proceedings taken by Corlett against Gourlay in November, 1900. These allegations, so far from having been proved, have been positively disproved. It is true, Chidell, in cross-examination, accused Hodgson of having deliberately concealed from him the particulars of the transaction with Corlett, but he afterwards withdrew the charge, and said he simply meant to imply that Hodgson had not told him of them. Chidell was not present when the communications were made to Hackblock. Again, when Hodgson went to England in August, Hackblock, jun., became manager in his place, and it may well be that these successive managers did not fully inform one another, or that each one did not make himself personally acquainted with the documents in his possession; but the defendant cannot be blamed for this. Chidell had Corlett's lease in his possession, though he says he did not look at it, when he adjusted accounts in June, 1899. At that time Hodgson, though protecting defendant's interests, had every reason for acting honestly by plaintiffs, in whose employ he then was; and Hodgson had no object to serve in concealing facts that could be ascertained at any moment by his employers by a simple reference to books and documents in their possession. As defendant had already handed over to them the document itself, the plaintiffs are not entitled to say he had concealed the date of it from them. In addition to the sale of the goodwill being mentioned in the lease, this fact was pointedly put before Chidell by the debt on this account being brought up in the list of loans submitted to him by Hodgson, on which list, moreover, Chidell himself noted the sale, the price, and the balance remaining due. The insinuation made that this list was subsequently stolen by Hodgson from Chidell's custody is so utterly without foundation as not to require further notice. Then again, a year before the date mentioned in the replication, Hackblock, jun., wrote upon the lease itself a

consent on behalf of the plaintiffs of the assignment by Corlett to Gourlay. At that very time it is clear, from the letter written by Hackblock, jun., to plaintiffs' attorneys, that he knew the goodwill had been sold for £1,250, and that there was a balance of £750 still owing—the difference between £750 and £850 being accounted for by Corlett's statement that certain payments made by him to defendant should have been appropriated against the debt on the goodwill, and not to debts for goods supplied. All this was before the final settlement in December, 1899. Then in January, 1900, Hackblock, jun., wrote twice to defendant, and as Corlett's financial position was not good, endeavoured to induce defendant to accept a compromise in full settlement of this debt. This is altogether inconsistent with the allegations of the replication. All through this transaction both parties treated the balances due on the sale of these two goodwills as coming under the designation of outstandings. If the plaintiffs had taken over these debts, and paid for them, they would now have been entitled to anything realised from the debtors; but the plaintiffs would not take over the debts, and never paid for them. If the plaintiffs were to succeed in this action, they would get the benefit of outstandings due to the business which they never acquired. The contract between the parties has been carried out, and a final stating of accounts has been settled. The plaintiffs, in effect, though not in form, now seek to reopen that settlement. They do not set up any fraud, or misrepresentation, or mistake of fact, or any other ground for so doing, except that the settlement was not based on a true construction of the written documents. If that is so, the foundation of their action is a mistake in law, and that would not entitle them to reopen the accounts. Looking at the circumstances of this case from any point of view, the plaintiffs have failed to establish their claim, and judgment must therefore be given for the defendant, with costs.

Mr. Justice Hopley said he had had an opportunity of seeing the above judgment, and he fully concurred.

[Plaintiff's Attorneys: Van Zyl and Buissinne. Defendant's Attorney: D Tennant, jun.]

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice HOPLEY.]

VAN DER BYL V. ESTATE { 1902.
OF FAURE. { June 6th.

Koopbrief — Transfer cancella-
tion.

This was an action brought by Andries Christoffel van der Byl against the executors testamentary of the late Hon. Johannes Albertus Faure to compel them to pass transfer of certain two erven at Gordon's Bay; failing which, for the sum of £1,000, by way of compensation and damages.

The plaintiff's declaration was as follows:

1. Plaintiff resides at Gordon's Bay, in the district of Stellenbosch; and defendants are George William Steytler, secretary of the Colonial Orphan Chamber and Trust Company, and Anna Fredrika Wilhelmina Faure, in their capacity as executors testamentary of the late Hon. Johannes. Albertus Faure, of Eerste River, in the district of Stellenbosch.

2. On or about the 15th day of March, 1898, the plaintiff and the said late Hon. Johannes Albertus Faure, who is hereinafter referred to as the deceased, entered into an agreement of sale or koopbrief, whereby deceased sold and plaintiff bought certain two erven, known as Nos. 24 and 25, situate at Visch Hoek (now called Gordon's Bay), in the district of Stellenbosch, for the sum of £150, payable against transfer and upon such further conditions as are contained in the said koopbrief, to which plaintiff craves leave to refer.

3. Plaintiff thereupon took possession of the said erven so sold, made several improvements thereon, and has been in undisturbed occupation thereof ever since.

4. Plaintiff more than once requested deceased to transfer the said erven in accordance with the terms of the said agreement, plaintiff tendering payment of the purchase price upon transfer being made, but deceased from time to time put the matter off.

5. After the death of deceased, plaintiff called upon deceased's executors, the said defendants, to carry out the said

agreement, plaintiff offering to fulfil his own part of the said agreement, but defendants have failed and refused to do so.

6. In the event of the plaintiff not obtaining transfer of the said property, he would be entitled to recover the value of the improvements effected by him, as referred to in paragraph 3, together with damages sustained by reason of breach of contract, which he estimates in all in the sum of £1,000.

Wherefore plaintiff claims: (a) Transfer of the said erven, in terms of the said agreement, plaintiff being ready and willing to pay the said purchase price thereof upon transfer and to fulfil such other conditions as the contract imposes on him; (b) or, failing which, the sum of £1,000, by way of compensation and damages; (c) alternative relief; (d) costs of suit.

The defendants' plea was as follows:

1. Paragraph 1 is admitted of the plaintiff's declaration.

2. The defendants admit that the said late Johannes Albertus Faure entered into the agreement annexed to the declaration, but say that subsequently the said agreement was cancelled by mutual consent, and it was thereupon agreed between the plaintiff and the said late Johannes Albertus Faure that the plaintiff should receive from the said late Johannes Albertus Faure certain other two lots situate at Gordon's Bay, for the sum of £500 sterling, in place of the two lots referred to in the agreement annexed to the declaration.

3. The said two lots so sold in place of the lots referred to in the agreement annexed to the declaration have been duly transferred to the plaintiff.

4. The defendants admit that the plaintiff entered upon the lots referred to in the agreement annexed to the declaration, erected a certain iron shed, and removed certain wire fencing, but say that the plaintiff acted wrongfully and unlawfully in so doing, and without the knowledge or consent of the said late Johannes Albertus Faure, or the defendants.

5. They admit that the late Johannes Albertus Faure refused to transfer the said lots, and that they refuse to transfer the said lots to the plaintiff, and say that the said late Johannes Albertus Faure and the defendants were and are justified in so refusing.

6. Save as above, they deny all the allegations contained in paragraphs 2, 3, 4, 5, and 6, and specially that the plaintiff has sustained any damage or is entitled to any compensation for which they are liable.

The replication was general.

Mr. Searle, K.C. (with him Mr. De Waal), for plaintiff; Mr. B. Upington (with him Mr. Gooch), for defendants.

Mr. Searle called

Andries Christoffel van der Byl, who said that he lived at Sir Lowry's Pass, and had known the late Mr. Faure for many years. In March, 1898, witness bought from Mr. Faure two lots of land at Gordon's Bay, numbered 24 and 25. Witness, with Mr. Faure's knowledge, at once took possession of the erven, and effected certain improvements—erecting a cowshed, removing fencing, laying on water, etc.—at a cost of £130. Witness asked for transfer from time to time, but Mr. Faure said he could not give it yet, because he had to get it himself from a Mr. John Frieslich, of Pretoria. Witness had some bricks made for the purpose of building on the land, and then he again asked Mr. Faure for transfer, but could not get it. Witness then placed the matter in Mr. Nelson's hands, and a demand for transfer was made; and as that was not complied with, witness gave instructions for an action to be instituted. Then he met Mr. Faure in town at Nelson's office. Mr. Faure wanted time to pass the transfer, and ultimately witness agreed to wait for two years on Mr. Faure selling him portion of two adjoining plots, Nos. 22 and 23, for £500, witness's brother buying the remaining portion of the two plots for £250. Witness waited two years, and then again asked Mr. Faure for transfer, but received the answer that he could not give it just then because he had not got it himself yet. Witness then went to Mr. Cluver, and a letter was sent to Mr. Faure calling upon him to pass transfer, and a reply was received from his solicitors, in which, for the first time, the position was taken up that the sale of lots 24 and 25 had been cancelled. Witness saw Mr. Faure after that, and proposed a settlement, under which Mr. Faure would give him the back portion of the erven. That offer was made twice. Mr. Petrus le Roux, witness, and Mr. Faure were present on the last occasion, and no one

else. That was about a couple of months before Mr. Faure died. About March last witness built a butchery and bakery on these two erven. That cost £75, but that amount was included in the £130 he had previously mentioned as the cost of the improvements. The erven were now worth about £700.

Cross-examined: Witness had paid for water being laid on to lots 24 and 25 in April last, after these proceedings had been commenced. He erected the butcher's and baker's shop also in April last; the fence was put up about nine months ago—witness could not remember the exact date. Witness had paid the Divisional Council rates on the four erven and buildings. He would not tell a lie for £100,000.

Re-examined: Witness put up the fence between lots 23 and 24 long before Mr. Faure's death.

Petrus le Roux, a resident of Gordon's Bay, deposed that he erected the cowshed on plaintiff's erven between eighteen months and two years ago. About a month before Mr. Faure's death witness heard the conversation between plaintiff and Mr. Faure referred to by Van der Byl. Mr. Faure said to plaintiff, "Why do you make it so awkward?" Plaintiff replied, "Well, I will make you another offer, after all the offers I have been making you. You give me back parts of lots 23 and 24, and all my expenses, and pay me £60 for the house on the beach, and give me transfer as soon as you can get it; I will give you the koopbrief back." Mr. Faure answered, "Well, if we cannot do otherwise, we will have to do this." Lots 23 and 24 were worth between £600 and £700, without any of the buildings or improvements. Plaintiff's estimate of £130 for what he had done on the erven was not too high.

Paul le Roux, a resident of Gordon's Bay, stated that he had erected the fence for plaintiff on the disputed erven.

Johannes Jacobus le Roux Villiers, a landowner of Gordon's Bay, said the disputed erven were worth about £600 without any improvements, which were of the value of about £150.

Martinus Versfeld, a Cape Town conveyancer, deposed that the koopbrief had been in his possession for a long time, eventually Mr. Faure calling at witness's office for it, in company with plaintiff. Witness believed that Mr. Faure him-

self could not get transfer of the disputed erven. He had never heard from Mr. Faure that the sale to plaintiff was cancelled. Plaintiff asked witness for the koopbrief, which witness returned to him.

Mr. Searle then closed his case.

Mr. Upington called

Charles Willoughby Herold, a conveyancer, of Cape Town, who deposed that he remembered going over the ground at Gordon's Bay, deceased pointing out the pegs. Plaintiff on one occasion said to witness, "You and Faure want to do me out of the ground." Witness was about to detail conversations between Mr. Faure and himself in regard to the transaction in dispute, but was stopped, the evidence being declared to be inadmissible.

No further evidence was called by Mr. Upington, who was then heard in argument.

Mr. Searle, in reply to the Court, said plaintiff would much prefer having transfer to being awarded damages.

De Villiers, C.J.: It is common cause in this case that in March, 1898, plaintiff bought from the late Mr. Faure two erven of ground at Gordon's Bay, lots Nos. 23 and 24. A formal koopbrief was drawn up and signed by the parties. The plaintiff never got transfer, and he now sues for transfer, in accordance with the koopbrief. The defence set up is that in December, 1898, a cancellation took place of this sale. Well, it clearly lies upon defendants to prove such a cancellation. Unfortunately, Mr. Faure is dead, and the Court has now to depend upon documents and mainly upon the evidence given by the plaintiff as to whether such cancellation took place. The plaintiff positively swears that there was no such cancellation, and no evidence in proof of cancellation has been given. Well, one would suppose that the parties who made this formal contract in writing, when they came to cancel that sale, would have made an equally formal document of cancellation; instead of that, there is no evidence that any such document was ever executed. We also find that the agreement of sale was allowed to remain in possession of plaintiff's attorneys without any demand being made for its return. The defendant himself did not set up the case that an arrangement had been come to to give two years for the obtaining of transfer

until this action had been commenced, and he did not answer the letter written by plaintiff's attorneys in January. That letter, however, was not written until plaintiff had through his attorney made demand for transfer; he made that demand while Mr. Faure was alive, and up to that time for two years no demand had been made upon plaintiff for the return of the koopbrief, nor had any demand been made upon him for the cancellation of sale. There was strong presumption that there was no such cancellation at all. Mr. Faure himself may have suggested that he intended to cancel the sale. There may have been a misunderstanding, but there was an agreement of sale, and the onus lies upon defendants to prove that there was a cancellation. We have only the evidence of plaintiff and his witnesses to rely upon, and they are clear that there was no such cancellation. Under these circumstances, plaintiff is clearly entitled to claim that there should be transfer, but it appears that Mr. Faure's executors are unable to give transfer. I think they should have time, because plaintiff prefers having transfer, and defendants should make an effort to give it. Of course, if they cannot give transfer the Court will have to assess the value of damages to be given in lieu of transfer. The Court will order the defendants to give transfer within three months; failing that, to pay to plaintiff £500, and in that case plaintiff will be entitled to remove all materials on the property. The defendants will pay the costs.

[Plaintiff's Attorney: J. J. Michau.
Defendant's Attorneys: Van Zyl and Buissinne.]

	1902.
ACKERMANN AND ADAMSON	{ June 9th.
V. COLONIAL GOVERN-	" 10th.
MENT.	" 11th.
	" 13th.

Architect's Plans — Approval —
Scope of employment—*Quantum meruit*.

The defendant employed the plaintiffs as architects to prepare plans for the extension and alteration of the Cape Town Railway Station, undertaking to pay 2½ p.c. on the estimated cost for preparing the

necessary drawings, and 2½ p.c. for supervising the construction. Plaintiffs prepared certain plans in accordance with instructions, when they were directed to stop and to prepare plans for a different scheme. After working for some months on the second set of plans they were again stopped, and set to work on plans for a much enlarged scheme. After working for some time they were for the third time stopped, and given directions to prepare plans for a fourth alternative scheme. These last plans were approved of by the defendants, but the whole project was then stopped. The plaintiffs claimed payment on a quantum meruit for all their work, but the defendant tendered only the amount claimed for the last set of plans. Held, that plaintiff's employment did not fall within the rule laid down in De Witt v. The Cape Canning Co. [11 S.C. Rep., p. 116]; and that under the special circumstances they were also entitled to be paid a reasonable remuneration for their work and labour on the three previous sets of plans.

This was an action brought by Messrs. Ackermann and Adamson, carrying on business as civil engineers and architects, against the Colonial Government under the following circumstances: In January, 1897, Mr. Ackermann was carrying on his profession by himself, and on January 11, 1897, he entered into an agreement with the Government, which was contained in certain letters, by which he undertook the work of preparing the necessary drawings for the extension of Cape Town Station on the usual terms—2½ per cent. on the estimates for the drawings and 2½ per cent. for supervision. Mr. Ackermann then took Mr. Adamson into partnership with the knowledge of the Gov-

ernment, and the dealings subsequently were between the partnership and the Government. In 1897, on the instructions from the Government, the plaintiffs prepared certain plans and drawings for a scheme which was known as scheme A, and the estimated cost of which was £170,000. After preparing certain plans and drawings they were instructed by the Government to stop, and not go on with that scheme any further. In the same year they were instructed to prepare another set of plans and drawings for another scheme, known as scheme B, the estimated cost of which was £286,000. After having prepared certain plans and drawings they were again instructed to stop that scheme. In the same year they were instructed to prepare plans and drawings for another scheme, known as scheme C, which was to cost a million pounds. They then prepared the plans and drawings, and after completion of the preliminary drawings they were again instructed to stop.

The plaintiffs' declaration was as follows:

1. The plaintiffs are civil engineers, and are also architects, carrying on their profession in Cape Town; the defendant is the Commissioner of Public Works of the Cape Colony, and as such is the proper party to be sued.

2 In the month of January, 1897, the plaintiff Ackermann was carrying on his profession by himself, and on the 11th of the said month, the then Commissioner of Public Works, through his duly authorised agent, the Engineer-in-Chief of the Cape Government Railways of the Colony, entered into an agreement with the said Ackermann, by which the latter undertook the work of preparing the necessary drawings for the Cape Town Station extension and alterations, and subsequently to superintend their erection, on the usual terms, to wit, 2½ per cent. on the estimate for the drawings, and the same for supervising the construction.

3. The said Ackermann thereupon took the plaintiff Adamson into partnership, to the knowledge of the defendant and his predecessors, who recognised the plaintiff Adamson as a party to the contract, and thereafter all dealings took place between the defendant and his predecessors and the plaintiffs.

4. Thereafter, in the year 1897, upon instructions from the then Commissioner or his duly authorised agents, the plaintiffs prepared plans and drawings for the Cape Town Station extension and alterations which are known as "Scheme A," and which scheme is estimated to cost £170,000.

After the plaintiffs had prepared certain plans and drawings, they were instructed to cease continuing them by the then Commissioner or his said agents, and to prepare another scheme. Plaintiffs thereupon became entitled to be paid for their work, labour, and services in preparing the said plans and drawings.

5. In the same year the plaintiffs were instructed in the like manner aforesaid to prepare plans and drawings for the new scheme for the said work, which is known as "Scheme B," and which is estimated to cost £286,000. After the plaintiffs had prepared certain plans and drawings for this scheme, they were instructed in like manner aforesaid to cease continuing them, and thereupon the plaintiffs became entitled to be paid for their work, labour, and services in preparing the said plans and drawings for this scheme.

6. Thereafter, in the same year, the plaintiffs were instructed in like manner aforesaid to prepare plans and drawings for a new scheme for the said work, which scheme is known as "Scheme C," and which is estimated to cost £1,000,000, and the plaintiffs duly prepared and completed the preliminary drawings for the Scheme C, and they were then instructed in like manner aforesaid to cease continuing the said plans and drawings, and the plaintiffs thereupon became entitled to be paid for their said work, labour, and services.

7. The usual ordinary and professional charge for preliminary drawings is $1\frac{1}{2}$ per cent. upon the estimated cost, and on or about the month of August, 1897, while the plaintiffs were at work on Scheme C, they requested payment of £1,800, as being an advance on account at the said usual rate of $1\frac{1}{2}$ per cent., and the then Commissioner, with full knowledge of the facts, admitted the said charge as the usual and ordinary charge, and paid plaintiffs a portion of the said sum, and thereafter the then Commissioner and his successors paid the

plaintiffs various sums on account in like manner to the extent of £5,000.

8. Thereafter, in or about October, 1897, after the then Commissioner had paid the sum of £1,400 on account in manner aforesaid to prepare plans and drawings for a new scheme for the said work, which scheme is known as "Scheme D," and which is estimated to cost £500,000, and the plaintiffs duly completed the preliminary drawings, when they were instructed in like manner to cease continuing them, and thereupon plaintiffs became entitled to be paid $1\frac{1}{2}$ per cent. on the estimated cost.

9. In December, 1898, the plaintiffs were instructed in like manner to complete the drawings of certain of the work for which they had already completed the preliminary drawings, and to prepare the detail drawings, specifications, etc., for the work, which is estimated to cost £3,600. The plaintiffs duly completed the said work, for which they are entitled to be paid $2\frac{1}{2}$ per cent. on the estimate, less the $1\frac{1}{2}$ per cent. for the preliminary drawings.

10. The plaintiffs were further instructed in like manner to take out the quantities for the said work, and to invite tenders for the same, all of which the plaintiffs did, and they are entitled to payment at the rate of $2\frac{1}{2}$ per cent. and $\frac{1}{2}$ per cent. on the estimate respectively for this said work and labour.

11. The fair, reasonable, and professional charges for the plans and drawings prepared by the plaintiffs on Schemes A and B are the sums of £425 and £1,430 respectively, and the charge for the plans and drawings on Schemes C and D are £12,500 and £6,250 respectively, and the charge for the work in paragraphs 9 and 10 mentioned is £153.

There is due and payable to the plaintiffs the said sums, amounting in all to £20,758, less the sum of £5,000 paid on account, but the defendant refuses to pay the plaintiffs the balance of £15,758 or any part thereof.

The plaintiffs claim:

- (a) The sum of £15,758, with interest *a tempore mora*;
- (b) Alternative relief;
- (c) Costs of suit.

To this declaration, the defendant pleaded as follows:

1. He admits the allegations in paragraphs 1 and 3 of the declaration.

2. He does not admit that the plaintiffs are, as alleged in paragraph 4, entitled to be paid for their work, labour, and services in preparing preliminary plans and drawings for Scheme A, which was the scheme in contemplation in January, 1897, when the agreement referred to in par. 2 was entered into, and which was estimated to cost £170,000, for the said plans and drawings were not either completed by the plaintiffs, or approved of by the defendant's predecessor in office, but the said scheme was abandoned before the completion thereof, and the plaintiffs undertook the work of preparing and submitting various other preliminary plans and drawings for the approval of defendant's predecessor in office. Save as aforesaid, he admits paragraphs 2 and 4 of the declaration.

3. At no time were the plaintiffs entitled to be paid for their professional services or work and labour in regard in the first eight paragraphs of the declaration, unless or until the preliminary plans and drawings were so approved, and the preliminary plans and drawings of Scheme A, Scheme B, and Scheme C were at no time so approved, but the preliminary plans and drawings of Scheme D were so approved, though it was decided by the defendant's predecessor in office not to proceed further with the scheme or to submit it to Parliament.

4. The rough estimates of Schemes B, C, and D, as furnished by the plaintiffs are £286,000; £1,000,000, and £500,000 respectively, as alleged in the declaration, but the estimate originally contemplated by the plaintiffs for Scheme D was £400,000, and defendant's predecessor in office from time to time, paid to the plaintiffs sums on account amounting to £5,000, being $1\frac{1}{4}$ per cent. on £400,000, but defendant is willing to accept the figure of £500,000 as the basis on which $1\frac{1}{4}$ per cent. should be computed to be paid to the plaintiffs in full satisfaction of their claims in this suit, other than they claim for £153 in respect of the matters mentioned in paragraphs 9 and 10 of the declaration.

6. The defendant admits that the plaintiffs are entitled to £6,250 in respect of their claim (other than their said claim for £153), less the sum of £5,000

already paid, and he admits that the plaintiffs are entitled to £90 in respect of their claim for £153.

6. The defendant hereby tenders to the plaintiffs payment of the sums of £1,250 and £90, together with the taxed costs to the date of this plea.

7. Save as aforesaid, and save that he admits that he refuses to pay any larger sum than the above amounts the defendant denies all allegations of fact and conclusions of law in paragraphs 5, 6, 7, 8, 9, 10, and 11, of the declaration.

Wherefore, subject to the above tender, he prays that the plaintiff's claim may be dismissed with costs.

II. For a claim in reconvention the defendant (now plaintiff) says as follows:

1. He beg to refer the Court to the several paragraphs of the above plea.

2. He is entitled to claim delivery by the plaintiffs of the preliminary plans and drawings connected with scheme D upon payment of the sum due to plaintiffs (now defendants) in this suit; but the said plans and drawings have not been tendered or offered by the plaintiffs, who refuse to part with the same.

Wherefore he prays that the plaintiffs (now defendants) may be ordered and adjudged upon the payment of the sum due to them to deliver up to him all the said preliminary plans and drawing connected with scheme D.

Plaintiffs' replication and plea in reconvention was as follows:

They deny that Scheme A was in contemplation, or that it was estimated to cost £170,000, or any sum (when they were instructed to prepare plans and drawings).

They deny that they undertook the work of preparing and submitting various other preliminary drawings and plans for the approval of the defendant's predecessor: they say they prepared plans and drawings as they were instructed by the defendant or his predecessors, and that they completed their instructions until ordered to cease, and they say that their work was not submitted for, nor was it subject to the approval of the defendant or his predecessors, and they deny that it was not approved of.

2. Save as aforesaid and save for admissions they deny the allegations in paragraphs 2, 3, 4, 5, 6, and 7 of the

plea, and join issue with the defendant thereon, and again pray for judgment with costs.

For a plea to the claim in reconvention, the plaintiffs say:

1. They have always been ready and willing to have tendered before action brought to deliver all the plans and drawings, including those for scheme D, to the defendant upon payment to them of the sums due to them as set out in the declaration, but the defendant refuses to pay the said sums, and they say they are entitled to keep the same until such payment is made to them.

2. They beg to refer to the pleadings in convention, and save as aforesaid deny the allegations in the claim in reconvention contained, and pray that the said claim may be dismissed with costs.

The defendant's rejoinder was general.

Sir H. Juta, K.C. (with him Mr. Benjamin) for the plaintiffs. Mr. Searle, K.C. (with him Mr. J. E. R. de Villiers) for the defendant.

Sir Henry Juta called

Adolphus William Ackermann, who said he was one of the plaintiffs, and was a civil engineer and architect, carrying on business in Cape Town. He entered into partnership with Mr. Adamson in January, 1897. That partnership was known to the Government. Witness drew the plans for the Cape Town Station. On January 11, 1897, witness received a letter from the Railway Department, offering him the work of preparing the necessary drawings for the extension of Cape Town Station, and subsequently the superintendence of their construction, on the usual terms, viz., 2½ per cent. on the estimate, and the same for supervision of construction. On January 14 witness wrote accepting the terms offered. These letters formed the contract relied upon in the declaration. As a matter of fact, witness had already had an interview with Mr. Brown. He drew up and submitted to Mr. Brown preliminary sketches, and received definite instructions as to what had to be done. He then began upon what would have become working plans in due course if the scheme had been carried to completion. That was for the scheme known as A. He did not entirely finish the plans, because it was soon found by the Government Engineer-in-Chief, Mr. Brown, that they would not give suffi-

cient accommodation. Mr. Brown stopped any further work on these plans, and gave him fresh instructions, upon which witness began work on scheme B, which gave a large frontage and more lines of rails than scheme A. Witness could not use the plans of scheme A for scheme B. Witness prepared rough sketches, submitted them, received definite instructions, and then proceeded with the work on the plans for scheme B. Altogether, there were 137 plans prepared, and to lay out all their drawings would require a wall 200 feet long and 5 feet high. Witness worked on scheme B, and made certain plans and drawings. There were also plans which, if the scheme had been proceeded with, would have become working plans. These had gone beyond the stage of preliminary plans, because witness had been confident the scheme would be carried out. In April there was a meeting of railway officers in Cape Town, at which witness and Mr. Adamson were present, on the invitation of the General Manager. The railway gentlemen present made certain suggestions, and decided that scheme B was inadequate, and he was instructed to go on with scheme C, which was a very much larger scheme, providing for eighteen lines. In a letter he received from the Commissioner of Railways, the latter said he wanted a station that would suffice for fifty years. Witness went on with the work until Mr. Price returned in August, and a meeting was held shortly afterwards. In dealing with scheme C, there was an overlapping of the Harbour Board buildings, then in course of erection, and witness pointed that out to the Government. In consequence, the work on the Harbour Board buildings was stopped for over a year. The preliminary sketches were submitted, definite instructions received, and then the plans proceeded with. The plans for scheme C, when he was stopped, were in such an advanced state that witness could have begun on the foundations in a month. They were practically working drawings. In August witness wrote with regard to receiving payment for the work done up to date, and received a reply asking how the details were arrived at. Witness replied, enclosing a full report on the designs prepared and an explanation as to the charges made. Upon that report witness received two sums

of money. Witness did not remember any letters coming at the time of the payments. In October there was a receipt for £1,400, which amount witness received before the receipt was given. "C." was not further proceeded with after Mr. Price came back. Mr. Price thought it too big a scheme altogether, and the firm had instructions not to go beyond Waterkant-street. There was a meeting after Mr. Price returned. The Commissioner was present at the meeting, which was held in the offices of witness's firm. A decision was arrived at and witness received instructions which were embodied in "D." On the 6th September, the firm wrote to the General Manager, asking that they should be furnished with a written statement as to what Mr. Price desired. On the 11th September, a reply was received enclosing a report dated the 4th September. Then witness went on with plans "D." He began on the 29th September, and placed himself in communication with the heads of the departments, according to instructions. There was afterwards a considerable amount of correspondence relative to details of the work. On the 17th November witness's firm received £200 from the Government, in January, 1898, they received £200, and in May, £1,500. On the 11th August, the firm received a letter in the following terms: "The Commissioner will not decide the question of the alternative designs until Parliament meets, when he will propose the appointment of a Select Committee to go into the whole matter." In January, 1899, witness wrote asking for a further advance of £2,000, and pointing out that the firm had been put to great trouble and expense in getting information in regard to big railway termini throughout the world. On the 20th January, 1899, witness wrote a letter in which he spoke of "A." and "B." having been abandoned, and of two plans having been selected and signed. It was then pointed out that there were over 100 plans prepared by the firm. On the 16th February, Mr. Brown wrote to the firm stating that a payment to them of £1,700, making £5,000 altogether, had been recommended, and he asked the firm to forward to the office all drawings and documents in their possession.

There had been a change of Government this time. In November the firm wrote forwarding their account, which was similar to that set forth in the declaration. Witness charged commission on £1,000,000 on scheme "C."

Buchanan, J., said that in a letter in August the witness wrote: "We cannot gauge the probable cost of design "C," but it will involve an expenditure of over £400,000." How did the witness now arrive at £1,000,000 as the estimated cost.

Witness said that when he wrote the letter he had not gone into the matter. The sum spoken of there was a guess. The estimate of £1,000,000 was a correct one.

Sir Henry Juta proceeded to read further correspondence respecting plaintiffs' claim for payment, and the dispute of the claim by the Government.

Further examined, witness said there was never any complaint by the Government or its officers as to the work on the plans having been done improperly. The defendants had every opportunity of inspecting these plans. It was understood when they started on Scheme D, that it was to be final, and therefore a letter was sent to get them to acknowledge that. Witness wanted the work pressed on so that they could be getting towards the 2½ per cent. charge.—(At this stage a number of designs and plans which had been made in connection with the various schemes were exhibited in court, to bear out the witness's statement as to the plans being more than the usual preliminary plans.)

Prior to commencing his cross-examination, Mr. Schreiner, in reply to a question by the Court, said the position the defendants took up was that after a number of preliminary sketches had been submitted Scheme D was accepted on June 3, 1898, and they had paid £5,000 on that, but as it might be a question whether the cost would be £400,000 or £500,000, they had tendered the additional £1,250. That was the defendants' case, and they did not tender anything whatever in regard to the work of altering done on the other plans.

Cross-examined by Mr. Schreiner, witness said that prior to the letter of January 11, 1897, he was working with the Government, and in December, 1896, he made an elevation plan, which was actually the origin of Scheme A. That plan.

of course, was done in his own time, and had no connection with the other work of the department he was then engaged upon. Witness first made the estimate of costs of Scheme A at £170,000, after he had got out the plans. The question of cost was never raised until payment for the plans was requested. The frontages of the schemes A, B, and D, to Adlerley-street, were 350, 362, and 362 feet respectively. In November, 1899, witness sent in a claim for commission on a million. He did not tell anyone that it would cost a million before this; he was not aware previously that the cost would be so great. He arrived at the sum of £1,000,000 by the ordinary calculations upon which an architect based his estimates.

By Buchanan, J.: If Scheme D had been carried out under witness's supervision, and witness had been paid his 5 per cent., he would still have claimed for commission on C. He might have let A and B go. The C plans were quite fit to get tenders on. The builder could take out his quantities from the plans. Possibly some doors and windows were not shown. They had not got up to that. Some builders did not allow for doors and windows. He could not say that A and B were so completed that tenders could be called upon them.

By Sir Henry Juta: Witness was never given any estimate by the Government. He had to make new elevations for Scheme A. Witness could not have adopted the plans for A, B, or C for the D Scheme; he had to make fresh plans.

By the Court: In each case witness submitted rough sketches to the Engineer-in-Chief, who told him to go on.

William Adamson, one of the plaintiffs, said he entered into partnership with Mr. Ackermann in January, 1897, and worked on scheme A. Before that, preliminary sketches had been made, and were shown to Mr. Brown. Afterwards work was begun on these drawings, which were not made on approval, but in accordance with instructions received. Scheme A was stopped, and work begun on scheme B, but the latter was also stopped, after a meeting of railway officers on April 13, 1897, because the scheme was not considered adequate. They then worked on scheme C until Mr. Price came from England in August, and then, after another meeting of railway officers, scheme C was also stopped. Thereafter they commenced on scheme

D. The drawings for the latter scheme and those for scheme C were both in the same stage of completion. They were advanced enough for tenders to be called if the specifications were drawn up. Schemes A and B were not quite so far advanced. On September 2 a request was made for some payment, and by September 10 they had been paid £1,400. The drawings for the previous schemes could not be used for scheme D. Not a word had been said about scheme D when the £1,400 was paid. No prices were given for the schemes when they started on them. The reference to £400,000 in one of the letters did not emanate from witness's firm at all. Witness thought it arose from some haphazard suggestion of the engineer. The charges for schemes A, B, and C had been made on the assumption that plaintiffs would carry out scheme D, otherwise more would have been charged. Witness would guarantee the estimates of cost made to be correct to within 5 per cent.; at the time they were made, of course. So far as witness knew, no objection was ever taken to these estimates, and their accuracy was never questioned.

Cross-examined: The estimates were written on a piece of paper, and handed to the Chief Engineer (Mr. Brown) about May, 1898. There was no letter written. The instructions came to them by hand from the Engineer-in-Chief, and having the information ready, they just jotted it down for him. Although he had not done so personally, he had heard of instances where architects charged for more than one plan for the one building. Correcting himself, witness said he could remember a recent case where his firm had been paid for more than one plan for the same building, viz., in connection with the South African Breweries. They had never informed the Government that they intended to make separate charges for the different schemes until November, 1899. There was no necessity to do so. In September, 1897, they had simply written asking for payment of £1,800, on account of all the work they had done. The Engineer-in-Chief had written asking if scheme C would cost £400,000, and they had replied that it would cost more than that. That figure was never the plaintiffs' estimate. It was a misnomer to call these plans preliminary

drawings, as they were actually working drawings. Although the doors and windows were not shown in the plan, any architect ought to know by looking at the plans where they were to go in.

Frederick George Green said he was an associate of the Institute of Architects, and was now employed on the new City Hall. He had examined the plans in question, which were further advanced than preliminary sketches. As far as he could see, the plans for the different schemes were designed on separate instructions, and the plans for one scheme could not have been adapted for another. He considered the commission proposed to be made by the plaintiffs for the various plans very reasonable.

Cross-examined: They were working plans, and no further plans would be required. The scheme could be completed from those plans. According to the scale of charges, witness thought the charges for all the plans, and carrying out of Scheme C would be between £40,000 and £50,000.

[By Mr. Justice Maasdorp: He had not gone into the question as to whether there were forty or fifty times as much work on scheme C as on scheme A. They always worked on percentage.]

George Ransome said he was an associate of the Institute of Architects, and had practised in Cape Town for twenty years. He was one of those called in by the Government to report on the plans. He was told not to go upon the percentage.

Mr. Schreiner objected to an architect who had been called in by the Government as an expert in the matter being asked what were the confidential instructions given him. Counsel submitted that, as in the case of a lawyer called upon to give evidence, such a witness could not be forced to divulge his confidential instructions.

[Buchanan, J.: The Courts have not been inclined to extend that privilege. They have refused to do so in one case between a man and his confessor.]

Mr. Schreiner said that if they could go into the instructions given to Mr. Ransome, they must go into the whole question of the communications between the Government and Ransome and those associated with him.

[Hopley, J., thought the witness himself would have objected to answering a question of that sort, but if he has not the nicety to do so, he did not know that there is any law to prevent his answering.]

[Buchanan, J.: I do not think there is any privilege as between architect and client, but I do not see that there is any relevancy in the question. I hold that the evidence is objectionable on the grounds of irrelevancy.]

Continuing, witness said that he valued these plans, but did not do so on a percentage, but on working it out. Scheme C was complete, with the exception of the specifications, and D was in the same position. A and B were not so far advanced. He did not think the plans of the one scheme could be used for the other. He considered the charges made by plaintiffs very reasonable, speaking as a professional man. Looking at it from the basis of the work done, he put the valuation at £12,500 for the whole on all four plans.

Cross-examined: Witness first saw the plans about two years ago, at the time that he saw them along with the late Mr. Greaves and Mr. Alexander. He had not seen them since, nor before then to go into them. In his report at that time he had reported £11,500 as being a fair and reasonable price. That was on consultation with the gentlemen associated with him. His was the highest calculation of the three gentlemen. He then thought £12,500 was a fair and reasonable price, but a figure was agreed upon after discussion to send in to the Government. That figure was about £10,000. He had thought at first that £12,500 was a reasonable figure, but it was probable that he put it at £11,500 after his associates had discussed the matter with him. The report sent in by the late Mr. Greaves said that Mr. Alexander estimated the value of the work at £11,300, Mr. Ransome £11,500, but he (Mr. Greaves) thought £10,000 sufficient. It was, however (the report stated), agreed to put the figure at £11,100, taking into consideration that plaintiffs had lost a large work. In coming to the figure witness did not take into consideration the fact that plaintiffs were losing the construction of scheme D. Witness could not give the values on the different schemes. Witness arrived at £12,500

simply by experience. He estimated the value of the work and labour from his own knowledge. Witness had nothing to do with the estimates. He valued the plans on seeing them. Witness's figure was to purchase the plans entirely, so that if the Government decided to go on with a scheme Ackermann and Adamson had no claim respecting the work.

John F Tully, architect, said he had examined the plans and drawings. In witness's opinion, schemes C and D were completed, excepting in regard to the specifications. The schemes were distinct. Witness considered that the rates charged by plaintiffs were reasonable.

Cross-examined by Mr. Searle: The doors and windows should be put in before tendering. A certain amount of detail work from one scheme could be used for another, but fresh drawings would have to be made. A big work like this could not be approved of on a rough sketch, and witness's practice would be to submit plans until the clients were suited.

By Buchanan, J.: In sending in plans for competition, it was not necessary to send in enlarged plans, such as had been prepared for schemes C and D. The plans would be prepared to a certain scale, and would have to be complete.

Edwin Austin Cooke, architect, said he had seen the plans, and had made estimates of the cost. Witness's figures nearly agreed with those of the plaintiffs. The plans for C were in the same state of advancement as D. C plans were nearly ready for tendering. Witness considered the charges of $\frac{1}{4}$, $\frac{1}{2}$, and $1\frac{1}{2}$ per cent. fair and reasonable.

Charles Henry Smith, architect, gave similar evidence.

This concluded the evidence for the plaintiffs.

Mr. Schreiner called

Thomas Rees Price, General Manager of the Cape Government Railways, who said that during the time that these plans were prepared Sir Charles Elliott was General Manager, and witness was Traffic Manager. Witness was away from the Colony on a foreign tour in January, 1897, and he took the matter of station accommodation as one of the subjects which he investigated during the time he was away. He saw a number of large foreign railway-stations. On his return in July, 1897, witness became

aware of plans having been prepared for the extension of the station. Witness drew up a report, which he sent in on September 4. This was sent to the plaintiffs, and from it scheme D was born. Witness had avoided going into schemes A, B, and C before submitting this report. Witness attended a meeting with the architects in September, and the letter sent to plaintiffs afterwards correctly set forth what occurred at that meeting, and the position which was then arrived at. Plaintiffs sent in the final scheme in May, 1898, and witness approved of that. In principle, scheme D satisfied the reasonable requirements for railway purposes at Cape Town for fifty years, in witness's opinion. The decision witness arrived at, as embodied in the correspondence, was that between C and D, the latter was the practical and working scheme. Witness did not go into the matter of costs. Scheme C covered the Harbour Board buildings and part of the Goods Station, and it involved reclamation from the sea. The Harbour Board buildings were arrested for about twelve months. Witness was consulted as to making room for the Harbour Board in the station buildings, but he advised that this should not be done. The first instructions to the architects were not to go beyond Waterkantstreet. Before the statement of claim, witness was not aware that scheme C was to cost a million. There were no writings to witness's knowledge to show that this was even an instruction.

Cross-examined by Sir Henry Juta: D was carried out in pursuance of witness's advice. Witness had seen a letter written by Mr. Brown to Mr. Elliott, dated the 2nd August, 1898. In this letter approximate estimates were given as to the costs of the different schemes. Scheme C was therein stated to cost between £800,000 and £1,000,000, and scheme D, roughly, £500,000.

Mr. Schreiner contended that this document should not be used. The document was not in the affidavit of discovery.

Buchanan, J., ruled that the witness could be asked if he had seen the letter.

In further cross-examination, witness said that he presumed that the Harbour Board buildings were stopped by the Government. He could not say

whether it was done for the purposes of scheme C.

Re-examined: From the architects' side no information as to the costs of the schemes was given so far as witness knew.

At this point, the evidence of Mr. Vixseboxse, architect, taken on commission for the plaintiffs, was read. He said he considered that the charge of $1\frac{1}{2}$ per cent. was fair and reasonable.

The evidence, for the defence, of Sir Charles Elliott, formerly General Manager of the Cape Government Railways, was also read. Deponent stated that the consent of Parliament was required for any scheme. His understanding was that the remuneration of the plaintiffs should be as set out in the letter of the 11th January.—Sir James Sivewright, former Commissioner of Public Works, examined on commission for the Government, said that plans and various drawings for the station extension were submitted during the period for which he was in office, but none were approved because the money necessary to carry out the work had not been sanctioned by Parliament. The witness's idea was to place the plans in the lobby of the Houses of Parliament for inspection. In the event of one plan being finally selected and approved of by Parliament his idea was to pay plaintiffs for all work done on the new station, but in the event of no plan being accepted he intended that plaintiffs should receive fair and reasonable remuneration for work done by them under the instructions of officials. There were no verbal instructions given by witness except such as were confirmed by letters of which there were records in the office. There were drawings for which no instructions were given.

John Brown, Engineer-in-Chief of the Cape Government Railways, said that Ackermann had been in the employ of the Railway Department previous to 1897. Witness addressed the letter of January 11 to Ackermann. Scheme A was the idea before that. As to the scheme B, there was no letter relating to that, and it might be that he instructed plaintiffs verbally to go on with that scheme. He did not give out the scheme architecturally, and it had nothing to do with engineering. He had never approved of scheme C, which was too big

for his idea. It had a frontage of 640 feet, which was too much. The plaintiffs submitted many sketches and sections, but witness never approved of scheme C. He had, however, approved of scheme D. In June, 1897, he estimated that scheme C would cost £715,000 to carry out, of which £500,000 was for the station itself. Then there would be £100,000 for reclamation, £25,000 for new goods sheds, £10,000 for passenger and goods yards, £10,000 for a bridge at No. 5 crossing, £5,000 for drainage, and 10 per cent. for contingencies. Witness formed a rough estimate of £350,000 for scheme D, and the £5,000 paid was calculated on a basis of $1\frac{1}{2}$ per cent. of that. Schemes B and C were never at any time approved by witness for the Government.

Cross-examined: When the contract was entered into witness had in contemplation scheme A. He gave instructions to Ackermann to prepare scheme A, and Ackermann carried out these instructions. If things had finally stopped in the middle of April witness thought they would have paid plaintiffs for what they had done. If nothing had been adopted they would have been remunerated in some way. If D had not been adopted, then they would have paid for C. It was not in witness's mind that plaintiffs should go on year after year drawing plans which the Government would not adopt, and that they should receive no payment for them.

Sir Henry Juta: Supposing the plaintiffs were kept on preparing plans year after year until, say, 1922, and then some little scheme for £50,000 or £100,000 adopted, is it your idea that these gentlemen were to go on year after year making plans and drawings and receiving no payment for them, except the percentage on the little scheme of £50,000 or it might be £25,000?

Witness: No; they would not have done it.

Further cross-examined, witness said that he personally disapproved of scheme C, and he did not know of anyone who did approve of it. He presumed that the plaintiffs went to work upon it as a result of the decision of the meeting of railway officers held in Cape Town in April, 1897. No question of cost was ever raised on any of the schemes. When Mr. Price came back from Rhodesia he

disapproved of the scheme in the same way as witness had done. Witness thought the architects were called upon to present some scheme of what they proposed to do. Proposals as to where the platforms for passengers and goods were to go he would leave to the plaintiffs, as Mr. Ackermann was a railway architect and engineer. If the plans did not meet with the approval of those who had to manage the traffic they would say so. In August, 1897, no approval had been given of any scheme. The plaintiffs asked for some payment on account, and witness did not then say they could not then get any payment, as none of the plans had been approved of, because he did not think that was the case. Witness adopted the position that none of the plans were approved of, except the one D2b, which was signed by the heads of department.

Re-examined: Witness did not think that the plaintiffs were kept an unreasonable time considering the magnitude of the work, before a decision was come to. Witness could not give authority for payment. He formed a rough estimate for C on the 4th June, 1897, after the architects had been working at the plans. Witness never approved of C, in so far as it provided for the discharge of traffic into Adderley-street. Mr. Clark and the other subordinate officials had no authority to approve of any scheme, or to give instructions for any scheme. They were simply asked to give their advice. Scheme C was considered. Witness knew of no special authority having been given to the architects to prepare the elevations.

By the Court: Witness approved of the D scheme, as meeting the railway requirements. It was witness's view that 1½ per cent. should be paid on the scheme approved of, and not on any of the previous schemes.

Sir Henry Juta asked the witness if he remembered having written a certain letter to the General Manager on the 10th August, 1900, in which the following paragraph occurred: "The large number of schemes submitted is, I think, due to the difference of opinion amongst some of the traffic officers as to the extent of the accommodation necessary, but all work done by Messrs. Ackermann and Adamson was done with the verbal approval, if not desire, of the then Commissioner."

Witness said he recollected having written that.

Sir Henry Juta: And that is correct, Mr. Brown?

Witness: I presume it is.

So I take it that all work done by Ackermann and Adamson was done with the verbal approval of the then Commissioner?—That is my opinion.

Mr. Schreiner then read the letter in question, and handed it in.

Herbert Baker, Fellow of the Royal Institute of British Architects, said he had been in Court during the hearing of the case, and had heard the evidence given. Witness did not think that the plans of C or D were ready to call for tenders. They were small scales. If tenders were called on 16 or 20 scales, it would lead to hopeless confusion. Scheme C did not show certain windows, and staircases were not fully worked out. On the whole, witness did not consider that the plans C and D had gone beyond the stage of preliminary drawings. They were elaborate preliminary drawings, rather well got up, to be shown to the committee. Witness referred to plans, elevations, and sections.

Cross-examined by Sir Henry Juta: The scheme C was as far advanced as D.

In your opinion, do you think something is payable on C?—In my opinion, that depends upon whether the architects were warranted in carrying on the drawings to that extent.

In reply to Mr. Schreiner, witness said that if C scheme were authorised, ¼ per cent. on a million would, in his opinion, be a fair amount to pay to the architects. Witness would not put in anything for the other two schemes.

This concluded the evidence.

Sir H. Juta, K.C. (for plaintiffs): In January, 1897, defendants said that they were prepared to pay plaintiffs 2½ per cent. on the estimated cost of the work for preparing certain necessary drawings in connection with a contemplated enlargement of Cape Town Railway Station. Owing to defendant's own action, this contract has never been carried out, but the question now is whether we are not in any case entitled to payment for the work done by us at defendant's special instance and request? Defendants now take up the position that we must go on making plans till we make one of which they approve. I suppose that they rely upon the doctrine that if you employ an architect he cannot

claim payment until his plans are approved of. But surely this contract does not oblige us to go on working indefinitely on approval. The doctrine I have mentioned only applies to rough preliminary work, and not to highly elaborate work like this. (*Hudson on Building Contracts* (p.p. 71, 79-93). *De Witt v. Cape Canning Co.* (11 S.C.R. 116). That was a case of competition. In all these schemes certain preliminary rough sketches have to be made, and it is only when the general design, as seen from these, has been approved of, that elaborate drawings and models are prepared. This was a question of submitting plans that had previously been done, and the plans approved of, and I submit that we are at least entitled to a *quantum meruit*. Sir J. Sievright said that if the plans had been laid before Parliament we should have been paid.

[Maasdorp, J.: Then you would have got nothing for what was not put before Parliament?]

Ackermann said that in any case he would expect to be paid for scheme C. Elliot admits that the plans for this scheme were completed, but it was abandoned on account of the expense. He said that none of these plans were either agreed to or disagreed with. Nothing has been submitted to Parliament, and therefore on Sir J. Sievright's own showing we are entitled to something. Our plans were never disapproved of, and the engineer-in-chief says that our work was done with the approval of Government. I am quite content to rest on that statement, and in the face of it Government cannot now refuse to pay us for plans. I admit that we cannot claim the full 2½ per cent., but we are entitled to a *quantum meruit*.

[Maasdorp, J.: Then you want damages for breach of contract?]

Not exactly, but we say we are entitled to a *quantum meruit*. The Government engineer (Brown) had a definite scheme in his mind. This was no question of preliminary work, or of drawings on approval. The question is, were these drawings necessary or not? We are not responsible for the changes of mind of Government officials.

Then as to scheme C: Elliot said that the plans were completed; but how could they be completed if they were accepted

only on probation? He does not take up the position that the plans were never approved. Again, on August 17, when payment was asked for, there was no scheme in existence, and when the Government were asked as to details, they said that they went on the designs prepared up to date. How then could the payment made in September be in consideration of D, which was not yet in existence. Government will not pay in advance. To come to May, 1898, neither Sir J. Sievright nor Elliot ever threw the whole thing out then. And when we sent in our account, they did not say that we were entitled to payment for only one plan. If, then, we are entitled to payment, to what amount are we entitled? C and D are much on the same lines, and if they thought 1½ per cent. a fair remuneration for C, why dispute it in the case of D? I submit that we are entitled either to a *quantum meruit*, or to 1½ per cent. for D.

Mr. Schreiner, K.C. (for defendants): Plaintiff's case is based on the letter of January, 1897. That letter embodies a contract.

[Buchanan, J.: They do not say they have done the work.]

No, but on January 14, they had commenced the preliminary work. Their declaration shows that they did not do all in their power to secure the approval of the Government for their plans. It was the duty of these architects to bring forward a scheme of which the Government could approve. *De Witt v. Cape Canning Co.* It was the architects' business to find out what the Government wanted. The idea started with scheme A. About April that was given up, and then came scheme B.

[Maasdorp, J.: Suppose a man orders plans for a villa, and then changes his mind, could the architect claim payment for his plans?]

He would have an action for a *quantum meruit*. *Prickett v. Badger* (26, L.J.C.P., 33), but if general language only were used, and the employer did not know quite what he wanted, it might well be that the architect would be entitled to fees only for the plan finally adopted. In this case, the approval of Parliament was not a condition precedent to the adoption of these plans; only the approval of Government was required. See the letter D. 2, A, of June 3, 1898. Nobody has ever taken up the position that no remuneration

ation was due until Parliament approved. See the letter of January 15, 1900. In November, 1899, we hear the first of this inflated claim. Nobody ever suggested that architects should be kept "on the string" more than a reasonable time. Plaintiffs wanted 5 per cent. on an approved plan, prepared according to contract, and yet on D they claim only a *quantum meruit*. From Ransome's evidence it is clear that the block sum paid by Government of £5,000 was in satisfaction of all claims for compensation. The evidence as to D does not support the claim of plaintiffs. Their case is that no plans were accepted, but that D was approved. But where is the proof of this approval. As to C, we derived no benefit from it; it was unworkable.

[Hopley, J.: Did not Mr. Price keep the architects working all this time, and is it not reasonable that they should be paid for their work?]

Not if we paid them on one of the plans; if we merely kept them off, and adopted no plan at all, of course, they would have a claim for a *quantum meruit*. *Prickett v. Badger* (26, L.J.C.P., 33).

[Hopley, J.: Suppose the Government had reverted to A, to what would they be entitled?]

To 5 per cent. on the estimated cost of A.

[Hopley, J.: To nothing else?]

No, that is part of an architect's risk.

[Buchanan, J.: Then if nothing is approved he gets nothing?]

Oh, yes; he can recover for breach of contract.

Cur. Adv. Vult.

Postea, June 13th.

Buchanan, J.: In this action the plaintiffs, who describe themselves as civil engineers and architects, sue the Government for work and labour done in connection with preparing certain drawings and designs for a new railway-station. It would appear that the Government, proposing to have an extension of the Cape Town Railway-station, and being unable to prepare plans from want of staff in their own department, had the letter of January 11, 1897, written to the plaintiffs, in which they say: "Cape Town Station Extension and Alterations.—It having been decided to proceed with the above at an early date, I have the honour to offer you the work of preparing the necessary drawings, and of

subsequently superintending their erection, on the usual terms, viz., 2½ per cent. on the estimate for the drawings, and the same for supervision and construction." This offer was at once accepted by the plaintiff Ackermann, who shortly afterwards took into partnership the other plaintiff, and these two gentlemen worked together under this appointment. The original idea which was in the contemplation of the parties when this letter was written found form in preliminary plans for certain alterations and extensions which would cost about £170,000 which has been called scheme A. While the plaintiffs were employed on the work of preparing plans and designs for this scheme, the Government, or the Government officials seem to have altered their minds. The plaintiff were thereupon told to stop the work in progress and to submit a totally new scheme. This found expression in the design called scheme B, and here again, after a certain amount of work had been done, the plaintiffs were ordered to stay further progress. The Government seemed to be still unsettled as to what they wanted, and on the suggestion being thrown out by, it is said, the then Commissioner, that the future wants for fifty years ahead should be borne in mind when alterations and extensions were being made, and a meeting of traffic managers having been held in Cape Town whose deliberations were communicated to the plaintiffs, the plaintiffs stopped B, and set to work on what has been called scheme C. This was a gigantic scheme, doubling the frontage, crossing streets, causing the stoppage of work on and alteration to other buildings, pulling down the Harbour Board building, interfering with the goods station, and necessitating the reclamation of further land from the sea, etc. Mr. Price, the present General Manager of Railways, was away from the Colony at the time, but on his return in August of the same year, he disapproved of this scheme, and put definitely on paper what he considered were the requirements of the Government in connection with the Cape Town Station alterations and extension. These specifications were approved of by the Engineer-in-Chief of the Government, and upon this definite statement, for the first time made in writing, of what was required, the plaintiffs prepared what is now called

scheme D. The plans and designs for this scheme, which took a considerable time in preparation, were submitted, and after alterations the plan which has been called D2b was approved by the Traffic Manager and the other Government officials as meeting their requirements. The original contract contemplated that the plaintiffs should complete the necessary drawings, for which they should get 2½ per cent., and after completing the same, supervise the erection of the buildings, for which they were to get another 2½ per cent. Had this been done on scheme D, it is quite possible the plaintiffs might have been satisfied to let a good deal of their previous work go—in fact, Mr. Ackermann said they would have been prepared to let at any rate schemes A and B go, but not C, had scheme D been carried out, and they had received their 5 per cent. However, owing to a change of Commissioners, and other circumstances, the whole project was stopped. Nothing further has been done, and as the plaintiffs had then performed a considerable amount of work, and were not required to complete the drawings of any one of the schemes, and would not be allowed the supervision of the erection of the buildings, they sent in an account, which is in fact a claim for a *quantum meruit*. In this account they claim payment for work and labour done on scheme A at the rate of ¼ per cent. on its estimated cost, viz., £435; on scheme B ½ per cent. on the estimate, £1,430; and on scheme C the sum of £12,500, being at the rate of 1¼ per cent. on the estimated cost of the scheme. On scheme D they also claimed at the rate of 1¼ per cent. on the estimated cost. As to scheme D, the Government do not dispute that the plaintiffs are entitled to be paid, and they tender the amount which the plaintiffs claim, viz., 1¼ per cent., or £6,250, on the estimated expenditure for scheme D. They have already paid £5,000 of that amount, and they tender the balance of £1,250. There are one or two smaller items for other work done claimed in the declaration, and not in dispute, and as a matter of form judgment will be given for these items. The Government, in making this tender of £1,250, deny that they are liable to compensate the architects for anything done on the previous schemes, and rely mainly upon the decision of this

Court in the case of *De Witt v. The Cape Canning Company*. The principle laid down in that case, we do not consider ourselves at liberty to depart from, namely that in the absence of any special agreement an architect employed to design a building is not entitled to remuneration for his plans unless the employer has approved of the same or in some way utilised them. Now, no doubt in this case the Government did not accept any of the previous plans, nor have they yet but from their conduct and from the statements made by their own officers, I think it must be taken as admitted that there was, at the least an implied contract that the plaintiffs would be paid for the work they were doing. It was not as though they were asked to design one building, the plans for which, after alterations, were approved of. On the contrary, they were asked to make two or three, if not four, distinct schemes, and they performed the work required of them, and there was no objection to the character of the work done. Indeed the Government wished to have the plans prepared for the different alternative schemes submitted to Parliament for discussion. This is not the usual case of an architect being asked to prepare a design which was afterwards rejected, as unsuitable. We are of opinion, under the special circumstances disclosed in this case, that the plaintiffs are entitled to some compensation for the work they have done. It is true, that the tender of the Government was made on the supposition that the previous work should not be paid for, but it is also an admission by them that the work done on scheme D is worth the amount which they tender. I myself would have preferred looking at the whole case as one of a *quantum meruit*, and decide the case upon that ground, but the Government officials both in their evidence and their plea say they will pay the plaintiffs' claim of £6,250 on scheme D, as the work had been done. That therefore leaves the question open for decision whether or not the plaintiffs are entitled to compensation for their previous work. We are unanimously of opinion that the plaintiffs are, under the special circumstances of the case, not brought within the rule laid down in *De Witt v. The Cape Canning Company*, and that the circumstances of this case justify them in asking for compensation for the

work they had done on the other schemes. The question then arises, to what extent are they so entitled to be paid? There is some difference of opinion in Court as to what amount should be arrived at on the basis of a *quantum meruit*. I think that a reasonable remuneration for all the work that has been done by the plaintiffs may be taken at from £8,000 to £8,500. I have arrived at that amount in several ways. I have taken the estimate at a percentage, and I have also taken the sum, which was assessed by the architects called in by the Government to value the work done by the plaintiffs. In this estimate made by the architects they all of them seem to have taken into consideration that the plaintiffs should be compensated for the loss of reputation which would have accrued to them if they had carried out the erection of noble buildings like Cape Town Railway Station. Even Mr. Baker, one of the last witnesses called, seemed to be influenced by that consideration. It is a claim for work and labour done as a *quantum meruit*. Making due allowance for the other items which the Government admit, and making a certain deduction for consequential damages for loss of increased reputation. I think a substantial reduction ought to be made on the estimate of from £10,000 to £11,000, made by the architects called for by the Government. This is one way of looking at the case. Another way is, I have taken $\frac{1}{4}$ per cent. as the remuneration for scheme A and scheme B, and at the same rate for what was originally estimated as the cost of scheme C, namely, £400,000, and that comes to something like £3,000. My brethren do not go upon the same principle, but I am rather between the two. The judgment we have agreed upon is that the work done should be estimated at £8,500, and judgment will be given for that amount, less £5,000 paid on account. There is an additional amount which does not enter into the *quantum meruit*, viz., that of £153, and the Court will, therefore give judgment for the plaintiffs for £3,500. and £153, with costs.

Maasdorp, J., said it seemed to him that the legal liability of the defendants in this case could almost have been decided upon what was admitted upon the pleadings. There were certain admissions made by the defendants in their plea which he thought would, un-

der the authorities which had been cited in that case, establish the liability of the defendants. The defendants said in their plea that scheme A was the scheme in contemplation in January, 1897, when the agreement was entered into; that it was estimated to cost £170,000; that plans and diagrams were made, but that the scheme was abandoned, and plaintiffs were instructed to cease working on the plans, which were never completed or approved. These were the admissions made by paragraph 2 of the defendants' plea, and it seemed to him that what it amounted to was this: that it had been agreed that a building of certain dimensions and of a certain character should be erected, that the defendants engaged the plaintiffs to make the necessary plans, and that upon completion of these plans the plaintiffs should receive for the drawings $2\frac{1}{2}$ per cent. of the estimated cost of the work and $2\frac{1}{2}$ per cent. for supervision. It was quite clear upon the authorities cited that when such contract had been entered into and the owner of the property afterwards decided to abandon the work simply for his own reasons, and did not intend to proceed any further, then some compensation must be paid to the architects for their work. It was a case in which the plans had been disapproved, but not by any fault of the architects. The schemes had simply been abandoned, and, upon the authorities in such a case the architects would be entitled to some compensation. What they would legally be entitled to was not a question he need now enter into. When scheme A was abandoned it might be said that the contract to that extent came to an end, but he held that the contract for the other schemes was still based upon the letter of January 11, 1897, and therefore these schemes came into the same position, as far as the legal liability of the parties was concerned, as if they had been done under the first contract. There was a principle laid down in the authorities that an employer should get some value for his money, and it seemed to him that in this case the defendants did some value, because as the scheme proceeded they discovered from an examination of the different plans that they wanted further accommodation. Sir James Sivewright had said that he had in con-

temptation that if the buildings were not proceeded with, some compensation should properly be granted to the plaintiffs, and that was exactly the view he took upon the authorities. He held that the least the plaintiffs could claim would be remuneration for their work. He did not say that was all they could claim, because the authorities went further, and they might perhaps be entitled to further damages. He considered that the estimate made by the plaintiffs was a reasonable one, and that they were entitled to judgment against the defendants for that amount.

Hopley, J., said that schemes A and B seemed to be on the basis of work ordered, which was abandoned not through any fault of the architects; but in regard to scheme C, it seemed to him to stand on a different footing, because no authorisation for it was ever given. No Government official ever said, "Go and build us a thing like scheme C." The Government said that they wanted something which would suffice for the wants of the country for many years to come, and the architects then set about drawing up this scheme out of their own heads. That scheme was condemned by Mr. Price on his return to this country, and then, on the more workable suggestions made by him, scheme D was eventually approved. In his lordship's opinion, all the plaintiffs were entitled to was the amount tendered by the Government and a quarter per cent. of the estimated costs of schemes A and B, but nothing at all on scheme C.

Judgment was entered for the plaintiffs for £3,500, as payment for the work on all the schemes (exclusive of the £5,000 paid on account), and also for the £153, as tendered on items not in dispute, with costs, the plaintiffs to give up to defendants the plans, as tendered in the replication.

[Plaintiffs' Attorneys: Van Zyl and Buissinne; Defendant's Attorneys: Reid and Nephew.]

ADMISSIONS.

(1902.
(June 12th.

Mr. Benjamin applied for the admission as an attorney, notary, and conveyancer of Francis John Hildebert Landsberg.

Granted, applicant taking the usual oaths.

On the motion of Mr. Close, Llewellyn John Pritchard van Breda was admitted as an attorney and notary. Applicant took the usual oaths.

GENERAL MOTIONS.

COLONIAL GOVERNMENT V.) 1902.
HOLT AND HOLT AND (June 12th.
OTHERS.

Possession — Delivery — Bills of lading — Attachment.

By agreement between the Government and certain railway contractors the former advanced to the latter large sums of money against certain railway sleepers bought by the contractors in England, the bills of lading for the conveyance of which to this Colony were to the order of and indorsed by the shippers and given to the Government as security. On arrival of the sleepers the bills of lading were given to the contractors' agent for the purpose of receiving delivery and landing the sleepers. The agent handed them for safe keeping to a warehouseman, who afterwards, by order of the contractors, delivered them to the Government.

Held, that even if the Government lost its right of pledge while the goods were in the possession of the agent or of the warehouseman, the right revived upon the goods being redelivered to the Government, and that an attachment by other executive creditors after such redelivery cannot prevail against the prior pledge.

This was an application to set aside the attachment by the Deputy Sheriff of Port Elizabeth of 23,000 creosoted sleepers, now lying at Zwartkops. The sleep-

ers were part of a cargo of 59,000 shipped at Ardrossan by the ship Theodore on behalf of Arnold F. Hills, who was the contractor for the construction of certain lines of railway in the Cape Colony. These sleepers had been attached by reason of writs of execution taken out by three respondent firms. The application to have the attachment set aside was based on the ground that the Government had a lien on the sleepers, the Agent-General in London having advanced £14,127 to the contractor against the bills of lading.

The affidavit of Arthur May Tippet, Chief Resident Engineer for the C.G.R., stated that at present there were 23,000 sleepers in the hands of the Deputy Sheriff, this being part of a lot of 59,000 shipped by Arnold F. Hills, under contract with the Government. These were shipped under seven bills of lading, which were handed to the Agent-General in London as security for money advanced by the Government. The bills of lading were received in the Colony, and handed over to one Captain James Smith for the purpose of clearing and landing the sleepers, a portion of which was consigned to East London and the remainder to Port Elizabeth. These bills were not obtained from Smith by the Government until May 22, and when they were returned they bore an endorsement which was not upon them when given to Smith. This endorsement referred to the East London sleepers, and read: "Delivered at Algoa Bay, James Smith, for Grand Junction Railways."

Thomas Rees Price, General Manager of the C.G. Railways, said that the Government from time to time made advances against the shipping documents in London. The Grand Junction Railways (Limited) was a joint-stock company, and the Government had no contract with that company. The sleepers attached were on Government ground.

For the respondents, John Yeoman, partner in the firm of Phillip Brothers, in an affidavit, said that on account of the shortness of the time he had been unable to procure evidence in order to fully reply to the allegations of the Government officials. At the time of the attachment the ship and sleepers were apparently at the disposition of the Grand Junction Railways.

Arthur Waite, partner in the firm of Hansen and Schraeder, stated that Captain Smith was the recognised agent of the Grand Junction Railways, and that he (Waite) had heard that Smith made application to Tippet for room to store the sleepers, and that such application was refused. The ship was consigned to the Grand Junction Railways, and deponent was led to believe that the sleepers were the property of the Grand Junction Railways. A certain number of sleepers were stocked and stored in the name of the Grand Junction Railways in the firm's yard at New Brighton, and portion of these had been offered for sale, and had been bid for by Tippet on behalf of the Government. On the 24th April, deponent first knew of the claim of the Government. On that day a letter was written by the Government requesting the firm to hand over the sleepers, which they said they (the Government) had paid for.

In an answering affidavit, Tippet denied that application had been made to him by Smith, as alleged. If the sleepers were stored in the yard of Hansen and Schraeder, they should have been stored in the name of the Government, or subject to the lien of the Government.

Mr. Schreiner, K.C. (for applicants): We must look at the terms of the contract in consideration of which the Government made advances. These were made under Act 19 of 1900. This case has to do only with the Oudtshoorn and Mossel Bay Railway from the King William's Town branch. £14,000 was advanced on these sleepers on the guarantee of Hansen and Schraeder. The Grand Junction Railways had not entered into a bill of lading, and in this transaction we know nothing of Hills, but only the Grand Junction Railways. When these sleepers were first attached, they were on Government ground, and that is really our case. When once we got the bills of lading into our possession, we had a good title to the sleepers, and it did not matter that we parted with the bills of lading in order to get delivery of our property. *Carrer on Carriage by Sea* (Sec. 501). Some of the sleepers were attached on the 7th, and others on the 16th of May.

[Buchanan, J.: Bills of lading are only orders on the ship to hand over the goods to you.]

"CAPE TIMES" LAW REPORTS.

But see *Meyerstein v. Barber* (2, C.P. 38-661, and 4, H.L., 317), cited by *Curver*

[Maasdorp, J.: Suppose the bill of lading authorises delivery to some third person?]

The holder of the bill is always entitled to say that it is symbolical of title. Now it is said that although we held these bills, the creditors of the Grand Junction Railways can come upon Government ground and attach these sleepers. *Payn v. Yates* (9, S.C.R., 494, and 2, Sbeil, 384). This case was quite on all fours with the present.

Sir H. Juta, K.C. (for the respondents): It is common cause that symbolical possession is done away with by real possession. There was real delivery to Smith, and therefore the bills of lading are dead. These sleepers were meant for the Grand Junction Railway, and therefore had to go into the contractor's yard.

[De Villiers, C.J.: Has not the Government a lien on these goods if they were in its possession?]

Not unless it retains possession. The Government was in the position of a pledgee, and if a pledgee once parts with his pledge, except for a temporary purpose, his lien is gone. The first question, then, is whether the Government has not lost its lien. There is a further question whether the pledgee's lien can revive if once the goods are parted with. Smith is the recognised agent of the Grand Junction Railways, and as such agent stored the sleepers on Government ground. The Government did not claim these sleepers till April, and can it be believed that it was only after these goods had been lying on Hansen and Schrader's ground for months that the Government awakened to the fact that they were Government property?

[De Villiers, C.J.: Who paid for these sleepers?]

Government paid nine-tenths.

[De Villiers, C.J.: Then could not the Government resume possession of them?]

No; if you once part with a pledge you cannot resume possession. Here the goods were consigned to the Grand Junction Railways, and were delivered to them. Smith stored the goods on their behalf. Government therefore had lost possession. If it is the law that a pledgee revives his lien by recovering possession of his pledge, that, of course, is a very different matter.

[Buchanan, J.: How did the Government acquire property in these goods?]

They never had any property in them, they only had possession, and if a pledgee parts with possession he loses his lien.

Mr. Schreiner was not called upon in reply.

De Villiers, C.J.: In this case the money was advanced in England by the Colonial Government for the payment of these sleepers, and the Government obtained as security the shipping documents, including the bills of lading. Now clearly, so long as the Government had possession of the sleepers, whether the possession was actual or constructive, they had a legal pledge on these goods. When the goods arrived here, on behalf of the Government, the bills of lading were handed over to Smith, and Smith in turn gave these goods for safekeeping to Hansen and Schraeder. It is not necessary now to decide whether the Government lost its lien, so long as the goods were in possession either of Smith or Hansen and Schraeder. On that point a great deal would depend upon what was the actual position of Smith. If Smith was not the agent of the Government, and was the agent only of the Grand Junction Railways, then there might be some force in the argument that, so long as these sleepers were in the possession of Smith or of Schraeder, the Government ceased to have the lien, but I am clearly of opinion that when afterwards these goods again came into the possession of the Government, the Government's rights as pledged would revive. Their possession revived, consequently the lien or pledge which had been granted under the original contract would be revived, and the Government could object to the attachment of these goods at the suit of a third party. After the Government had obtained possession of these sleepers, these goods were attached by the respondents, and in my opinion, the attachment cannot be sustained, and the application to set it aside must be allowed, with costs.

Their lordships concurred.

[Applicant's Attorneys: Reid and Nephew; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

PRICE V. NORMAN.

Sir Henry Juta, K.C., appeared for the applicant in this matter, which was for the cancellation of a lease, on the ground that one of its conditions had been broken by respondent. A consent paper had been signed, and counsel now asked for judgment as prayed, subject to the consent paper.

Mr. Schreiner, K.C., who appeared for the respondent, said that his instructions did not go beyond consenting to judgment in terms of the consent paper.

Under the circumstances, the Court ordered the matter to stand over.

PROVISIONAL ROLL.

S. A. MILLING COMPANY { 1902.
V. GRAND JUNCTION { June 12th.
RAILWAYS.

This application, to have the provisional order for the sequestration of defendant's estate made final, was allowed, by consent, to stand over until July 12.

In consequence of this postponement, seven provisional and five illiquid cases, in which the Grand Junction Railways were the defendants, were ordered to stand over until July 12.

VAN DER BYL V. HAMED.

Mr. Hull moved that the provisional order for the sequestration of defendant's estate be made final.

Order granted as prayed.

ZEEDERBERG V. LOUIS AND MARY WEINTROB.

Mr. Benjamin asked that this matter be allowed to stand over until July 12, as it was possible that a settlement would be arrived at before then.

Postponement allowed.

BELL V. WEST.

Mr. Hull moved for provisional sentence for £250, due on a mortgage bond, with interest thereon from due date; also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted, and the property declared executable.

LOVETT V. PONSONBY.

Mr. Russell moved for provisional sentence for £150, due on a mortgage bond, with interest, and also that the property specially hypothecated be declared executable. The bond had become payable by reason of three months' notice given.

Provisional sentence granted, and the property declared executable.

SLABBERT V. SLABBERT.

Mr. Buchanan asked that this matter be allowed to stand over until July 12, owing to the non-return of the service.

Postponement granted.

LAWRENCE AND CO. V. NIAY.

Mr. Buchanan moved that the provisional order for the sequestration of defendant's estate be made final.

Provisional order made final.

COLONIAL GOVERNMENT V. LEWIS.

Mr. McGregor moved that the provisional order for the sequestration of defendant's estate be made final.

Provisional order made final.

MASTER V. THE EXECUTORS OF THE ESTATE OF HUDSON.

Mr. McGregor moved that the usual order be made calling upon the respondents to file accounts in the above estate.

Usual order granted.

COLONIAL GOVERNMENT V. POTGIETER.

Mr. McGregor moved for provisional sentence for £242 8s. on a mortgage bond, with interest, and also that the property specially hypothecated be declared executable. The bond had become payable by reason of the non-payment of interest. Mr. McGregor pointed out that in this and the two following applications leave had been given by the Court to sue by edictal citation, and that had been done. The edict had been published in full, but not any specified copy of the bond.

The Chief Justice said that it appeared that the substance of the bond had been fully set out.

Order granted as prayed.

COLONIAL GOVERNMENT V. VENTER.

Mr. McGregor moved for provisional sentence for £276, with interest, due on a mortgage bond, and also that the property specially hypothecated be declared executable.

Provisional sentence as prayed, and property declared executable.

COLONIAL GOVERNMENT V. MARITZ.

Mr. McGregor moved for provisional sentence for £114 8s., with interest, due on a mortgage bond, and also that the property specially hypothecated be declared executable.

Provisional sentence as prayed, and property declared executable.

VAN HEERDEN V. VAN EEDEN.

Mr. Langenhoven appeared in this matter, but as an amendment of the service was required, the matter was ordered to stand over.

ESTATE OF DE WET V. BOHM AND CO.

Mr. De Waal moved for provisional sentence for £4,250, due in terms of a broker's note in connection with the sale of certain property in Bree-street, Cape Town. Under this note, defendants undertook to purchase the property for £10,250, £4,250 of which was to be paid on May 31, and bond for £6,000 passed for the remainder.

Provisional sentence as prayed.

W. MCINTYRE V. C. MCINTYRE.

Mr. Russell moved for provisional sentence for £40 upon an I.O.U., less the sum of £16 12s. 4d. paid on account.

Provisional sentence as prayed.

OHLSSON'S CAPE BREWERIES V. LOUIS AND MARY WEINTROB.

Mr. Upington moved for provisional sentence upon five mortgage bonds for a total sum of £3,060.

The defendant Louis Weintrob appeared in person, and asked that the matter be postponed for a month, by which time he expected to be able to pay all he owed.

The Court granted provisional sentence, but with a stay of execution for one month.

ILLIQUID ROLL.

**OHLSSON'S CAPE BREWERIES (1902.
V. WEINTROB.) June 13th**

Mr. Upington moved for judgment, under Rule 329d, for £163 19s. 10d., being money advanced to pay premiums on policies, licenses, etc., and also for £80 7s. 6d., for goods sold and delivered.

Defendant appeared in person, and asked that the matter be postponed for a month.

The Court ordered the postponement of the matter until July 12.

CAPE TIMES LIMITED V. BUCHNER.

Mr. P. S. Jones moved for judgment, under Rule 319, in default of plea, for £74 16s. for advertising. Counsel stated that the matter had been before the Court on May 29, when, on the application of the plaintiff, defendant Buchner, who appeared in person and denied that he was liable for the debt, it was ordered to stand over until June 12.

Defendant again appeared in person, and repeated his statement that the plaintiffs, on the dissolution of his partnership with one Medlicott, had agreed to release defendant from liability, and accept Medlicott as solely responsible for the debts of the firm.

Mr. Jones read the affidavit of F. L. St. Leger, general manager of the plaintiff company, in which deponent said that he was the only person who could, on behalf of the plaintiffs, have made such an agreement as that alleged by defendant, and he denied that he had ever made such an agreement.

The Court granted judgment as prayed, but with stay of execution for one month.

TOWN COUNCIL V. SCOTT.

Mr. Schreiner, K.C., moved for judgment for £20 11s. 6d., for rates, including water rates.

Judgment as prayed.

ROBERTSON AND CO. V. COCHRANE AND CHERRY.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £352 11s. 6d., for goods sold and delivered, with interest and costs of suit, less £150 paid on account.

Judgment granted as prayed.

ARDBERNE AND CO. V. HENRY WHITE.

Mr. M. Bisset moved for judgment, under Rule 329d, for £227 10s. 9d., for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Judgment granted as prayed.

**BURNS V. DE VRIES AND CO. { 1902.
June 13th.**

**Landlord and tenant—Alterations
of premises—Occupation.**

This was an action brought by Alfred L. Burns, carrying on business as a tailor in Cape Town, against B. A. de Vries and Co. (Limited) to recover the sum of £700, which plaintiff alleged he had sustained as damages by reason of a breach of contract on the part of the defendants in failing to give him possession of certain premises situated in Plein-street.

The declaration stated that the defendants agreed to let plaintiff a portion of No. 23, Plein-street for a term of three years. Plaintiff was at the time occupying part of the premises, and he alleged that defendants contracted to let him the place, altered and improved according to certain plans, at a rental of £40 a month. Defendants said that the alterations were estimated to take a month or six weeks, the increased rental to take effect from the completion. The plaintiff alleged that the defendants had failed to make any alterations within a reasonable time or any time. He alleged that he had ordered stock for the premises, and had been unable to use it. He claimed £700, as damages sustained by reason of the alleged breach of contract. In the plea, the defendants alleged that on the 27th August, 1901, plaintiff was their tenant, and on that date they gave him legal notice to leave, being desirous of making alterations. On the 30th September, they agreed to let him the shop altered and improved. Defendants stated in writing that the alterations would be completed, if possible, by the new year. It had not been possible for them to complete the alterations, but they were ready and willing to carry out the contract on the completion of the alterations.

Mr. Searle, K.C. (with him Mr. Alexander), for plaintiff; Sir H. Juta, K.C.

(with him Mr. Buchanan) for defendant.

Alfred L. Burns, the plaintiff, said he had been in the premises in question for three years and three days. He paid a rent of £12 a month. In August last the defendants gave him three months' notice. It was a monthly tenancy subject to three months' notice. De Vries and Co. wrote a letter on the 28th August, in which they gave notice and in which they said they were going to enlarge part of the shop occupied by witness, and asked if he would make an offer. In September witness wrote to De Vries asking if he could remain a month longer. De Vries told witness he had sold the property to the Civil Service Supply Company. Witness afterwards saw Mr. Noorden, who showed him a plan similar to that produced. The alterations were to consist of the substitution of a modern shop front window, the enlarging of the shop by knocking down a wall, and the lowering of the floor. Noorden told witness that it would take from a month to six weeks to complete the alterations. It was arranged that the rent was to be £40 for the shop, and a workroom, and witness was to have a three years' tenancy. Mr. Noorden gave witness a letter in which he confirmed the arrangement verbally made with witness, and agreed on behalf of the company to let witness the premises for a term of three years, altered and improved according to plan, the improvements to be effected before the new year if possible, and the increased rental to date from the completion of the alterations, but not earlier than the 1st December. Witness wrote on the 17th September asking why the alterations were not being proceeded with. On the 1st January, he saw Noorden, who said that the alterations would be commenced "as soon as the holidays are settled." Witness had ordered hosiery and woollen goods from England, and had instructed people in England to engage two men. On the 25th January witness wrote to Noorden, pointing out the loss which would accrue if he were not given possession of the premises, improved as per contract, by the 1st March. It was originally agreed that, if not done before the holidays, the alterations would be started immediately after Christmas, and

that witness would have possession on the 1st March. Witness countermanded the orders for some of the goods, and cancelled the engagement of assistants. Some of the goods arrived, but witness could do nothing with them. On the 10th March witness's attorney wrote to the Civil Service Company, and a letter was received from the secretary of the company, stating that the letter was apparently intended for De Vries. It was afterwards pointed out in a letter written on behalf of Noorden (the secretary of the company) that Noorden was concerned in the matter, as secretary for De Vries and Co. Witness's business had suffered considerably. The goods had to be received in the small shop, with the result that the room was taken up to a great extent by the goods. Witness left the premises on the 5th May. Alterations were then commenced, but on a different plan to that originally shown to witness. Witness gave up the key on the 7th May. On the 1st May they gave witness fourteen days' notice to vacate, so that the alterations should be proceeded with. Witness was anxious to have the alterations done, and removed his stock in four days, giving up the key three days later. The premises, he afterwards found, were being used as an office by the company. Witness had always been willing to perform the contract. A lease had been submitted to him by De Vries, but witness objected to this, as it stipulated that he should pay the increased rental of £40 from the 1st May. Witness claimed damages. He claimed for loss of profit, estimated at 30 per cent., for expenses of storing the goods, and for other expenses. Four empty cases belonging to witness were placed in a lumber-room belonging to defendants without witness's knowledge. Witness did not engage to rent a room from the defendants.

Anthony M. de Witt, architect, gave evidence as to the plans.

Mrs. Burns, wife of the plaintiff, was called, and gave evidence. She said that obstruction was caused in the shop by the new goods arriving. The goods ordered for sale in the altered shop had deteriorated in value, on account of the season for such goods having passed.

Ernest Manuel Henochsberg, general importer, said that goods landed here could not be sold to wholesale merchants

at landed price. There would have to be from 30 to 50 per cent. reduction.

Walter McLaghlan said he had seen the plaintiff's shop after the hosiery arrived. Plaintiff had no room for cutting. The woollen goods had deteriorated, owing to being moved about. March was the autumn season, and was a good month in the trade. These were autumn goods. They would not do for next autumn; the fashions changed.

James Henderson Forrester said he had been the manager of Markham's tailoring department for five years. He had gone over Mr. Burns's stock on May 1. The stock was overcrowded, the fixtures being full, and the goods stacked on the floor. There was no place where the stock could be displayed. There were about £400 worth of woollens. The depreciation on such stock would be 40 per cent. The goods looked rather knocked about. After March and April the season would be past, and there would be the risk of not being able to dispose of the goods. Fancy goods would not be suitable for next year, and the bulk of this stock consisted of fancy goods. Witness had been a tailor for 26 years, and would say it was impossible to carry on business in a shop crowded like that.

Cross-examined: He saw the goods in the old premises, but could not say how long the goods had been there.

Harry B. Bamford said the cost of the gentlemen's outfitting goods in question was about £250. If an out-and-out sale had to be effected, it was improbable that any wholesale people or anybody else would buy, as the goods were marked with Burns's name. That had been specially done in England for Mr. Burns. If it were not for Mr. Burns's name on the goods, the depreciation would be very little. If kept until next season, a lot of the goods would be worthless. The depreciation then would be about 50 per cent., taking into consideration cost of storage, loss of interest on money, and the fact that some of the stuff would be sold for very little, or not saleable at all.

Cross-examined: The goods would not deteriorate in fifteen days.

Moses L. Levenstein deposed that in March last he was in the employ of Mr. Burns, when the goods in question arrived. The cases had to be left outside, while as to the stock, they had no

chance to exhibit it. The man in De Vries's shop refused to allow them to put the cases in the yard. Through there being no chance to display the goods, there was a loss of custom.

Edward John Dampier, of the City Engineer's Department, stated that on October 17 the plan produced was put in, but was returned shortly afterwards, neither approved nor disapproved. There was no record of any objection, and therefore witness took it that the plan was withdrawn at the owner's request. The other plan was put in on April 8.

Mr. Searle closed his case.

Sir Henry Juta called

Joseph Benjamin Noorden, who said that he was formerly secretary of the defendant company, but was now a director. The defendant company was a limited liability company. Witness did not know anything about the arrangements in connection with the original plan, as Mr. Dykman, who was to have been the builder, had the whole matter of the plans in his hands. Witness was appointed a director at the end of March, and the fresh plans were put in shortly after that. Witness was naturally anxious to get the buildings finished, as it meant that they would get £80, instead of £12. As soon as the alterations were completed, they were quite willing to carry out their contract. They had one clerk at present in the building, but he was only there subject to the builder's convenience. The builder could turn them out at any time. It was impossible for a tailor to carry on business in the premises while the alterations were going on. The place was being entirely rebuilt, and that was the original idea. Witness showed Mr. Burns the plans in September. He would not swear that he made Mr. Burns understand that the premises were to be entirely rebuilt, but he certainly thought Mr. Burns understood that. The builder was now in absolute possession of the building, and he alone could make any arrangements to allow Mr. Burns to carry on. Their own clerk could only remain there as long as it suited the convenience of the builder, and, as a matter of fact, they would have to remove their clerk on Monday. Witness had arranged for the Civil Service Association to give

Burns accommodation for the storage of his goods.

Cross-examined: The Civil Service Company and the defendant company were connected by agreement. When witness showed Burns the plan of October 17, he told him the alterations would take about five or six weeks. They did not go on with the building then, owing to Mr. Dykman, who was to find the money for the building, ceasing to build. Witness ceased to be secretary of the defendant company at the end of last year, and had nothing to do with the company from that time until he was appointed a director at the end of March.

By the Court: It had been their intention to have the improvements effected before the new year.

Frederick Charles Tucker said he had been secretary of the defendant company since the beginning of the year. Mr. Burns spoke to him several times about the new buildings, and witness said he would do what he could to push the matter on. Burns had hired a room from witness at 30s. a month, but the next day said he did not want the room.

This closed the evidence.

After argument, the Court gave judgment for plaintiff for £50 damages, with costs.

Buchanan, J.: This is an action for damages for breach of contract; and it has been argued, in the first place, that no contract was entered into. But both on the pleadings and by the evidence, it is clear that there was such a contract. It is contained in the letter of the 30th September, written by Noorden—written, he says now, on behalf of the defendant, though it appears from the letter that it was written on behalf of the Civil Service Company. In this letter he says: "On behalf of the company, I have agreed to let to you for a term of three years, at a rental of £40 a month, the shop, altered and improved as per plans prepared, together with room on the first floor." At this time plaintiff was in occupation of this store, but defendants contemplated altering it, and had prepared plans. They showed these plans to the plaintiff, and on these they made the contract. The letter goes on to say that the improvements will be effected by the new year, if possible, but rent

shall not be payable before 1st December. It was known that these improvements could be effected within four or six weeks, and this was intimated to the plaintiff. The words "if possible" do not, to my mind, mean that it was at the option of the defendants to make the alterations when they chose, but simply amounted to this statement: "We will have your premises ready probably by the 1st December next, but at any rate, unless there are some unforeseen circumstances interfering, they will be ready by the new year." The defendants intended doing this work in September. Plans were submitted to the Town Council, but these were withdrawn with the object of substituting other and much more extensive plans. It is said that plaintiffs protected themselves by the words "if possible," and that they had not at that time the means to construct the buildings originally intended, though they now contemplated spending a much larger sum. The Court presumes that the defendants are going to give the lease when these new plans are carried out, and consequently the question of complete breach of contract may be left out of consideration. The question is, had there been a breach of contract in not having the premises ready by the 1st January. I am of opinion that there has been a distinct breach of such contract. It is in question whether the defendant was informed before the contract was entered into as to the object for which the new premises were to be leased, but whether or not, it is clear that there was a distinct intimation made in plenty of time to enable the defendant to have the alterations made before any damage accrued. At any rate, in January the plaintiff distinctly told the defendants that he had ordered goods for the new business, and that if they did not push things forward he would suffer very serious injury, and would hold them liable for damages. In spite of this, the defendants did not go on with the alterations, but kept the thing hanging over for their new and improved plan. The plaintiff says that in consequence of this breach of contract he had suffered damages to the amount of £700, represented by depreciation of goods, loss of profits, expenses of storage, etc., etc. I must say that, to my mind, plaintiff has not proved damages to anything like the extent of £700. But

there has been a breach of contract, and I am satisfied that there has also been a loss, and a loss through circumstances in the contemplation of parties when the contract was entered into. The Court is unable to say the exact amount of the loss, but we think we will be within the mark in saying that the plaintiff has suffered at least £50 damages. Judgment will be given for £50 damages with costs. Their lordships concurred.

[Plaintiff's Attorney: D. Tennant, jun.; Defendant's Attorneys: Van Zyl and Buissinné.]

JOSEPH V. HALKETT. { 1902.
June 16th.
.. 20th.

Broker's commission—Conditional Sale — Inchoate contract — Earnest money False representation.

A broker employed to sell the goodwill of a business obtained a purchaser, the broker's note stating that part of the price was to be paid in cash and the balance in bills, but with the following condition: "deposit of £500 to be paid at once by the purchaser to the broker, to be held in trust by him for both parties against transfer, but to be forfeited by the purchaser should he fail to complete his purchase." The seller was to pay brokerage. The purchaser failed to complete the purchase and did not pay the deposit to the broker, who, beyond asking the purchaser on two occasions for the amount of the deposit, did nothing to perform his part of the condition.

Held, that the broker was not entitled to claim any remuneration.

This was an action for the recovery of a sum of £192 10s., alleged to be due to the plaintiff, S. B. Joseph, by the defendant, John Halkett, as brokerage

on the sale of a hotel. There was a claim in reconvention for £307 10s., as damages for breach of contract.

The plaintiff's declaration was as follows:

1. The plaintiff is a broker, carrying on business in Cape Town, and the defendant is a hotelkeeper, carrying on business on the premises known as His Lordship's Larder, in Loop-street, Cape Town.

2. On or about January 30, 1902, the plaintiff, duly authorised thereto by the defendant, sold the goodwill, licence, and contents of the said premises, with the exception of the stock of liquors, which were to be taken over at cost price, for the sum of £3,500, to one W. F. Robertson, of Cape Town, as will more fully appear from a copy of the broker's note.

3. It was a condition of the said broker's note, which was signed by both parties to the agreement of sale, that the seller—the defendant—should pay a brokerage of 5 per cent. on the purchase price, to wit, the sum of £192 10s.

4. Although all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to call upon the defendant to pay the said sum of £192 10s., the defendant neglects and refuses to do so.

The plaintiff claims: (a) The sum of £192 10s., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the declaration.

2. As to paragraph 2, he admits that the broker's note attached to the declaration was passed on January 30, 1902, but he does not admit the other allegations in that paragraph, and begs leave to refer to the terms of the said broker's note.

3. Before the said note was passed, the plaintiff falsely represented to the defendant that the intending purchaser was a man of substantial means, who would put £3,500 of his own money into the purchase, and would forthwith, upon the passing of the broker's note, deposit £500 with him, the plaintiff, to be forfeited in case the purchaser should fail to complete the transaction, and the plaintiff undertook that the said deposit should be made as aforesaid.

4. Upon the faith of the aforesaid representations and the undertakings made and given by the plaintiff, and not otherwise, the defendant agreed to pay him a brokerage of 5 per cent. on the purchase price, when the said deposit should be made, and accepted the broker's note accordingly.

5. The said representations were false in fact; the plaintiff broke his said undertakings, and the said sum of £500 was not deposited by the intending purchaser, who is a man of no means, and wholly unable to complete the transaction.

6. The defendant admits that, by reason of the premises, he refuses to pay the sum of £192 10s., or any sum, to the plaintiff, but save as aforesaid, he denies the allegations in paragraphs 3 and 4 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed, with costs.

7. And for a claim in reconvention, the defendant (now plaintiff) begs to refer the Hon. Court to the several paragraphs of the foregoing plea.

8. By reason of the breach by plaintiff (now defendant) of his aforementioned undertaking the defendant (now plaintiff) has sustained damages in the sum of £307 10s., which he is entitled to recover in this suit.

Wherefore he prays for judgment for the sum of £307 10s., with costs of suit.

The plaintiff's replication to the plea was general, and for a plea to the claim in reconvention, the plaintiff (now defendant) said: He craves leave to refer to the matters above pleaded in the claim in convention; he denies the undertaking alleged to have been given by him in the claim in reconvention, and that he has committed any breach of contract, and that the plaintiff in reconvention has sustained any damages by reason of any act of his; wherefore he prayed that the said claim might be dismissed with costs.

The broker's note referred to in the pleadings was as follows: "30th January, 1902.—Bought from John Halkett, sold to W. F. Robertson, the goodwill, licence, and all contents of His Lordship's Larder Hotel, corner of Loop-street and Shortmarket-street, Cape Town, for the sum of £3,850, with the exception of stock of liquors, which are to be taken over at cost price, and a few private articles pointed out; payment in cash the sum of £3,500, and promissory

notes for the balance of £350, together with the value of the stock of liquors at three and six months; possession to be given and taken on the 3rd February next; deposit of £500 to be paid by the purchaser at once to S. B. Joseph, to be held in trust by him for both parties against transfer, but to be forfeited by the purchaser should he fail to complete his purchase payment as above; seller to pay brokerage of 5 per cent. reckoned on the purchase price, viz., £192 10s.— (Signed) Jno. Halkett, W. F. Robertson."

Mr. Searle, K.C. (with him Mr. J. E. R. de Villiers), for plaintiff; Mr. Schreiner, K.C. (with him Mr. Buchanan), for defendant.

Mr. Searle called

Selim Barnet Joseph, a broker, carrying on business in Cape Town, who said that he knew the defendant, the holder of the licence of the hotel known as His Lordship's Larder. The sale of the goodwill of that property was placed in witness's hands by defendant, and on January 21 witness wrote defendant stating that he had two good buyers, but he must have the matter in his own hands. A few days later defendant called and gave witness verbally definite instructions to sell. On January 29 witness wrote to the effect that he had a buyer in Mr. Robertson, who came to witness's office, and wrote out a letter, which witness afterwards showed to defendant. In that letter Mr. Robertson authorised witness to offer £3,500 cash for the goodwill, licence, and contents of the hotel, excepting a few private articles to be pointed out, and the stock of liquor to be taken over. Robertson informed witness that he was prepared to put down £3,500 in cash. There was some conversation as to how the money was to be forthcoming, the principal firm mentioned as that from which Robertson could obtain the money being White, Ryan and Co. Witness saw defendant, taking the letter with him, and defendant said he was not prepared to accept that offer, as it stood. He figured the thing out, and said that he would take the sum of £3,850 for the goodwill, and stock of liquor to be taken at a valuation. The defendant knew Robertson as having been the proprietor of the Frascati Restaurant. In the afternoon Robertson called upon witness to see what had

been the result of his offer. Witness told him what defendant was prepared to do, and suggested that he should go up, have a look round, and see if satisfactory terms could be arranged. Witness went with Robertson, and the latter and defendant discussed the matter. Eventually they came to a conclusion, and gave witness instructions to draw up a broker's note. The terms of the note were arranged, and signed by both parties. It was agreed that Robertson was to give a deposit of £500, and witness said to him, "As I have been appointed stakeholder in this matter, will you give me a cheque for £500 now?" and Robertson replied that he had not got his cheque-book with him, but would give him the cheque on the following day. On Saturday, February 1, Robertson called at witness's office, and asked whether it would make any difference, seeing that the transfer would take place in two days, if he did not give him the cheque that day. Witness said he could not say one way or the other, but would ask Mr. Halkett. The latter called in afterwards, and on witness telling him what Robertson had said, offered no objection. Stock was taken on the Sunday by Mr. Halkett, Mr. Robertson, and two of White, Ryan's people. Witness went to the hotel while the stock was being taken, and there was a conversation about the payment of the bills. It was arranged that the balance of the purchase price (£350) should be paid by unsecured bills, and that the bills for the stock should be endorsed bills. That was arranged between Halkett and Robertson. Next morning (February 3) witness went down to Ohlsson's, as arranged (Ohlsson's consent to the transfer being necessary), and found Mr. Halkett there, but Mr. Robertson did not turn up. On February 7 witness wrote defendant asking for payment of his commission. He had already written on February 1 asking for payment. In answer to his letter of February 7 he received an answer refusing payment, as the sale had not been completed, and stating that if he did not succeed in putting this particular sale through to Robertson, his (witness's) agency to sell would terminate. The same day witness's solicitors sent a letter of demand. There was no truth in the allegations that witness made false representations about Robertson. Up to a few days be-

fore this transaction Robertson had been proprietor of the Frascati Restaurant in Church-street. At Robertson's request witness went round to two or three merchants to see if they would help Robertson through, but could not get the assistance required. Robertson had now a large hotel at Caledon.

Cross-examined: Mr. Isaacs was at that time witness's managing clerk, and was paid by salary and commission. Witness could not remember who the two buyers he had for the hotel, when he wrote the letter of January 21, were. There were many people coming in making inquiries for hotels. Witness sent his first letter asking for his brokerage on February 1, and a few days after that he saw Halkett, and the latter said he would not pay. Neither of the two buyers mentioned in the letter of January 21 was Mr. Robertson. Halkett had told witness that he was not going to sell unless he got cash. Witness would say that it was not probable that Robertson could have had any business conversation with Halkett before January 30. Witness remembered Robertson saying that he was realising a certain amount of money, about £1,000, from the Frascati Restaurant, but he did not say that was all the money he had. Witness never promised to advance money to Robertson if the latter did not get assistance from White, Ryan and Co. At the time the broker's note was arranged, Robertson made no statement as to where the £500 was to come from. Witness made no representations about Robertson to defendant. He merely repeated in Robertson's presence what Robertson had asked him to say. He said that Mr. Robertson had stated that he had £3,500 to put down.

Archibald Bultitude said that he was the manager of Ohlsson's Breweries. He had stated on January 31 that Ohlsson had no objection to accepting Robertson as a tenant. He did not think at that time the question of a higher rental was mentioned. On the Tuesday or Wednesday after the broker's note was passed, Robertson came down to their office, and they were then willing to accept him as a tenant.

Cross-examined: Robertson wanted a long lease, but they told him they could not give that. The rent was £60 or £65. It was only a monthly tenancy.

Mr. Searle closed the case for the plaintiff.

Mr. Schreiner called

John Halkett, the defendant, who said that he was now the proprietor of His Lordship's Larder Hotel, but in January last had the hotel on a monthly tenancy. Joseph had several times approached witness to get the sale of the hotel. Between the time of his receiving the letter of January 29 and the signing of the broker's note, witness had no business conversation with Robertson, and knew nothing whatever about Robertson's financial position, except what he got from Joseph. The latter introduced Robertson to witness, and said that Robertson had £3,500 in cash. He asked if witness would accept bills for the balance, and witness said, "Yes, that is good enough." Witness had never before had a conversation with Robertson. Witness entered into the contract on Joseph's representation that Robertson had got £3,500 in cash. After detailing the negotiations in connection with the signing of the note, witness said that subsequently, in consequence of something he had heard, he went to plaintiff's office, and saw there Mr. Isaacs, to whom he said, "I hear you are trying to raise £2,000 from White, Ryan and Co." Isaacs replied that he believed there was something of that sort, and witness said, "That is a nice state of things, after Mr. Joseph telling me that he had £3,500 in cash, and now I hear he is raising £2,000." Witness said that that altered things altogether, and he would not now accept the bills. Isaacs said that Joseph knew before then that Robertson had not got £3,500 in cash. Joseph then came into the office, and witness repeated what he had said, and that he would not accept any bills after that. On the plaintiff's suggestion, witness went with the plaintiff and Robertson to White, Ryan and Co.'s, to see Mr. White with reference to his advancing £2,000. Witness was not present at that interview. He would not be a party to it, but waited to see the result. They were there for an hour, and when they came out, plaintiff told witness that it was no good, and that it was all up, that White, Ryan would not assist Robertson.

By the Court: Witness went to White, Ryan's because he wanted to find out whether they were going to support

Robertson. As far as witness was concerned, all the bills had to be guaranteed. Witness gave Mr. Joseph to understand in the presence of Mr. Robertson that he was not selling the place on credit, nor was he going to finance the man that came in, and if he took bills, it was on the understanding that they must be paid when they became due. If Robertson had been able to borrow the money and paid the £3,500 in cash, witness was willing to accept guaranteed bills for the balance.

Cross-examined: Witness was willing if he got the part cash to take the rest in notes. Robertson, Joseph, and witness were together when the broker's note was made out. The terms were discussed. The matter was arranged entirely between Joseph and witness. Joseph said Robertson had £3,500 in cash. Witness was quite willing to give transfer when he had the cash. Witness had since bought the whole property. The stock list was made up between Robertson, White, Ryan's people, and witness. Witness did not know Robertson when the latter came in. He did not tell Robertson that he knew him as the owner of Frascati's. There was a conversation about the bills when the stock list was made up. When witness found out that they were trying to raise the £2,000 from White, Ryan and Co., he said that he would not take the bills unless they were guaranteed.

Re-examined by Mr. Schreiner: Witness would not have agreed to leave anything on bills if it had not been for Joseph's representations. Witness was willing to take cash for the whole or to take part cash and approved bills.

By the Court: Witness gave them to understand that the bills were to be guaranteed. Witness did not at first stipulate that the bills should be guaranteed, owing to the representation that Robertson had £3,500 cash. It was only in case the money was borrowed that witness would want guaranteed bills.

Albert Isaacs, formerly managing clerk to plaintiff, said that Robertson approached him in regard to the matter. Witness told Joseph what Robertson said. Robertson told witness that he had heard that His Lordship's Larder was in the market, and that he wished to put the matter through Joseph. Witness took Robertson to Joseph. Robertson

said that he had about £800 in cash, and that he could get £2,000 from White, Ryan and Co. This was known to Joseph before the broker's note was signed. Witness remembered Halkett coming to the office, and saying that he had heard that Robertson was getting £2,000 from White, Ryan and Co. This was within a couple of days of the signing of the broker's note. He told witness that Joseph had represented that Robertson had got his own money. Witness told Halkett that it was impossible that Joseph had said this, as he (Joseph) knew about the £2,000 coming from White, Ryan and Co. Halkett afterwards made the same statement to Joseph, and raised the question of taking bills. Witness was now carrying on business as a broker on his own account.

Cross-examined by Mr. Searle: Witness knew all along that Robertson was being financed by White, Ryan and Co. Witness saw the broker's note. It did not strike him that there was anything wrong on the broker's note. When Halkett came in in reference to the money coming from White, Ryan and Co., witness made it clear to him that the money was coming from White, Ryan and Co. It was a very common practice when goodwill were sold and bought for a firm to come forward and finance the purchaser.

Edwin George White, of the firm of White, Ryan and Co., deposed to application being made by Robertson for financial assistance to acquire His Lordship's Larder in January. Witness agreed to give assistance on security. Witness's men went to the hotel to take stock without witness's knowledge. The security was quite satisfactory, but Robertson and his friend and partner withdrew. Joseph came to witness and asserted that witness had contracted to advance money, but witness repudiated the allegation that he had offered to advance money unless there were ample security.

Wm. Frederick Robertson said that before he went to His Lordship's Larder to sign the broker's note he was not acquainted with Halkett, though, he believed, he had been introduced to him in the bar some time previously. Witness went to the hotel with Joseph, who drew up the broker's note. It was arranged that witness should pay £3,500

in cash and give bills for the rest. Joseph told Halkett that witness would pay £3,500 of his own cash. Joseph said he had the cash in hand. Witness had told Joseph previously that he had £800 in cash.

Cross-examined by Mr. Searle: Halkett put no questions to Joseph about the cash. Nothing was said as to where the £3,500 was coming from. Witness supposed that Halkett understood it was witness's own cash. Witness had taken over a new hotel at Caledon. On Saturday evening February 1, witness went with Mr. Menzies, of White, Ryan's, to see Halkett, and the latter then mentioned approved bills for the first time to witness. Those bills were for the furniture and the stock. On the Sunday, when they were stock-taking, Halkett again mentioned, in the presence of Joseph, the matter of approved bills. Witness did not know whether or not he could have got the approved bills. After this case had been commenced Mr. Halkett, through his solicitors, demanded payment of the £500. White, Ryan and Co. had advised witness that Ohlsson's might raise the rent, but that difficulty was got over. Witness understood that Mr. Joseph had been assured by Mr. Bultitude that Ohlsson's would not raise the rent.

Re-examined: Witness had told Joseph that he could find £800, and he could have done so at that time. Witness never said anything to deceive Mr. Halkett.

By the Court: Witness did not pay down the £500 deposit, because he first wanted to see the other money, which Mr. Joseph had promised to arrange, paid down.

Mr. Searle, K.C. (for plaintiff): There is considerable conflict of evidence in this case, but the documents are quite clear. The defendant raises the plea that plaintiff made certain false representations.

[De Villiers, C.J.: Can the broker recover the brokerage if the sale was not for cash?]

No doubt the seller wanted cash, and the promise of a cash payment caused the sale to go through. As the sale went through we are entitled to brokerage. In these transactions cash is not usually paid. There is no proof that Joseph undertook to get the money. A

broker may be entitled to his commission, even if the bargain goes off (*Bowstead on Agency*, 2nd ed., Art. 64, p. 379). This sale had taken place days before Halkett attempted to disavow it. He clearly had not insisted on having the money as a condition precedent to completing the sale, but to giving possession. The documentary evidence in our favour is overwhelming, and Halkett has adopted the sale by his negotiations with Robertson. There is really no evidence to support the case of the defendant. His plea was clearly opposed to what *Bowstead* says (p. 387). See also *Green v. Lucas* (33, L.T., N.S., 584), also *Fisher v. Drewett* (39, L.T., N.S., 253), *Passingham v. King* (14, Times L. Rep., p. 39). The last is a very similar case to this one. There the defence was that the agent could not set up "a man of straw" as a purchaser. If there is a sale, there must be brokerage on that sale, and nothing short of fraud on our part can deprive us of our claim. The evidence shows that the defendant was kept fully informed of the position of the parties, and I submit that we are entitled to succeed in our action.

Mr. Schreiner, K.C. (for defendant): Plaintiff's own account is that Halkett was selling for cash only. He then introduced a Mr. Robinson, who cannot pay more than £800, whereas the price was to have been £3,850, and the stock was also to be taken over and paid for. Joseph represented that Robinson had the money.

[De Villiers, C.J.: Mr. Searle contends that even if that statement was false, it was not necessarily fraudulent.]

See *Chisholm v. Gadsden* (Digest of American Cases, Vol. 1, p. 676). In this case we have to look at the *suppressio veri*. Joseph concealed facts. He said nothing about Robinson raising some of the money by bills. See *Bowstead on Agency* (Art. 67, § 9, 196, and the cases there cited). An agent cannot recover commission if he does not act in accordance with his principal's instructions. *Story* (Art. 329). Even if misrepresentation does not amount to fraud, it is sufficient to disentitle the agent to commission, and that is so, even if the agent believes the false statement. Joseph should have said that Robinson expected to get money from White, Ryan and Co.

[De Villiers, C.J.: You cannot say that a man cannot pay because he has to borrow money to pay.]

How could anyone know what bond would be registered against him, or how it would cripple him. If a man who buys property has £3,500 with his bankers, that is a very different thing from going and raising money on bonds.

[De Villiers, C.J.: I cannot see it.]

The distinction may not be a very logical one, but it is one which would appeal to commercial men. Halkett insisted on cash. He objected to doing business with a man overwhelmed with liabilities. He therefore first insisted on approved bills, and when he could not get these, he repudiated the whole transaction. *Hammond v. Holliday* (1, C. and P., 384) shows that if there is any default on the part of the agent, he cannot recover commission. No case cited for the plaintiff went further than to show that a broker is entitled to commission if a bargain goes off without any fault of his. It is true that Halkett allowed Joseph a day or two to try and arrange matters, but that was a new bargain. If a broker is careless, he cannot recover. See *Storey* (Section 333). He certainly cannot claim 5 per cent. on the purchase price if no purchase price is paid. See *Frans on Agency* (p. 404, last edition), in which a number of late cases are brought up. It has been argued that we never repudiated liability; our failure to admit it was a sufficient repudiation.

Mr. Searle (in reply): I took it as admitted that with us, misrepresentation, to give a cause of action, must be fraudulent. *Tait and Others v. Wicht and Others* (7, Juta, 158), and *Forbes v. Behr and Co.* (6, Sheil, 341). It may then be asked: why did we not except to the plea? The only reason was that the charge of misrepresentation was mixed up with the claim for £500. No case has been cited on the other side on which the contract went through. In *Hammond v. Holliday* and cases mentioned by *Bowstead* (p. 190), the contracts went off.

Cur. adr. vult.

Postea, June 20.

De Villiers, C.J.: The plaintiff in this case claims a sum of £192 10s., as brokerage for a sale alleged to have been concluded by the plaintiff upon behalf of defendant. The declaration alleges that

all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to call upon the defendant to pay the said sum of £192 10s. The defence, mainly, is to this effect: that before the said broker's note was passed by the plaintiff, the plaintiff falsely represented to the defendant that the intending purchaser was a man of substantial means, and would put £3,500 of his own money into the purchase, and would forthwith, upon the passing of the broker's note deposit £500 with him (the plaintiff) to be forfeited in case the purchaser should fail to complete the transaction, and the plaintiff undertook that the said deposit should be made. If this charge of false representation were the only defence available in the present case, I should certainly have come to the conclusion that the plaintiff is entitled to the judgment of the Court. The evidence, however, is not clear that there was any false representation or anything of the nature of a guarantee on the part of the plaintiff. He no doubt represented to the defendant that Robertson, the intending purchaser, had stated that he would pay cash, and I think that the plaintiff might fairly have believed at the time that Robertson was in a position to pay cash, because negotiations had been going on with various firms, and there was every reason to believe at that time that Robertson would be able to obtain money for the purpose of paying cash in terms of the broker's note. Now the broker's note is in the following terms: "30th January, 1902. —Bought from John Halkett, sold to W. F. Robertson, the goodwill, licence, and all contents of His Lordship's Larder Hotel, corner of Loop-street and Shortmarket-street, Cape Town, for the sum of £3,850, with the exception of stock of liquors, which are to be taken over at cost price, and a few private articles pointed out; payment in cash the sum of £3,500, and promissory notes for the balance of £350, together with the value of the stock of liquors at three and six months; possession to be given and taken on the 3rd February next; deposit of £500 to be paid by the purchaser at once to S. B. Joseph, to be held in trust by him for both parties against transfer, but to

be forfeited by the purchaser should he fail to complete his purchase payment as above; seller to pay brokerage of 5 per cent. reckoned on the purchase price, viz., £192 10s." Now throughout this broker's note there appears to be no guarantee on the part of the broker that the cash of £3,850 would be paid, or that the deposit would be paid, nor does the evidence given in this case satisfy me that there was any false representation on the part of the broker to the effect that Robertson was a man of means, that he would pay cash, or that he would pay the deposit. Therefore, if the case had depended entirely upon this part of the defence, as I said before, the judgment would be for the plaintiff. But I think the plaintiff cannot succeed in obtaining this remuneration until he has shown that he has performed everything he is required to do under the contract, and the cases which have been cited support this view. In the passage from *Bowstead* (Agency, p. 187), cited by counsel, it is said that "if an agent, employed to negotiate a loan, brings the principals together, and nothing more remains for him to do, he is entitled to his commission even if the contract afterwards goes off without any default of his principal." In the present case the payment of the deposit to the plaintiff was an essential condition, and until it was fulfilled, the contract was inchoate only. The deposit was not exactly an "arrha" or earnest money, but it bore a strong resemblance to it. If it was a condition that earnest money should be paid, there was no sale under the civil law until the earnest money was paid to the seller. Not only is a deposit to be paid in the present case, but the plaintiff, as broker, was to receive it, and hold it in trust for both parties. Beyond asking the purchaser for payment on one or two occasions, he did nothing to fulfil his part of the condition. He cannot therefore recover brokerage, and there must be absolution from the instance, with costs.

Buchanan, J.: During the hearing of the case I was not satisfied with the broker's conduct, but on the grounds stated by the Chief Justice, I am not prepared to find that the broker has been guilty of false representation. It is probable that the plaintiff anticipated that there would be

no difficulty in obtaining the money after arranging for the sale. The ground upon which his case has, however, failed, was that stated by the Chief Justice, viz., that the broker has not done all that was necessary to entitle him to receive his commission. He was to receive the deposit money, and the evidence pointed to the fact that the intending purchaser and the plaintiff had arranged the ways and means between them. The purchaser said the plaintiff was to finance him, and in was in consequence of the plaintiff failing to do so that the deposit was not made. The question of earnest money was treated in two different ways. In the one, it was a part of the contract itself that the earnest money should be paid, and unless paid, there was no contract. In certain other cases, it might be considered as evidence of a complete contract. In this case, where the broker undertook to receive the earnest money, and hold it in trust for the parties until he received the earnest money, there was no completed contract. If there had been a completed contract, the defendant in this case would have had recourse against the purchaser, but with no completed contract, he had no such remedy. On the ground, therefore, that the broker had not done everything it was necessary for him to do to earn his money, and to give the defendant cause of action against the purchaser, this action must fail.

Mr. Searle asked if costs in reconvention would be allowed plaintiff (defendant in reconvention).

The Chief Justice said there could be no costs in reconvention in this case, and the judgment would therefore be absolution from the instance in the claim in convention as well as in the claim in reconvention, plaintiff to pay the costs.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's, Silberbauer, Wahl and Fuller.]

VAN WYK V. SMITH AND CO. 1902. June 17th.

Costs of transfer — Diagram—
Expenses of survey.

The owner of land sold certain lots being portion thereof, one of the terms of the contract of

sale being that the buyer should pay all expenses in connection with the completing of transfer.

Held, that the charge of the surveyor for preparing the necessary diagram formed part of such expenses, but that the costs of a survey made before the date of the sale for the purpose of a general subdivision and not for the special purpose of giving effect to the sale, did not form part of such expenses.

This was an action brought by S. W. van Wyk to recover from G. D. Smith and Charles Sonnenberg, carrying on business as G. D. Smith and Co., a sum of £96 12s., alleged to be due in connection with passing transfer of certain property.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Maitland, in the Cape Division; the defendants carry on business in partnership in Cape Town.

2. Prior to the 27th December, 1901, the plaintiff was the owner of certain landed property at Maitland, and was desirous of selling portion of same in lots, and it became, was necessary, and was in accordance with the practice of the Deeds Registry Office of this colony, and for the purpose of passing transfer of the said lots of land, that the same should be surveyed, and diagrams thereof framed by a land surveyor, and the said lots were so surveyed, and diagrams framed.

3. Prior to the aforesaid date plaintiff entered into negotiations with the defendants for the sale of the aforesaid lots, upon the condition, *inter alia*, that the defendant should pay all expenses, including survey expenses, save brokerage, and thereafter, on the 27th December, 1901, one Holm, a member of the firm of brokers of Moller and Holm, who were the only authorised agents of the defendants, and acting on their behalf, purchased the said lots from the plaintiff for and on behalf of the defendants, and handed to plaintiff a broker's note, copy whereof is attached, as embodying the said contract of sale.

4. The plaintiff objected to the said note, and refused to accept it, inasmuch as all the expenses of survey and framing of diagram were to be paid by the defendants, and thereupon the said Holm, acting as the duly-authorised agent of defendants, and on their behalf, represented to plaintiff that the clause in the said broker's note, to wit, "the buyer to pay all expenses in connection with the completing of transfer," included the said survey and diagram expenses, and relying upon the said representations, the plaintiff accepted the said note.

5. The plaintiff says that the expenses of survey and diagrams in connection with the said lots amount to £96 12s., and he has paid the same to the surveyor as reasonable, and he says that the same were, and are necessary and essential for passing transfer of the said lots, and that the transfer of the said lots to defendants could not have been completed without such survey and diagram expenses.

6. Plaintiff has passed transfer to defendants of the said lots, but defendants refuse to pay said sum of £96 12s., refusing to pay any survey or diagram expenses.

Plaintiff claimed: (a) The sum of £96 12s., with interest *a tempore moræ*; (b) alternative relief; (c) costs of suit.

The defendant's plea was as follows:

1. The defendants admit paragraph 1, and that prior to December 27, 1901, plaintiff owned certain landed property at Maitland, and that it is necessary for the purpose of transfer of any particular portion or lot of ground it should be surveyed and a diagram framed. They have no knowledge of the other allegations in paragraph 2.

2. As to paragraph 3, the defendants admit that they bought a portion of the ground which plaintiff had cut up into lots, including the roads marked on the said plan. They deny that there was any condition before the sale that the defendants should pay all the expenses connected with the survey of lots as alleged, and say that the broker's note contains the contract between the parties, and they crave leave to refer to its terms.

3. They deny the allegations in paragraph 4.

4. They have no knowledge of the amount of the expense of survey and

diagrams of the lots referred to, and do not admit that £96 12s. is a reasonable sum, and they deny all the other allegations in paragraph 5.

5. They admit that plaintiff has passed transfer to defendants of ground purchased by them from him, and they have refused to pay the sum of £96 12s., or any survey or diagram expenses. They say that they have carried out the terms of their contract according to the said broker's note.

Wherefore they prayed that plaintiff's claim might be dismissed with costs.

The replication was general.

The broker's note referred to was as follows:

Cape Town, December 27, 1901.

The boys' house to remain as appears on plan.

(Init'd.) M and H.

Sold on account of S. W. van Wyk, Esq., to G. D. Smith and Co.

Certain ground, with the buildings thereon, as per plan framed by the surveyor, Charles Pritchard, 46 lots of ground, situate at Maitland, portion of Wykveld Estate, being Nos. . . . , and a road adjoining plots Nos. 43a, etc., measuring in breadth 27 feet, more or less, together with the slaughter-house and privileges included, on the following terms and conditions, viz.:

1. The purchase price to be the sum of £1,650.

2. Cash against transfer.

3. Transfer to be given and taken on or before February 1, 1902, when possession is to be given.

4. Buyer to pay all expenses in connection with the completing of transfer. £30 commission, as agreed.

Payment as above.

Seller to pay brokerage.

(Sgd.) MOLLER AND HOLM.

Sir Henry Juta, K.C. (with him Mr. Goch), for the plaintiff; Mr. Searle, K.C. (with him Mr. Benjamin), for the defendant.

Sir H. Juta urged *in limine* that as transfer could not be given without a diagram, and consequently not without the survey on which the diagram was framed, that these survey expenses should be included in costs of transfer.

[De Villiers, C.J.: But it would appear from the broker's note that this survey had already been completed at the date of the sale.]

Evidence was then led.

Sir Henry Juta called

Schalk W. van Wyk, the plaintiff, who said he lived at Maitland. Some time ago he was desirous of selling some land, and arrangements were made by which the defendants were to buy the land and to pay all expenses, excepting brokerage. The defendants had refused to pay survey expenses.

Mr. Pritchard, surveyor, was called and gave evidence in support of the plaintiff's allegations.

In answer to the Court, Mr. Pritchard said that in order to transfer, work in addition to that for which witness was paid was necessary. Witness had to put the pegs in, which would take him four days. Forty guineas was, witness considered, a reasonable charge for this. For framing the eight diagrams—the diagrams were in duplicate—the charge was 6s. per figure, the total charge being £27 12s. If the purchaser had come and made some offer, witness or Mr. Van Wyk might have met him.

Mr. Searle called

George David Smith, one of the defendants, who said he saw Mr. Van Wyk on the ground. Witness told Van Wyk that he wanted the ground for the purpose of erecting a factory. Van Wyk said it had been his intention to cut up the ground in lots. Witness said that he did not want this done, as he intended building a factory. Witness afterwards saw Mr. Pritchard, who went out to the ground. Witness was not told that he would be charged with the survey fees in connection with the general plan. Mr. Van Wyk pointed out some pegs to witness.

Cross-examined by Sir Henry Juta: Witness only saw boundary pegs. To witness's knowledge, the plots were not marked off. Witness could not say whether on all occasions purchasers paid for a general survey. It was usual on some occasions.

Re-examined: Quite independently of any papers, the exact piece of ground purchased by witness was known to him and Van Wyk.

Petrus Maskew, surveyor, said that if land were cut up into lots and diagrams prepared, and the surveyor was paid for this work by the employer, it was usual for the surveyor not to charge for making a diagram for blocks. If

the work were easy a fair charge to make for three diagrams, including survey, would be between ten and fifteen guineas. The charge for framing a diagram was 6s. for each diagram. Witness was not aware of charges being made per figure.

Cross-examined by Sir Henry Juta: Witness could not tell whether or not the work was easy in this case.

Mr. Searle, K.C. (for the defendant): I rely on the evidence of Pritchard and of Maskew that the charge for framing these diagrams is 6s. each, and that works out at about two guineas for the lot.

Sir H. Juta, K.C. (for the plaintiff): The question is: should the defendants pay for the diagram and for the survey expenses? It is significant the people who incurred the expense up to the time of transfer in connection with these surveys have not been called. Maskew says he charges two guineas per lot. They do not charge for the cost of surveying the whole farm. Holm promised to pay all expenses. He meant to get the benefit of the survey, for he knew that he could not get lots without survey.

[Maasdorp, J.: You say that he bought the ground as surveyed?]

No; for at that time the pins had not been put down. The defendants clearly understood that they would have to pay the expenses of the survey. The buyer usually pays for the survey, and in this case the contract makes the duty all the more imperative. They paid for the declarations of purchaser and seller, and therefore "expenses in connection with completing the transfer did not mean merely the final act of putting the stamps on the deed. Even should the Court be disposed to hold that they are not bound to pay for the survey, I submit they must at least pay for the diagrams.

Mr. Searle, K.C. (for defendants): I admit that it is presumed that the purchaser pays expenses of transfer. *Van der Merwe v. Colonial Government* (15, S.C.R., 91 and 94), and *Indre River Co. v. Colonial Government* (14, S.C.R., 228). But although this is the presumption, in this case the broker's note takes it out of the ordinary conditions. The broker's note distinctly says that the lands have been surveyed. Therefore the purchaser is entitled to the full

benefit of that survey. Possibly the costs of framing diagrams might be changed, but that would be only trivial. The point is, that we bought survey lots.

[De Villiers, C.J.: It is not clear that the survey took place before the purchase; they do not do so as a rule.]

It was not necessary that there should be a fresh survey before the purchase. The boundaries were well known. We bought this ground as surveyed ground, and why, then, should we pay for survey? All we are liable for is, at most, some £3 or £4 for diagrams.

Sir H. Juta (in reply): I cannot follow the distinction between costs of survey already incurred and costs to be incurred. There is nothing whatever in the broker's note to show that the parties thereto intended to exclude the common law of the country. The presumption is that the buyer pays; is there then anything in this case to rebut this presumption? The survey was necessary in order to divide the lots, and we should be paid for it. If I purchase land, I want to know where the land is, and this I cannot know without a survey.

De Villiers, C.J.: The only question in this case relates to the meaning of this clause in the broker's note, "Buyer to pay all expenses in connection with the completing of transfer." In my opinion, everything that is necessary to be done for the purpose of completing the diagram which forms part of the transfer deed is an expense in connection with the completing of the transfer. The preparation of the diagram itself is such an expense, and I am inclined to go further, and say that the cost of a survey made for the special purpose of enabling the surveyor to prepare such a diagram would be part of such expenses. But I cannot accept the view that the costs of a survey made before the sale for the purpose of a general sub-division, form part of such expenses. Two cases have been cited, viz., those of *Van der Merwe v. The Colonial Government* and *The Indre Company v. The Colonial Government*. These, to some extent, support this view; they certainly do not contradict it. Again, we must bear in mind that in these cases it was a question between the Government and the purchaser from the Government, and different considerations arise in such

cases from those which arise in sales as between private individuals. Moreover, in both these cases the Court was, to some extent, guided by the various Acts relating to Crown lands, while in the present case we can only be guided by the terms of the broker's note. "Buyer to pay all expenses in connection with the completing of transfer." Certainly the preparation of duplicate diagrams in this case was an expense connected with the completion of transfer, but the survey had already taken place, and the question now is: in what manner is the remuneration to the surveyor to be estimated? Roughly, one witness said ten to fifteen guineas would give a fair remuneration. If we take the Government tariff in cases analogous to the present case, we find the charge to be something like 3s. for each figure. In the present case there are 46 figures, and at the rate of 3s. each for duplicates, the charge would be £13 16s.; but seeing that there is evidence in support of fifteen guineas, the Court will assume in the present case that a fair remuneration to the surveyor for preparing the diagram will be at the rate of fifteen guineas. There has been no tender on behalf of the defendants, and the Court must therefore give judgment for the plaintiff for £15 15s., with costs.

Their lordships concurred.

[Plaintiff's Attorneys: J. J. Michau;
Defendants' Attorneys: Minchin and Sonnenberg.]

VAN DER SPUY V. VAN DER (1902.
SPUY. (June 18th.

Landlord and tenant—Lease—
Rent—Agency.

A farm had been let to three tenants, one of whom afterwards surrendered his share to the lessor. The defendant took over from the lessor this share, and also the share of another of the tenants, with the lessor's approval. By the contract the rent was payable on the 25th April at the office of the lessor's agent. The lessor on the 15th April, before the due date of the rent, took out a summons for the rent due on the third

share taken over directly from him by the defendant. On the due date the defendant paid all the rent due by him at the agent's office in terms of the lease. The agency had never been revoked.

Held, that this was a good payment.

This was an action brought by Sybrand Johannes van der Spuy against Dirk J. J. van der Spuy, to recover a sum of £70, alleged to be due for rent.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer, and resides at Durbanville.
2. The defendant is a farmer, residing at Adderley, Durbanville, in the Cape district.
3. On the 18th March, 1901, the plaintiff and the defendant entered into a verbal contract of lease, whereby the plaintiff agreed to let, and the defendant agreed to hire, for the period of one year, a house and a portion of a farm known as Alexandria, in Koeberg, Cape district, at a rental of £70 per year.
4. The defendant, on the 24th of March, 1901, took possession of the said house and land under the said letting, and continued as such tenant thereof to the plaintiff until March 24, 1902.
5. The defendant has not paid to the plaintiff the said rent or any part of it due in respect of such period of one year.

Wherefore the plaintiff claims: (a) The sum of £70, for twelve months' rent from March 24, 1901, to March 24, 1902; (b) interest *a tempore morae*; (c) costs of suit.

The defendant's plea was as follows:

1. He admits paragraphs 1 and 2.
2. He admits paragraph 3, save that he says that the period of the said lease commenced on April 25, 1901, and terminated on April 25, 1902.
3. With reference to paragraph 4, the defendant admits that he took possession of the said house and land on March 24, 1901, but he says that he did so with the consent of the plaintiff, and that it was agreed between him and the plaintiff that the rent should not be affected by the said earlier taking of possession, but

should still commence to run on to April 25, 1901. The defendant continued as tenant until the 12th April, 1902. Save as above he denies paragraph 4.

4. He denies paragraph 5. It was a term of the aforesaid lease that the defendant should pay the said rent to Messrs. J. W. Moorrees, jun., and Co., the agents of the plaintiff, at their office in Malmesbury. On or about April 24, 1902, the defendant did pay the said rent to Messrs. J. W. Moorrees, jun., and Co.

Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

The replication was general.

[Mr. Wilkinson for plaintiff; Mr. Gardiner (with him Mr. C. W. de Villiers) for defendant.]

The onus being on defendant to prove payment and agency, Mr. Gardiner called

Dirk J. J. van der Spuy, the defendant, who said that on March 18, 1901, he went with the plaintiff to see one Mr. Mostert. The farm Alexandria was divided into three portions, and witness wanted to lease one of the portions, at that time rented by Mr. Mostert. Witness obtained the lease of that portion on the same conditions as Mr. Mostert had leased it, and after they had left Mr. Mostert plaintiff further agreed to let witness have, also under the same conditions as the old lease, another portion, which had been leased by a Mr. Louw, who had died. Witness knew these conditions, having heard them when the lease of the farm was put up to auction three years previously.

Mr. Gardiner pointed out that the important clause of the lease was as follows: "The rent to be paid by the joint lessees shall be £210 sterling, which shall be paid yearly on the 25th of April in each succeeding year, at the office of J. W. Moorrees, jun., and Co., at Malmesbury."

Examination continued: Witness took possession earlier than April 25, but the plaintiff agreed that no charge should be made for his going in earlier, the plaintiff saying that if witness did not move in at once he would be too late to plough that season. On March 29 last witness received a letter demanding the rent, and on April 15 summons was issued. Witness never answered the letter of March 29, as he knew the rent was not due until April 25, and on April 24

witness went to Moorrees' office and paid the rent for the two portions (£140), receiving the receipt produced.

Cross-examined: Mr. Moorrees' name was never mentioned when witness took the farm. Plaintiff never told witness that the rent would commence from the time he took possession. On March 8 or 10 plaintiff wrote witness a small note asking if he could pay the rent by March 15.

By the Court: Witness's only reason for paying the rent at Moorrees' office was that the contract said it had to be paid there.

Stephanus Cornelius Louw deposed that he was present when defendant leased the farm from plaintiff. Both portions were let under the same conditions as the lease of Mr. Mostert's portion. Plaintiff said that defendant could take possession at once, to get on with his ploughing, and nothing was said about payment.

John Louw, a clerk in the office of Moorrees and Co., said that the lease of this farm had been in his firm's office since it was made. They had always received the rents, and paid them over to plaintiff. The latter had a running account with Moorrees, and as the rents were received they were placed to plaintiff's credit. On April 24, defendant paid £140, being the rent of the two portions of the farm, and on April 25 witness wrote to plaintiff informing him of the payment, and stating that the £140 had been placed to his credit.

By the Court: Plaintiff owed them £114 at the time, and when they received the £140 that left a balance of £26 to his credit, which he could have at any time. Plaintiff had never told them they were not to receive the rents. Several months ago plaintiff had been communicated with about his account with Moorrees, and he had offered them a promissory note, saying that they need not be hard on him about his account, as they could pay themselves when they received the rents in a few months' time.

Cross-examined: That must have been about February last.

By the Court: The other tenant, Van Niekerk, had not paid this year's rent to Moorrees, and on plaintiff being told that, he said that Van Niekerk had paid the rent direct to him.

Mr. Gardiner closed his case,

Mr. Wilkinson submitted that the defendant had not discharged the onus which lay upon him, and that, therefore, there was no need to call any witnesses for the plaintiff, but the Court directed that evidence be led.

Mr. Wilkinson then called

Sybrand Johannes van der Spuy, the plaintiff, who denied that he had ever had any such conversation with Mr. John Louw as that stated by that witness. He had not been at Moorrees' office this year. In March last defendant asked him if he could lease the portion of the farm which had been rented by the late Mr. Louw, but afterwards he said it would be too small, unless he could get Mr. Mostert's portion also. Eventually witness went with defendant and Mr. S. C. Louw to Mr. Mostert, and the latter agreed to let his portion if one Vink would give it up. On the 22nd March they saw Vink, and the latter agreed. Defendant asked witness, in the presence of Mr. Vink, when he could take possession of the other portion of the farm, and witness said at any time, but that from the time he took possession, his rent would commence. Nothing was said about the rent being paid to Moorrees, or about the second portion being subject to all the conditions of the previous lease. Not a word was said about the contract of Mr. Mostert's at the leasing of the second portion. Witness never authorised defendant to pay the rent to Moorrees.

In cross-examination, witness at first said that if the rent had been paid to Mr. Moorrees on March 24, instead of April 24, he would have had no objection; but in answering a further question, he corrected himself, and said that now he objected to the rent being paid to Moorrees. He said he had not seen Moorrees or John Louw since October last year, and he had never asked them not to be hard on him, as they could pay themselves what he owed them from the rents when they became due. Witness had offered them a promissory note, but he did not go to the office himself, having sent the note there by post.

Thomas Albertus Vink, general dealer and farmer, residing at Philadelphia, said that on the 22nd March he had an interview with defendant and plaintiff. Witness was farming Mostert's portion, and there was a disagreement about some chaff. Defendant asked plaintiff

when he could have possession of Louw's portion of the farm. Plaintiff said he could take possession any day, but from the date he took possession the rent would commence. Nothing was said about payment of rent to Moorrees.

After hearing counsel on the facts the Court gave judgment for the defendant, with costs.

Buchanan, J.: The plaintiff in this case let his farm Alexandria in 1899 to three lessees, namely, Louw, Mostert, and Van Niekerk. The lessees were joint lessees, and when the agreement was entered into they divided the farm among themselves into thirds. In the next year—in March—the lessee Louw agreed with the lessor, the plaintiff, to surrender his third portion of the farm, and the plaintiff, either himself or through some other people, farmed this portion until the next year, when the defendant in this case agreed with Mostert to take over his third, to which sub-letting the landlord was a party, and at the same time plaintiff agreed with the defendant that he should also take over the third, which had been previously hired by Louw. Plaintiff admits that, at any rate so far as the third taken over from Mostert is concerned, the conditions of the hiring were those contained in the written contract, but he denies that these conditions apply to the third belonging to Louw. The defendant, however, alleges, and is supported in his allegation by witnesses, that it was clearly stated by the parties that the farm taken over by him was taken over subject to the conditions of the lease. These conditions, so far as they are material to the issue in this case, are that the rent should be paid yearly on the 25th April in each year, and that the place of payment should be at Mr. Moorrees' office in Malmesbury. The defendant, at the time the contract was entered was entered into, became liable to the plaintiff for two-thirds of the rents of this farm under the contract of lease, namely, the sum of £140 per annum. In March, 1902, before the rent was due, the plaintiff apparently needing money, wrote and asked if the defendant would anticipate the day of payment, or, at any rate, part of the amount, or if not, that he would require his rent to be paid by the 24th March, that being the day on which, so far as the verbal evidence shows, the par-

ties had come to their agreement. There was only one debt due by defendant to the plaintiff, and that was for £140 for rent, and that, under the lease, was not payable until the 25th April. Plaintiff, however, took out summons on the 15th April for £70, one-half of the amount. He was at once informed that the defendant considered the suit premature, and that he would pay the rent on the 25th April, the day upon which it was due. It may be that proceedings were hastened by the fact that before the summons was taken out, defendant had already given up possession of the farm on the 12th April. On the day before the rent became due the defendant, in terms of the contract, tendered his rent at the office of Mr. Moorrees, and it was accepted by Mr. Moorrees, as agent for the plaintiff. The plaintiff does not dispute this agency. He says that Moorrees was quite right in accepting £70, the rent due on the share of the farm taken over from Mostert, but that the other half of the rent, due on what was formerly Louw's share, ought to have been paid to him (plaintiff) direct. The defendant paid in terms of the contract. There was no intimation to him that he was not to pay his rent to Moorrees, and the receipt given by Moorrees states that the rent was due "as per contract in our possession." As a fact, the lease is still with Moorrees, and his agency has never been revoked. After the rent was so paid, the plaintiff continued his action to recover £70. He did this though he had been informed by Moorrees that defendant had paid this £70 to Moorrees, and that Moorrees had placed the amount to his credit. Moorrees had a claim against plaintiff in connection with other matters, and plaintiff knew that the balance which remained in Moorrees' hands, after deducting this, was at his disposal at any time he should choose to take it. I think, under the circumstances of this case, plaintiff was very ill-advised in proceeding with this action after the payment of the rent by the due date, and after he had received an intimation that the amount had been paid, and was at his disposal. The whole matter would probably have been settled if it had not been that plaintiff had unfortunately anticipated the date of payment and taken out summons. After payment he was wrong in proceeding with his

action, which then could only be a matter would probably have been settled if it plied with the contract, and had discharged the obligation which rested upon him. Judgment will therefore be given for the defendant, with costs.

Hopley, J., concurred. His Lordship said it was a perfectly clear case, and plaintiff ought never, under the circumstances, to have come into court.

[Plaintiff's attorneys: Silberbauer, Wahl and Fuller. Defendant's: Berrange and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAARDORP, and the Hon. Mr. Justice HOPLEY.]

KENNEDY V. GLUTSON } 1902.
BROTHERS. } June 19th.

Landlord and tenant — Rent —
Malicious damage by tenant.

This was an action brought by James William Kennedy against Morris and Simon Glutson, trading as Glutson Brothers, to recover certain rent, and also for damages for injury to property.

The plaintiff's declaration was as follows:

1. The plaintiff is a carpenter, residing at Bulawayo; the defendants are domiciled in the Cape Colony, and carry on business in partnership in Cape Town as shopkeepers.

2. In or about September, 1898, the defendants, who were then carrying on business as partners at Bulawayo, hired from the plaintiff, at a rental of £7 per month, under a written lease, for a period of one year and three months from 1st October, 1898, a certain store, the property of the plaintiff, situated at Bulawayo.

3. In or about April, 1899, the defendants (or one or other of them), while in occupation of the said store under the lease, wrongfully, unlawfully, and maliciously set fire to the said store, with

its fittings; the property of plaintiff was in consequence completely burnt and destroyed.

4. Since the month of April, 1899, the defendants have paid no rent to plaintiff under the said lease, and are indebted to plaintiff in the sum of £56, as and for rent under the said lease.

5. By reason of the wrongful, unlawful, and malicious conduct of the defendants (one or other of them) as aforesaid, the plaintiff has suffered damages in the sum of £368, being as and for the value of the said store and fittings as aforesaid, loss of rent, and otherwise.

Wherefore the plaintiff claims: (a) Judgment for £56 rent under the lease as aforesaid; (b) judgment for £368 as damages as aforesaid; (c) interest *a tempore morae*; (d) alternative relief; (e) costs of suit.

Defendants had been barred for default of plea.

[Mr. Close for plaintiff. One of the defendants appeared in person.]

In his evidence, which had been taken on commission, the plaintiff, after deposing as to the lease and the situation of the premises at the corner of Rhodes-street and 13th Avenue, Bulawayo, said that the premises were set fire to and destroyed between about eleven p.m. on the 15th April and one a.m. on the 16th April, 1899. The shop was totally destroyed, and the room was partially destroyed, burnt. It took £20 to repair that room. The building was not insured at the time of the fire. To plaintiff's knowledge the defendants had insured their stock for about £1,200, while the actual value of the stock was about £350. Inquiries were made as to the fire, with the result that both defendants were committed for trial, and were subsequently convicted in the High Court of Southern Rhodesia, and were sentenced to two years' imprisonment. Plaintiff himself gave evidence at the trial on the charge of arson. Plaintiff had received no rent since April, 1899, and the rent owing to him was for the month of May, 1899, and following months to the end of the lease, that was, eight months at £7 (£56). Witness valued his loss at £200, upon the basis of a fair and just valuation. For some time he could not rebuild, owing to want of means, but if he could have done so he could have let the place over and over

again. He considered that, owing to the place not having been rebuilt and let, he had been damaged to the extent of £84 per annum for two years. Plaintiff had had a conversation with Simon Glutsen when the latter was out on bail before the trial for arson, and Simon Glutsen then said that if he got clear of the charge he would rebuild or pay the amount as soon as he could.

The defendant, who appeared in person, said, in reply to a question put by the Court, that the plaintiff had no written agreement from him by which he could be held responsible for damage done to the premises by accident, fire, storm, or anything like that.

[De Villiers, C.J.: But the plaintiff does not say that it was an accident; he says that you set fire to the place.]

Defendant said that plaintiff had the premises in question insured at the time the lease was signed, but before the fire the Insurance Company cancelled the insurance, and plaintiff did not insure again.

[De Villiers, C. J.: But if he has lost, you cannot blame him for not going on with the insurance; if you set fire to the place, you must pay him the damages.]

Defendant said plaintiff had made a claim against them in Bulawayo, but he had withdrawn his case.

[De Villiers, C. J.: You admit you were found guilty of arson?]

The defendant: They found me guilty on suspicion, on evidence. I had no money, and could not bring the matter before a higher court. Further questioned, defendant said that his stock was insured, but he did not get the insurance money. He was not doing anything at present, and had no money. He could not afford to employ lawyers to defend the case. There was no evidence but the plaintiff's own as to the buildings being worth £200.

De Villiers, C. J., said that, if the defendant had nothing better to urge, the Court would have to give judgment against him.

The Court then gave judgment for the plaintiff as prayed, with costs.

[Plaintiff's attorney: D. Tennant, jun.]

GENERAL MOTIONS.

BRUNN V. TAPPE AND CO. { 1902.
June 19th.

Civil imprisonment — Tender —
Variation of order of Court.

This was an application by Martin Brunn against Tappe and Co., on notice of motion calling on respondents to show cause why a writ of arrest for civil imprisonment, issued by respondents against applicant, should not be suspended on payment of 10s. forthwith, and thereafter payments of 10s. a month.

Mr. M. Bisset appeared for the applicant; Mr. Gardiner for the respondents.

Mr. Bisset said that applicant was subjected to a decree of civil imprisonment, this being suspended pending payment of 10s. a month on the first day of each month. The instalments were paid punctually up to the first of the present month. The applicant was living with his uncle, from whom he received a remuneration of £4 a month. On the first of this month applicant gave his uncle 10s. to hand over to the respondent's solicitor. The uncle did not hand over the money, and did not inform applicant of the omission until the 6th of the month, when the respondent immediately went to see the respondent's attorney, and tendered to him the sum of 10s., but the attorney informed him that a writ of imprisonment had been taken out, and that he would not take payment of the instalment.

Supporting affidavits by applicant and his uncle were read. The latter states that he had forgotten to pay the money, and that the oversight was entirely his fault.

Mr. Gardiner said that the reason for opposition was that, in a matter of civil imprisonment, when a decree was granted, and suspended on certain payments being made, there was always liberty to the applicant to come to court and ask that the amount should be increased. The affidavits in this case disclosed that the respondent (present applicant) was in a much better position than he was when the decree was granted. When the application was made for a decree, Brunn said he had no means, and made an offer of 10s. a month, which he said he was earning at that time. Now the affidavits showed that

Brunn was working for his uncle, getting £4 a month and board and lodging. He submitted that, before the writ was suspended, the amount should be increased.

Mr. Bisset, after argument, said he would agree to an order for £1 a month.

The Court suspended the decree on condition that the instalments be increased to £1 a month, the first payment to be made on the 1st July; defendant to pay costs.

KOHLING V. MCKENZIE. { 1902.
June 19th.

Lease—Option of purchase—Sale
Interdict.

A lessee had the option of purchase during his tenancy. The lessor sold the land to a third person who had no knowledge of the lessee's option, which had not in fact been exercised.

Held, that as the lessee had no better right to the assistance of the Court than the purchaser, the Court should not interdict the lessor from transferring the land to the purchaser, and that the lesser's only remedy was by action for damages against the lessor.

This was an application upon notice calling upon the respondents, Donald McKenzie and Wm. McKenzie, to show cause why the sale to one Israelson of certain property in Long-street, leased to the applicant, should not be interdicted, and why the option of purchasing the property on the terms agreed upon between Israelson and respondents should not be given to applicant.

Applicant's affidavit stated that:

(1) On October 20, 1899, he leased certain premises in Long-street, Cape Town, for three years, from July 1, 1899, which agreement is still in force.

(2) By Clause 8 of the said agreement, respondents gave applicant a right of pre-emption during the term of the said lease, and agreed to allow him 48 hours to decide whether he would exercise this right.

(3) That he had been informed by one David Israelson that he (Israelson) had purchased the said premises privately from the respondents for £6,000.

(4) The respondents had never given applicant the option of purchase.

(5) He was prepared to purchase the said premises for £6,000.

In an answering affidavit, Donald McKenzie (one of the respondents) stated that he had had an offer from one P. T. Martin (of Martin Bros.) of £6,000 for the said premises. Deponent told Martin that he (deponent) could not do business with him until he had first seen the applicant with a view to giving him the opportunity of exercising his rights of pre-emption. Martin replied that he had already offered the place to applicant, who had refused to buy. Deponent objected to his having done this, and raised his price to £7,000. Martin soon afterwards again saw the deponent and offered £6,500 for the premises. Respondent replied that he must first see the applicant and afford him an opportunity of purchasing at that price. Applicant declined to purchase the premises for himself, but wanted to sell them to a third person, as he wished to get brokerage out of the transaction. Deponent told him that he would have to share the brokerage with Mr. Willmot, who was agent for the property. Deponent agreed to give applicant till the morning of the next day but one to find a buyer, and requested him to communicate with Mr. Willmot on the subject. At the expiration of the time given by deponent to applicant, deponent saw Willmot, who stated that he had not heard from applicant. Deponent thereupon requested Willmot to see applicant and offer him till the following day at noon wherein to do business. In a letter, dated January 17, 1902, applicant stated that he had found it impossible to come to a decision within the time granted to him as to the purchase of the property. Deponent thereupon went to Martin and told him to close at £6,500. In the meantime the offerer at that price had withdrawn his offer, and it was not till March 17 that deponent was able to sell, and then only at £6,000. The applicant's refusal to buy was clear, and owing to his delay deponent had lost a buyer at £6,500. Deponent was not aware that applicant objected to the sale to Israelson until he received applicant's

notice of motion, dated May 7, 1902. Other affidavits on both sides were read and put in.

[Mr. Searle, K.C., for the applicant; Mr. Schreiner, K.C., for the respondents.]

After hearing counsel, the Court refused the application with costs.

[De Villiers, C. J.: The applicant had an option under his lease to purchase the property, but that option had not been exercised at the time when Israelson purchased it from the respondent. Israelson had no knowledge of the applicant's rights, and the applicant therefore has no better title to the assistance of the Court than Israelson has. The Court cannot therefore grant an interdict restraining the respondent from transferring the land to Israelson, but must leave the applicant to his remedy by action for damages. The application must be refused with costs, with leave to the applicant to claim such costs in any action he may hereafter institute against the respondent.]

[Applicant's Attorneys: Findlay and Tait. Respondent's: Walker and Jacobsohn.]

Re THE ESTATE OF THE LATE MICHIEL DE WIT.

Mr. Bisset moved to make absolute a rule *nisi* authorising the cancellation of a mortgage bond.

Granted.

Ex parte GARNER.

On the motion of Mr. Close, an order was granted for the cancellation of a certain mortgage bond granted in favour of a minor. It appeared that the bond had been duly paid.—Granted.

Re THE PAARL SPIRIT COMPANY.

Mr. Searle, K.C., moved for an order for the confirmation of the report of the official liquidator of this company, and the dissolution of the company. Counsel also asked that an order should be made that the books and documents should lie at the office of the official liquidator for inspection for six months, and that afterwards they should be destroyed. The liquidation had worked

out most satisfactorily, and the shareholders had received £26 10s. for each share of £7 10s.

The application was granted.

COLONIAL GOVERNMENT V. HILLS.

Railways—Act 19 of 1900.

This was an application for an order authorising the Government to take over the Somerset East-King William's Town and the Kliplaat lines of railway. The application was made under the 52nd section of Act 19 of 1900.

Mr. Schreiner, K.C., appeared for the Government; and Mr. Searle, K.C., for the respondent.

Counsel having been heard in argument, the Court granted the application.

In giving judgment, De Villiers, C. J., said that the respondent had failed to complete the contract in terms of section 27, and the Government now asked for an order allowing them to alter and take possession of the contract lines in so far as they had been constructed by the contractors. To this the Government were entitled under the 52nd section. It was quite true that the Government had to pay the actual cost ascertained, but the Court could not make that part of the order. Having read the section, his lordship said that as for the objection that the Government had to take over the Mossel Bay-Oudtshoorn line as well as the two lines in question, he thought there was no reason whatever for this argument, seeing that the Mossel Bay-Oudtshoorn line stood on an entirely different footing. That was an agreement by which a concession was granted to respondent to construct a certain railway, and the term wherein that had to be completed had not yet elapsed; whereas in regard to the contract railways, the time for completion had long since elapsed. The Court would make an order as prayed, with costs.

Ex parte BARRY. (1902.
(June 19th.

Ante-nuptial Contract—Registration.

This was an application for an order authorising the Registrar of Deeds to register a certain antenuptial contract.

The petition of Hubert William Barry and Elizabeth Hedding stated:

1. That on April 23, 1902, the petitioners executed an antenuptial contract before the notary, Percival J. Griffiths.

2. That the said Griffiths instructed his clerk to send the said contract to his Cape Town solicitors for registration, but the former failed to do so until several weeks thereafter.

3. That the said deeds were lodged for registration in Cape Town on May 26, 1902, but were refused by the Registrar by reason of the same having been lodged after the time prescribed by law had elapsed.

Wherefore petitioners prayed for an order authorising the Registrar to register the said contract.

On the motion of Mr. B. Upington, the Court granted an order as prayed, without prejudice to the rights of persons who have become creditors before the date of registration.

[Applicants' attorney:s: Friedlander and Du Toit.]

SOUTH AFRICAN BREWERIES (LIMITED)
V. MARTIENSSEN.

Mr. Schreiner, K.C., moved for leave to appeal to the Privy Council.

Mr. Searle, K.C., appeared for the respondent.

The application was granted.

Ex parte THE EXECUTORS (1902.
OF THE LATE NOLTE. (June 19th.
Sale to executors.

This was an application for leave to transfer certain property at Somerset West.

The petition of Michael Smuts, Nolte, and Zielman Johannes Marais, of Somerset West, in the division of Stellenbosch, stated:

1. That the said petitioners were executors testamentary in the estate of the late Maria Magdalena Nolte (born Smuts), widow of the late Mathias Michael Nolte, who died in February last.

2. That there stands registered, in the name of the said late Maria M. Nolte, by deed of transfer, dated June 29, 1900, the following property: (a) A certain piece of perpetual quitrent land situate at Somerset West, being a part of a portion of the divided place, "De Hoop,"

also called "Paarl Vallei," transferred to Johannes Albertus Myburgh, on June 5, 1896. (b) Another part of a portion of the divided place, called "De Hoop," transferred to the transferee aforesaid on March 8, 1898. (c) a certain piece of perpetual quitrent land situate at Somerset West, being lots 1 and 17, portion of that part of the divided place "De Hoop," transferred to the said Myburgh on March 8, 1898.

3. That by codicil, dated January 27, 1902, the deceased Maria M. Nolte directed that the aforesaid landed property should be sold at public auction to the highest bidder.

4. A public sale was held on April 12, 1902, at Somerset West, of all the estate and effects of the deceased.

5. The said sale had been duly advertised and was well attended.

6. The movables were just disposed of at the said sale, and subsequently the immovable property.

7. The firstnamed petitioner (M. S. Nolte) was prepared to give £2,000 for the immovable property, and started the bidding at that price.

8. The property was sold to the said petitioner for the above amount, though every effort was made to secure an advance on his bid.

9. That this was a fair price for the said property.

10. That the petitioners did not know at the time they bought the property that there would be any difficulty in the way of obtaining transfer.

11. That the late Maria M. Nolte left eleven children, her surviving, whereof one, Hester Maria Jacoba, married in community of property to the second petitioner.

12. Two of the children aforesaid are minors, but are approaching the age of majority.

13. All the said children save three of the majors have given their consent to the purchase by the firstnamed petitioner of the said property, and the consent of these three majors cannot be obtained, as they are presently out of the Colony as prisoners of war.

Wherefore the said petitioners pray for an order sanctioning the said sale to petitioner first named, and authorising the Registrar of Deeds to pass transfer to him of the said property.

On the motion of Mr. Buchanan, the Court granted an order as prayed.

[Applicant's attorneys: Walker and Jacobshon.]

THOMPSON V. SEALE. } 1902.
June 20th.

Lease—Sub-letting—Approval of lessor—Evidence.

The lease of certain urban premises contained the following clause:—"The lessee is not entitled to sub-let the premises or any part of them except to such tenants and for such purposes as the lessor may approve."

Held, that the lessor was entitled to object to any sub-tenant proposed by the lessee without assigning any reasons.

A letter written by the lessee to the lessor some time before the signing of the contract of lease and not referred to in such contract is not admissible as evidence to vary the contract.

This was an application by William Thompson, upon notice given to the respondent to the effect that the Court would be moved: (1) For an order under section 35 of Act 23 of 1891, declaring that the judgment entered on the 30th day of May, 1902, in favour of the defendant in convention, now respondent, was wrong in law, and that judgment should have been entered for the plaintiff, now applicant; or in the alternative (2) for an order under section 36 of the said Act, that there should be a new trial, on the ground that certain material evidence of the plaintiff, now applicant, was rejected which should have been admitted; and for an order that the defendant, now respondent, be ordered to pay the costs of this action.

The applicant's attorney (Mr. D. Tennant) made the following affidavit:

1. That on the 30th day of May, 1902, judgment was entered for the above-named respondent in an action heard in this Hon. Court, before the Hon. Mr. Justice Hopley and a jury, in which the above applicant was plaintiff and the

above respondent was defendant, and whereby the said plaintiff sought to recover from the said defendant the sum of £2,000, damages for breach of a contract of lease.

2. That in the course of the trial it was admitted that respondent refused his approval to all sub-tenants whose names were submitted to him by applicant, respondent not considering these applications on their merits, but acting in and about the said refusal under a claim of right to refuse all sub-tenants.

3. That independently of any such admission the evidence proved the above facts.

4. That the verdict of the jury was to the following effect: "That the plaintiff had sustained damages in the sum of £400 if the defendant acted illegally; if he had acted legally, then plaintiff had sustained no damages."

5. That after the verdict the Judge gave judgment for defendant, holding that he had not acted illegally in refusing to consider the applications of sub-tenants which were submitted to him.

6. Applicant submits that the judgment so entered by the learned Judge was wrong, inasmuch as the defendant acted illegally, and that judgment should have been entered for plaintiff in convention.

7. That in the course of the said trial, the applicant (then plaintiff) tendered certain evidence in support of the allegations set forth in the fourth paragraph of the plaintiff's declaration, and more particularly a certain letter written by applicant (then plaintiff) to respondent (then defendant), and dated the 5th December, 1893, for the purpose of showing that the premises in question were, to the knowledge of the respondent (then defendant) to be hired, and were so actually hired, for the express purpose of being sub-let. Oral evidence was also tendered to the effect that respondent had this knowledge when he entered into the said contract of lease with applicant.

8. That the counsel for the respondent (then defendant) objected to evidence tendered on the above points, which objection the learned Judge upheld.

9. Applicant feels aggrieved that the said evidence should have been rejected, and claims that if it had been admitted the verdict and judgment would have been in his favour, and craves leave that, should your lordships not grant his prayer in

paragraph 6 hereof, to enter judgment for plaintiff, that a new trial should be ordered.

10. I desire to refer this Hon. Court to the terms of the notice of motion accompanying this affidavit, and to the pleadings and records of the proceedings at the trial as filed of record.

The letter referred to in the above affidavit as having been written to the respondent by applicant, was as follows: "Cape Town, 5th December, 1898. Dear Sir,—In re floors Nos. 1, 2, 3 over your Adderley-street premises having entrance in Longmarket-street. To divide the above into suitable offices or sample rooms will necessitate an expenditure of fully £100. Even then the low ceiling of No. 2 floor will be an impediment in the way of securing tenants. However, be that as it may, we are willing to take the three floors from you at a monthly rental of £25, with the proviso that at the end of three years' tenancy, the partitions to be put up shall become the property of the landlord or lessor. If the landlord will put up the partitions we will pay a monthly rental of £30 for the three floors. In the latter case we are willing to take the three floors on a yearly lease, with the option of renewing the same at the same rental, three months' notice of which is to be given. We understand that the premises will be vacated by the present tenants on the 31st December current, and that alterations could then be proceeded with forthwith, the work of which will take fully a fortnight, and an allowance on the rental should, we think, be made for the period. In other words, rent to date from completion of alterations when occupation can be taken. The writer, Mr. Wm. Thompson, is the sole partner in our business, and he refers you to the Manager of the Standard Bank, Cape Town."

The respondent's attorney (Mr. D. F. Berrange) made the following affidavit:

1. That I have perused the affidavit sworn to by the applicant's attorney in the above matter.

2. That as regards paragraph 2 of said affidavit, it was not admitted that respondent refused his approval to all intending sub-tenants, whose names were submitted by applicant to respondent. On two occasions respondent did consent to the applicant's sub-letting

offices, which fact is borne out by the evidence in said trial.

3. That the respondent admits that he claimed at the trial that he had a legal right under said lease at his own discretion to refuse consent to the applicant to sub-let, and that he could so do without reasons assigned and without considering the applications for permission to sub-let on their merits.

4. That counsel for the said applicant, then plaintiff, in the action against the said respondent, then defendant, admitted that in the withholding of the consent to allow the said plaintiff to sub-let the respondent, then defendant, did not act maliciously or vexatiously.

5. Whether the defendant, now respondent, acted illegally, or not, in refusing the applications of intending sub-tenants which were submitted to him by the plaintiff, now applicant, the respondent must leave in the hands of this Honourable Court to decide.

6. As regards paragraph 7 of said affidavit, I say that counsel for the defendant objected to a certain letter written by the plaintiff to defendant on the 5th day of December, 1898, as evidence, on the ground that the said letter was anterior to the date of the said lease, the date of the lease being 14th December, 1898, and that the said lease, which was in writing, set forth the contract.

7. The respondent submits that the ruling of the learned Judge at the trial was sound in law, and that the judgment so entered on the said 30th day of May last is a correct one.

Applicant's attorney made a further affidavit, as follows:

1. That I have perused the affidavit sworn to on the 11th inst. by the attorney for the respondent.

2. That with regard to paragraph 2 of the said affidavit, the applicant admits that the respondent did on two occasions give his permission to applicant to accept sub-tenants, but says that the evidence clearly showed that after the 14th January, 1901, the respondent refused all and every application for permission to sub-let, under a claim of right so to do.

Mr. Scarle, K.C. (with him Mr. Upington), for the applicant; Mr. Schreiner, K.C. (with him Mr. Close), for the respondent.

Mr. Scarle said that at the trial the respondent (then defendant) relied upon

the following clause in the lease: "The lessee is not entitled to sub-let the premises or any part of them, except to such tenants and for such purposes as the lessor may approve." I submit that this clause merely meant that the lessor could exercise his discretion, and not that he could refuse to allow any sub-letting at all.

[De Villiers, C.J.: You want us to read something into the contract that is not there.]

This clause meant that, it being in the contemplation of the parties that certain tenants were to come in, the landlord was to exercise a discretion, and could refuse any tenant if he had valid reason, but he could not take up the position that he would allow no tenants to come in. Then he went further, and said that evidence should have been permitted to show that it was in the contemplation of the parties at the time that the place was required for the purpose of sub-letting to tenants. In all agreements of this kind there is an implication of reasonableness.

See section 35 of Act 23 of 1891. The first ground of our application is that the jury at the trial assessed the plaintiff's damages at £400 should the Judge find that he had acted illegally; but the Judge found that he had acted legally. Our second contention is that evidence was wrongfully excluded. Clause 6 of the lease authorised the defendant to refuse as sub-lessees persons of whom he disapproved; but he had taken up the position that he would not have any sub-tenants, and yet the whole agreement shows that the very object with which these premises were let to plaintiff was for the purpose of sub-letting. Thus it was agreed by clause 11 that partitions put up by the lessee were to remain his property. Some £200 or £300 were spent in the erection of these partitions, and for two years the premises were occupied by sub-tenants. Though the defendant could refuse certain tenants for valid grounds, he could not refuse to admit any tenants. Evidence should have been admitted to show that the lessee leased the premises for the purpose of sub-letting. We say that defendant was bound to judge each case on its own merits. The word *approve* implies the exercise of a discretion. On the other side, *Carter v. Town Council* (10, Sheil, 722), was relied upon,

but see clause 10 of the lease in that case, of August 5, 1895, ceded by Bigod to Carter. As to *approval*, see *Hussey v. Payn* (L. Rep. 4, Ap. 311). Approval means reasonable approval. The landlord could not refuse all sub-tenants; he must approve of some persons.

[De Villiers, C.J.: Why did you not apply for a rectification of the lease, then all these documents would have been admissible; you cannot interpret the lease by previous correspondence. The lease gives the lessor absolute discretion.]

But he has not exercised any discretion. As to *approval*, see *Hudson on Building Contracts* (Vol. 1, p. 272).

[Maasdorp, J.: Suppose the lessor disapproved of sub-lessees one after the other?]

I would say that he has not exercised any discretion at all. It was open to us to show that Seale would not admit any subtenants at all. From January to December the names of prospective tenants were submitted to him, and he rejected them all without inquiry. Mr. Berrange admits that Seale would not have any sub-tenants. If he continues this general prohibition, he is acting *mala fide*.

[De Villiers, C.J.: His motives cannot affect the question if he is simply insisting on his contractual rights.]

Quite so, but that is not our reading of the contract. Our point is that defendant was bound to exercise discretion, and he did not do so.

[De Villiers, C.J.: Does not the clause, "except such persons as the landlord may approve," give the landlord a right to exclude any persons?]

No *approve* implies the exercise of discretion. It would have been different if the clause had read, "not without the landlord's consent." As to *approval*, see *Voet* (19, 2, 35), for here the same principles apply as in *locatio operis*. See *Vizon v. Blane* (Buch., 1879, 217). As to my second point. It was alleged in the declaration (par. 4) that defendant knew plaintiff wanted the premises for sub-letting; and yet the Judge ruled that this could not be proved. *Taylor Ev.* (sec. 1,197, 1,198, 9th edit.). *Pothier on Obligations* (V. 2, p. 212 (5th edit.)). *Morgan v. Griffiths* (L.R., 6, Ex. 70, cited by *Stephen Ev.*, Art. 90, 98, 4th edit.). So here it was quite understood between the parties that these premises were to be sub-

let, and evidence of this should have been admitted. Seale wanted to cancel the lease, and offered £300 at one time and £350 at another to be allowed to do so; but plaintiff refused to cancel for less than £1,000. As to admissibility of evidence, see *Pearson v. Pearson* (27 Ch., D 145 and 148). In that case letters written prior to a written agreement were admitted. In this case it was argued for defendant that the contract must speak for itself. The English authorities on restraints on sub-letting are not altogether applicable here; but see *Woodfall on Landlord and Tenant* (p. 693, 15th edit.). I submit (1) that defendant acted illegally, and (2) that evidence as to the object of the contract should have been admitted.

Mr. Schreiner, K.C. (for respondent) quoted *Voet* (19, 2, 5), as to the rights of the owner, if even an urban tenement, to restrain sub-letting by agreement. Here we have such an agreement. In fact this special clause of the lease is in derogation of the common law as to sub-letting. Thompson has contracted himself out of the rules of that law. He was not to have the right to sublet "except to such persons as the landlord should approve." This is not at all a parallel case with *locatio operis*. Here a man simply insists on his right to retain control of his own property. The case of *Carter v. The Town Council* shows that when it is a question of a sub-tenant the landlord may simply say "No." As to oral evidence being submitted to vary the written contract, see *Osmond v. Steyn* (10, Sheil, 763). This is quite a parallel case: so also *Goldsmitt v. Adler* (3 Juta, 117) and *Richards v. Nash* (1, Juta, 312), *Executors of Hofmeyer v. De Waal* (1, Juta, 42, 4). Counsel for the plaintiff denied at the trial that he imputed *mala-fides* to the defendant.

[Mr. Searle: If this is a question of legal right, and the letters are excluded, surely that is quite irrelevant.]

See also *Encyclopedia of the Laws of England* (Art. *Leases*, Vol. 4, p. 22), *Barrow v. Isaacs and Son* (1, Q.B., 1891, 417), *Bates v. Donaldson* (2, Q.B., 1896, 241), *Pierson v. Pierson* is clearly distinguished from the case. See also *Wheatherall v. Gearing* (12, Veasey, 504), where see particularly the judgment of Grant, M.R., and *Re Cash Contract* (1. Ch. D., 1897, p. 9), also *Pollock on Contracts* (p. 450, 2nd edit.).

Mr. Searle, in reply, denied the applicability of most of the above English cases.

[De Villiers, C. J.: The question of law which the learned judge had to decide was really the meaning of a clause in the contract of lease which reads: "The lessee is not entitled to sublet the premises or any part of them except to such tenants and for such purposes as the lessor may approve." Now Mr. Searle, on behalf of the plaintiff, candidly admitted before the jury that the defendant's action was not malicious, and on the other hand there is an admission on behalf of the defendant that he claimed at the trial that he had a legal right under the said lease, at his own discretion to refuse consent to an application to sublet, and that he could do so without assigning any reasons. Now if it had appeared upon the face of this lease that the object of the plaintiff in hiring the premises was to sublet to sub-tenants, there would have been much force in Mr. Searle's argument that the word "approved" should be construed with considerable latitude but there is nothing on the face of the lease to show that it was understood that the plaintiff hired the premises for the purpose of sub-letting. On the contrary the 5th section seems to assume that the lessee himself intended to carry on his business therein, because it provides that the lessee is to occupy the premises and carry on business in such manner as will not cause annoyance or disturbance to the lessor. Then comes the 6th clause, which begins by prohibiting the right to sublet the premises, and which provides: "The lessee is not entitled to sub-let the premises or any part of them except to such tenants and for such purposes as the lessor may approve." Mr. Searle admits that that does not make his case so strong as it would have been under a lease which said that the lessee shall be entitled to sub-let the premises, but only to such tenants and for such purposes as the lessor may approve. Now he wishes the Court to read this 6th clause as if these words had been added: "Provided the refusal shall not be unreasonably exercised"; but plaintiff should have insisted at the time the memorandum of lease was agreed to, upon the insertion

of these words. It struck him before signing the lease that the clause gave the lessor larger powers than were bargained for, but he was satisfied with the explanation given by the lessor. It is quite possible that the plaintiff might be entitled to claim that this lease should be rectified so as to make it in accordance with the intention of the parties, but there may be objections to that which do not now appear, and the Court, therefore, expresses no opinion on the point. As the lease stands, I think the Court must construe the 6th clause without the incorporation of the proposed additional words. The lease gives the lessor certain advantages, and it may well be that the rent has been settled upon the basis of such advantages and because the Court might think a condition unreasonable on the part of the lessor, we cannot deprive him of advantages which he stipulated for when he entered into the lease. For these reasons I think the first objection must fail. There is a second objection that there has been an improper refusal to admit certain evidence. The learned judge refused to allow certain letters written before the memorandum of lease was entered into to be read. Now, this memorandum of lease is the final agreement between the parties, and in strictness, therefore, any letters preceding this could not be admitted for the purpose of explaining the lease. If the case had come before the Court, perhaps the Court might have said: We will allow the letters to be read, because they are not likely to influence us," but in a case coming before a jury, I think the learned judge was quite right in refusing to allow any irrelevant matter to be introduced which might prejudice the jury. The case of *Morgan* (the Rabbit Case) is a very different one. In that case there was a collateral agreement at the time the lease was signed, and that collateral agreement was quite consistent with the terms of the lease. In the present case it would be somewhat inconsistent with the sixth clause to add to it words to the effect that the discretion shall be reasonably exercised. No reason has been shown, in my opinion, for setting aside the verdict or for granting a new trial. The application must be refused with costs.

Buchanan, J., said he fully concurred with the decision on the point of law. The words of the lease were so plain and absolute a restriction that he was surprised that exception was not taken to the declaration. As to the second objection, regarding the non-admission of evidence, if the sole question had been the construction of the lease, it was difficult to see what evidence outside the document itself was relevant. But as this was not the sole question raised, and the jury were asked to find on other issues, he would for himself have been in favour of admitting the letters written between the parties as being material to those other issues. As however the case was conclusive against the plaintiff on the lease itself, he could not be said to be prejudiced by the rejection of the evidence tendered.

Respondent's: Barrange and Son.]

STANDARD BANK V. CARTER (1902.
" " V. MCKENZIE. (June 20th.

Attachment—Bills of Lading.

The respondents, intending to institute an action in this Colony against the shippers of butter in Australia, obtained a judge's order for the attachment of the butter ad fundandam jurisdictionem. The Bank, as the holder of the bills of lading made to the order of and witnessed by the shippers, applied for an order to discharge the attachment with the object of reshipping the butter to Australia. The Court being satisfied that the butter was deteriorating in quality, and would realise less in Australia than here, refused to discharge the attachment, but in order to protect the rights of all parties concerned authorised the Sheriff to sell the butter through the agency of a broker, and to pay the proceeds to the Registrar of the Court, giving leave to the Bank to intervene as defen-

dant in the action brought by the respondents against the shippers.

Semble, that if the Bank advanced money, as it appears to have done, on the security of the bills of lading the shippers retained such an interest in the butter as was properly attachable ad fundandam jurisdictionem.

These were two applications for orders setting aside the attachment of certain cases of butter. As the applications were of a similar nature they were taken together.

In regard to the first application, the order of attachment had been obtained by Carter, on March 26 last, from Maasdorp, J., in chambers, the respondents being Howse Brothers and Co., who were then stated to be the owners of the goods. The attachment was to found jurisdiction in an action Carter was bringing against Howse Brothers and Co. for the recovery of moneys on an agency account. In regard to the second application, McKenzie and Co. had obtained the attachment of certain other cases of butter by order of the Court, also said to belong to Howse Brothers and Co., *ad fundandam jurisdictionem* in an action which McKenzie and Co. were bringing against Howse Brothers and Co., for damages for breach of contract.

For the applicants affidavits were read to show that Howse Brothers had drawn certain bills of exchange on Carl Beattie and Co., of Cape Town, in connection with the butter, which bills Howse Brothers endorsed in favour of the Royal Bank of Queensland, and that bank again had endorsed the bills in favour of the applicants. The bills of lading were given to the Royal Bank of Queensland by Howse Brothers and Co., and by that bank transmitted to the applicants. The bills of exchange had been dishonoured by Carl Beattie and Co., and the applicants retained the bills of lading in order that they might dispose of the butter in any manner necessary. In the second application the bills of exchange had been drawn on McKenzie and Co., and by them dishonoured. It was contended that the applicants holding the bills

of lading against the bills of exchange were entitled to possession of the butter. It was also stated in the affidavits that the market for butter here being overstocked at the present time, the Royal Bank of Queensland had given instructions for the butter to be returned to Australia to be sold there.

The respondents denied that the applicants were legally entitled to possession of the butter, and also that the market for butter here was overstocked.

[Mr. Schreiner, K.C., for the applicants; Sir H. Juta, K.C., for Carter; and Mr. Searle, K.C., for McKenzie and Co.]

Mr. Schreiner: McKenzie knew that the Standard Bank held the bills of lading, and he ought to have brought that fact to the notice of the Court when applying for the order for attachment.

[De Villiers, C.J.: It may be that the butter will realise more than is due on the bills of lading.]

But it may realise less. We are holders of the bills of lading, and they are evidence of property.

[De Villiers, C.J.: How can you hold that the butter would sell better in Australia than here?]

I do not press that point, but we are instructed by the Royal Bank of Queensland to send back the butter, and we must endeavour to comply with our instructions if we can legally do so. It is not our butter, and it should never have been attached.

[De Villiers, C.J.: How do we know that Howse Bros. and the Queensland Bank are not acting in concert? It is strange that they should suggest the sending back of the butter.]

There is no foundation for such a suggestion. The butter was never the property of Howse Bros.; it belongs to the bank, which holds the bills of lading.

[De Villiers, C.J.: A person may hold a bill of lading and yet be a mere pledgee.]

See *L. and S. A. Bank v. Currie* (Buch., 1875, p. 29). One cannot attach the property of third persons *ad fundandam jurisdictionem*. The bills of lading give no hint that the bank is holding the butter as agent for Howse Bros.

[Maasdorp, J.: How does it appear that the bank gave value for these bills?]

That is not necessary, the possession of the bills passes the property, unless somebody else can show a better title.

Possession of the bills is *prima facie* evidence of property. The Court will not presume that the Bank of Queensland is acting in collusion with Howse Bros. to defeat Howse's creditors here. See *Carrier, Carriage by Sea* (Sec. 501). We are the only people who have received delivery of these goods, and now it is sought to defeat our rights of possession by an order of attachment. The Court in granting the order expressly reserved the rights of creditors. If Carter is still agent for Howse Bros., how could McKenzie say in his affidavit that he did not know that Howse Bros. had any agent in this country. If the facts of our holding these bills of lading, and that the bills of exchange had never been met had been brought before the notice of His Lordship, Mr. Justice Maasdorp, I submit that he would never have granted Carter the order of attachment, and I may say the same of McKenzie's order, which was granted by the Court. Howse has no ownership in the butter.

Sir H. Juta, K.C. (for the respondent Carter): It is true that the bank holds the bills of lading, but it has given no value for them and, therefore, Howse Bros. are the owners of the butter. I deny that a mere endorsement of a bill of lading necessarily passes property. It may mean a pledge, or it may mean anything else, and this is the whole case for the bank, viz., that because they hold the bills of lading they own the goods. We would venture to suggest that the butter should be sold, and the proceeds paid into the hands of the Registrar of this Court, pending an action. It is absurd to suppose that if the Queensland Bank had advanced money on the butter it would want to have it sent back, and after paying freight and allowing for deterioration, still expect to sell it at a profit. The Standard Bank does not claim any balance of profit from the butter, therefore, it cannot be the owners of it. As to the market, the affidavit of Sexton shows that last week, butter of the same class sold here at a profit of 2d. per lb.

[De Villiers, C.J.: If the bank advanced money of this butter, it surely has a certain right in it?]

Yes, if it is a pledge, but even then only to the amount of the money advanced. The interest of the bank is only to cover its own advances. It is our interest to sell at the best possible price, and therefore it would be better for all

parties that the sale should be placed in our hands. I would suggest that Carter should be appointed to superintend the sale.

Mr. Searle, K.C. (for the respondents, McKenzie and Co.): I quite agree that Carter should sell the butter; as he has sold some 21,000 lbs. of butter for Howse Bros within the last few months. Let him act in conjunction with the bank. For the present law as to the delivery of bills of lading passing property see *Scrutton on Charter Parties* (p.p. 134, 135, 4th edit.), where he quotes *Scwell v. Burdick* (10 Ap. cases, 74) which reverses many of the earlier cases on this subject. See particularly, *Scrutton* (p.p. 156, 157). It is quite possible that a bill of lading may pass no property whatever. The Standard Bank do not know who are the owners of this butter. It is significant that in May the Queensland Bank wanted the butter sold here; now they want it sent back—probably because in the meantime they have been indemnified by Howse Bros. As to the point of law, see also *Carrer* (p. 497).

Mr. Schreiner (in reply): We hold certain clean documents which afford *prima facie* evidence of title. Nothing has been done to rebut that presumption. There is no proof of Howse Bros. intention when they passed the bills of lading to sell to the Queensland Bank. Why then should this bank, which is without the jurisdiction, be bound to come in and prove a better title than they show from the bills of lading. The onus of showing a title to the property is on the parties who wish to maintain the attachment not on us.

De Villiers, C. J.: There is no doubt, as applicants' counsel has urged, that possession of the bill of lading is equivalent to the possession of the goods, and *prima facie* entitles the holder to claim delivery from the shipowner. The right of property, however, is not necessarily in the holder of the bill of lading, for he may have received it as security for a loan, and not as purchaser. In the present case the applicant bank is acting merely as the agent of the Queensland Bank, which probably has advanced to the shippers of the butter the amount of the bills of exchange drawn on some of the respondents. The respondents would have an attachable interest in the butter, and if the Court were now to discharge

the attachment the respondents would entirely have their remedy in the Courts of this colony. The Queensland Bank, on the other hand, would not be prejudiced by the course which the Court proposes to adopt. I am satisfied that it would be for the benefit of all parties concerned if the butter were not allowed to be taken back to Australia, but ordered to be sold here. The affidavits show that its quality is deteriorating, and that if sent back it would sell for much less than it would realise in this colony. In this manner further freight would be saved and further loss prevented. The proceeds may be paid to the Registrar of the Court, so that all parties having an interest in the butter will have an opportunity of being heard before the proceeds are finally parted with. The butter has already been attached at the suit of the respondents *ad fundandum jurisdictionem*, and the Sheriff will be authorised to sell it through the instrumentality of a broker, and to pay the proceeds to the Registrar. The respondents will proceed with their action and raise the question now at issue by asking that the proceeds or part thereof be paid to them. The banks will have liberty to intervene as defendants in such action without any further application, and in this manner the rights of the different parties concerned will be determined with the least expense and inconvenience. The costs of this application will be costs in the cause.

Buchanan, J., concurred in the order as it was to the interests of all parties concerned to have the butter sold at once. The affidavits alleged that it was already deteriorating in value, and to re-ship the butter to Queensland would cause considerable delay and almost certain further deterioration. At the same time, he wished it to be distinctly understood that the onus would be upon respondents to establish the allegation that it was the property of the defendant Howse. The bills of lading, which were the symbols of the property, were in the hands of the bank, and, *prima facie*, they were entitled to the property represented by the bills of lading, unless something were shown to the contrary. He thought that if in the original application it had been shown that the bank held the bills of lading of this property, and no interest had been shown in Howse, the Court would have hesitated before giving

any order for attachment, which order was justified solely on the ground that this butter was the property of Howes, and not of the bank.

Maasdorp, J., also concurred.

[Applicants' Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: for Carter, Van Zyl and Buisinne; for Respondent McKenzie, Silberbauer, Wahl & Fuller.]

Ex parte FRASERS.

Mr. De Waal applied for leave to sell certain property at Cradock belonging to minors. The Master's report was favourable.

Granted.

On the motion of Mr. De Waal, the sub-division of the same property was confirmed.

Ex parte PERKINS.

Mr. Schreiner, K.C., moved for leave to cancel a certain mortgage bond which was admitted to have been paid in full. Granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

Ex parte HUGO. { 1912.
June 30th.

Articled Clerk—Trusteeship.

H. (an articled clerk) had acted as a trustee in a certain insolvent estate, and now applied to be admitted as an attorney of the Supreme Court. Held, that although the practice of articled clerks being employed in such capacity was to be strongly reprobated, seeing that the applicant had derived no pecuniary profit from his

trusteeship, and that he had assumed the said office on the suggestion of his principal, his having acted in the said capacity was no bar to his admission as an attorney of the Supreme Court.

This was an application for the admission of Mr. Stephen Hofmeyr Hugo as an attorney. Applicant's affidavit showed that the attorney to whom he had originally been articled had ceded the articles of clerkship to Mr. D. J. Michau, attorney, of Cradock. Thereafter the applicant was ordered by the military authorities to leave Cradock, and he went to reside with his father at Robben Island. Subsequently he entered into articles of clerkship with Mr. J. J. Michau, attorney, of Cape Town, and with him had completed a period of service, which, taken in conjunction with his previous terms of service, amounted in the aggregate to more than the period of five years prescribed by the 149th Rule of Court.

Mr. Schreiner, K.C., appeared for the applicant and moved his admission.

Mr. Searle, K.C., appeared on behalf of the Incorporated Law Society, and pointed out that the applicant's service had not been continuous. Under the circumstances, however, the Law Society did not oppose the admission of applicant on that ground. There was, however another matter which the Society felt it its duty to bring to the notice of the Court: that during the period of his service with Mr. D. J. Michau, applicant had accepted trusteeship in insolvent estates. He was not instructed actually to oppose Mr. Hugo's admission on this ground, as the Society thought that he had acted *bona fide* and had erred through ignorance and inexperience. They, however, considered the practice of articled clerks acting as trustees in insolvency highly objectionable, and now asked the Court to strengthen their hands by expressing an opinion on the matter. In *Hoare Ex parte* (1 Searle, 22), and in *Redelinghuyse v. Hofmeyr & Poirie* (1 Roscoe, 332) this practice had been adversely commented upon by the Court.

Mr. Schreiner (in reply): Formerly an attorney was not allowed to be a trustee in insolvency. That prohibition was removed by Act 38 of 1884, Section 6. The

cases referred to were both anterior to that Act. I do not say that it is desirable that the practice should be encouraged. If a trusteeship goes to an attorney's office, it ought to be discharged by the principal. Principals are to blame for allowing their clerks to accept such appointments; but here Mr. Hugo acted in perfect good faith; he derived no pecuniary benefit from the trusteeship, and the Resident Magistrate of Cradock, whom he had consulted about the matter gave it as his opinion that there was no reason why an articted clerk should not be a trustee.

[De Villiers, C.J.: The case cited by Mr. Searle is a very different one from the present. In that case the articted clerk had been a partner with his brother, and shared in the profits of the business which his brother was carrying on at the time. The test should be, "Has there been a real *bona-fide* service?" I quite agree that if articted clerks were allowed to be trustees of insolvent estates it might interfere with their *bona-fide* service, but I do not think the present was such a case. It was an incidental circumstance that the applicant was appointed trustee in a few insolvent estates, and it was done on the suggestion of the attorney to whom he was articted. I do not think the Court should punish him for these few acts, amounting at the utmost to indiscretion. The application will be granted.]

Buchanan, J., observed that it was the duty of an articted clerk to devote his whole time to the study and learning of his profession, and he was not to take up outside duties which would interfere with his studies. However, this was a special case, and he concurred with the judgment of the Chief Justice.

[Applicant's Attorney: J. J. Michau.]

ARTHUR KILWARDEN WOLFE.

Mr. Uppington moved for Mr. Wolfe's admission as conveyancer.

Admission granted as prayed.

GENERAL MOTIONS.

THEUNISSEN V. THEUNISSEN.

Mr. Alexander applied on behalf of the wife for leave to sue *in forma pauperis*.

The application was granted, the order to be returnable on July 12.

Postea (July 14th). The Rule was made absolute.

Ex parte HARTVIG. { 1902.
June 30th.

This was an application for leave to transfer certain property.

The petition of Carl Frederick August Hartwig, of King William's Town, agriculturist, showed:—

1. That the petitioner was married in Germany to Dorothea Sophia Hartwig (born Zatkennour), and subsequently came to this Colony.

2. That on November 27th, 1875, the petitioner and his wife executed a mutual will, whereof a copy is annexed marked A.

3. That petitioner's said wife died on October 9th, 1887.

4. That in and by the said will the first dying declared to nominate and appoint the survivor, jointly with the children of the marriage, to be the sole and universal heirs of the first dying, with power to the survivor to remain in the possession of the whole of the joint estate for the term of his or her natural life, "and at the death of the survivor of us the said estate is to be divided equally amongst our children.

5. That there were issue of the said marriage seven children, viz.: Hermann, August Emilie (married to Wilhelm Godow), Ferdinand, Wilhelm (now deceased); Otto (now deceased), and Pauline.

That the said estate consists of certain immovable property all enregistered in the name of the petitioner, viz:

(a) Lot 4 A, Lot 10 A, near the village of Keiskama Hoek, and Lot No. 1, near Keiskama Hoek.

(a) Lot No. 1, near Keiskama Hoek; Lot No. 223, in the district of Keiskama Hoek; and portion of Lot A, near Keiskama Hoek.

(c) Lot No. 8, Block C, in the village of Keiskama Hoek. The Divisional Council's valuation whereof is £610.

That petitioner is 66 years of age, and utterly unable to work the land from which his sole maintenance is derived, and is desirous of selling the same and placing the proceeds thereof at fixed deposit at interest in one of the banks in King William's Town, after paying off the bonds on the said property, which amount to £300.

Whereas petitioner prayed for an order authorising him to transfer:

1. The lots described in sub-section "a" to his own son August on payment of £400.

2. The lots described in sub-section "b" to Charles Montgomery on payment of £850.

3. The lot described in sub-section "c" to Wilhelm Fredrick Kumm on payment of £10.

In an accompanying affidavit the petitioner deposed that all the surviving children of himself and his late wife were majors, with the exception of Pauline, who was still a minor. That his deceased sons Wilhelm and Otto died without issue, and without leaving any estate. That he had not been able to ascertain the address of his son Ferdinand, who had left the district in April, 1900. That his son Hermann refused, and was unwilling to consent to the said sale and transfer of the property, his sole objection thereto being that he desires deponent to pay him £300 as his share of the inheritance under the joint will of deponent and of his predeceased spouse.

The Master's Report was as follows:—

"In terms of the will, the survivor is authorised to remain in possession of the whole estate for life, without being obliged to give any security, or until remarriage, when he could have the estate appraised by two impartial persons as directed, and pay out the children who have attained their majority and secure the minors' shares. that is, he could take over all the assets and pay out the share of the deceased parent.

"It is not stated whether there would have been a better sale if the property had been put up to auction; presumably, there would not have been a better offer, otherwise the major heirs would have objected to this petition if a better price could have been obtained.

"But the property does not appear to have improved in value since July, 1888, when an account of the estate was framed, and it was then brought up at a valuation of £1,200. It may now depreciate in value, if the petitioner, as he states, is unable to work the land; and I understand that such small holdings cannot be readily leased, being far removed from the Municipal towns.

I think, if the proceeds be deposited with one of the Trust Companies in Cape

Town, the sale may be authorised; the interests of the heirs would thereby be protected, and the petitioner would receive a higher rate of interest than from a bank."

On the motion of Mr. Russell, the Court granted an order in terms of the Master's report.

JOHNSON V. PARHAM. { 1902.
June 30th.

Injuria—Libel—Damages.

An untrue statement in a letter to the press that the plaintiff had tampered with a meter for measuring the electric light supplied to him by Municipal Electric Lightworks held to be a libel. The plaintiff, having seen it stated in a newspaper that the defendant had reported to the Municipal Council that he (the plaintiff) had stopped the meter, published in a subsequent issue of the paper a letter saying that the statement was a lie. The statement was, in fact, untrue.

Held, that although the defendant may have believed the statement to be true, the plaintiff, who could not have known what the defendant's belief was, was not guilty of a libel in saying that the statement was a lie.

This was an appeal from a decision of the Assistant Resident Magistrate of East London.

In the court below the plaintiff (Parham) had sued the defendant Johnson for £20 damages for slander alleged to have been contained in a letter published by the defendant in the alleged to have been contained in a letter published by the defendant in the "East London Dispatch." In this letter the plaintiff alleged that the defendant accused him of fraudulent conduct by tampering with a certain meter for the purpose of registering the quantity of electric power used at a certain house in East London, thereby de-

frauding the Council of certain money. The defendant asserted that his letter was written without malice and was published in the public interest, and made counter accusations of slander against the plaintiff, who, he alleged, had implied in letters to the "Dispatch" that he (defendant) was not to be trusted and was a liar. He claimed £20 in reconvention. The Magistrate awarded the plaintiff 1s. damages and costs, and granted absolution from the instance on the claim in reconvention.

It appeared that Johnson was meter-reader to the Town Council and Parham was foreman. Parham lived with one Hill in a certain house, supplied with electric light by the Municipality. Johnson did not read the meter of that house, and he was called upon to report to the Town Council why he had not read that meter. He gave as his explanation that Parham had given him instructions not to do so. Afterwards Parham's association with the Council, which had been a temporary one, ceased. The question of how this meter had not been read came before the Council, and Parham was called upon for a report. Parham then wrote a letter to the Town Clerk, in which appeared the words complained of in reconvention, and, not content with this, he published all the documents in the "East London Dispatch." Up to that time the defendant Johnson had published nothing whatever, but on August 30, the Town Council not having taken steps in any way to solve the matter, Johnson wrote the letter complained of in convention.

The letter complained of read as follows:

"Sir,—I have up to the present held my peace with regard to the above matter, but after the extraordinary proceedings which took place at the Council meeting of the 28th inst., I feel it my bounden duty to myself to make known through the columns of your valuable paper a few true facts which evidently are unknown to the Town Council. My report that Mr. Parham informed me that the meter erected at the house occupied by himself and Mr. Hill had been stopped by him (Parham), is, needless to say, quite true, otherwise I should not have made it. This has since been corroborated by the sworn statements of two eye witnesses, who saw Parham tamper with the meter,

and their sworn statements were handed in about a week ago by the acting electrical engineer. I trust that some of the Council will, at their next meeting, request that the sworn evidence to which I allude, be unearthed. I should regret Mr. Parham getting into serious trouble, but I cannot allow him to clear himself at the expense of my name. I much regret having had to trouble you in this matter, but in reporting the stopping of the meter to the electrical engineer, I simply did my duty, and have waited long and patiently for the Council to bring the true facts of this regrettable business to light, but as they have not been able to do so, I have been forced to suffer for doing my duty, or give a public explanation. (Signed), R. S. JOHNSON."

The innuendo was that defendant meant that the plaintiff had been guilty of fraudulent conduct by tampering with a certain meter which had been erected by the Town Council of East London for the purpose of registering the quantity of electric power actually consumed; either not to register at all, or to register less than was actually consumed, and thereby that he defrauded the said Council for the electric power consumed at the said house.

Defendant pleaded that the said letter was necessary for his own protection, that it was written in self-defence, and was therefore privileged. That the letter was true in substance and in fact, that it was written without malice, upon a matter of public interest and for the public benefit. That plaintiff commenced the attack in his letter of August 21, 1901, and continued the same after his (defendant's) letter was written, and by attempting, in the "East London Dispatch" and otherwise, to injure defendant in his good name and fame, and to bring him into ridicule, hatred, and contempt, is debarred from now complaining.

In reconvention (if plaintiff's claim should not be dismissed, but not otherwise), the defendant (plaintiff in reconvention) claimed £20, as and for damages in that on August 21, 1901, defendant in reconvention wrote and published of and concerning him in regard to his office as meter reader, the following malicious and defamatory words, "Liars have short memories," "I leave the public to judge if the lie is not nailed by this

time." meaning thereby that plaintiff in reconvention was not to be trusted or believed, and that he was a liar.

The evidence showed that plaintiff (Parham) was entitled to electric light in his house free of charge. That he had no interest in stopping the meter. That he had inserted a piece of paper into it, but the evidence was not conclusive that by so doing he had stopped the meter.

The Assistant Magistrate's reasons for his judgment were as follows :

1. That the defendant virtually commenced the correspondence which led up to the alleged libel. The defendant has not established the truth of his insinuations and allegations contained in the letter of August 30, to the effect that the plaintiff actually stopped the meter, and did so from an improper motive; but he has established the fact that he quite believed in the truth of his allegations at the time he wrote, and had fair reason for so believing from the statements of witnesses, Mr. and Mrs. Hill, but that the fact of his believing it did not justify his publicly writing to that effect.

2. In making his allegations he must have intended the consequent inference which would be drawn from them; and is therefore responsible for their consequences.

3. That those consequences were that the plaintiff was practically charged with a dishonest act in the eyes of the public.

4. The Court cannot accept the plea that the letter of defendant of August 30 was written in self-protection, as he had practically insinuated wrong motives to plaintiff, before the latter replied in his letter of August 21.

5. That the defendant's actions were hasty and ill-considered, and tended to damage the plaintiff, but that whatever measure of damages plaintiff may have sustained may almost be said to be neutralised by his (plaintiff's) own action, for in writing his letter of August 21 he does not confine himself to protection, but goes further, and accuses the defendant of being a liar, and repeats the accusation most emphatically in the witness-box, and therefore in the opinion of the Court he has lost his claim to substantial damages.

6. I cannot find that the defendant showed malice. He believed what he had been informed, and though in these

actions malice is presumed unless disproved, I cannot find that he was malicious in the true sense of the word. He quite believed at the time that what he alleged was the truth.

7. All things considered, I think the plaintiff is entitled to a judgment, and that judgment will be, in consequence of plaintiff's own action and demeanour, one shilling damages and costs of suit.

8. As for the claim in reconvention, he has begun the cause of dispute, and should not now complain, and the judgment must be absolution from the instance, with costs.

Mr. Schreiner, K.C. (for appellant): There is nothing defamatory in the words, "the meter was stopped, and I refused to take the reading." Then this communication was from a servant to his employers, and therefore was privileged—*Daries v. Daries* (3 E. D. C. 160). This case is very pertinent to the present one, and would be quite parallel save for our letter of August 30.

[Buchanan, J.: That is the defamatory document.]

It was written in reply to respondent's letter of August 27.

[Buchanan, J.: But then there was your letter of the 23rd.]

[De Villiers, C.J.: In that letter it is stated that respondent was "a man of short memory"; is that libellous?]

Yes, it is slanderous to call a man a liar.

[De Villiers, C.J.: Even if he is one?]

The Magistrate did not find that he was a liar. A mistaken statement is not a lie—*M. de Villiers* (p. 217) on *Voet* (47 10, 20). See the note in which he cites *Cooper v. Nixon* (4 Buch., 6). Here are two gentlemen, one of whom is annoyed by a perfectly justifiable act, and he at once rushes into print, calls his opponent a liar, and follows that up by other libellous letters. I submit that the magistrate's only course was to have given absolution from the instance, both as to the claim in convention and that in reconvention. If the Court is not with me on that point, I would urge the claim in reconvention. If Johnson's letter of August 30 was libellous, so was Parham's of August 21. The Magistrate cannot say that the onus of proving malice was on the plaintiff. *Rotha v. Brink* (Buch., 1878, p. 123.) If a man gives expression

to an honest belief regarding a matter in which the public are concerned, he ought to be protected.

[Maasdorp, J.: It has never been decided that you may say all that you believe to be true.]

No, but a statement made in the public interest has a qualified privilege. *Odgers* (229-234, 235, and 253) on statements in self-defence. *O'Donohue v. Hasscy* (Irish Rep. 5 C L. 124). See also *Odgers* (363). Johnson's report was privileged, but Parham was not justified in rushing into print in the manner he did. I submit that if the Magistrate did not see his way to grant absolution from the instance in respect of both claims, he ought to have found for the defendant on the claim in convention and then the claim in reconvention would have fallen through.

Mr. Searle, K.C. (for respondent) was not called upon.

De Villiers, C.J., in giving judgment, said he confessed that he was rather surprised at the appeal having been brought, as it might be thought that Johnson would congratulate himself on the result of the case. If the Magistrate had given far heavier damages, his lordship did not think that this Court would have interfered. On August 6 defendant made a certain report, in which he stated that he had been given to understand by Parham that the meter had been stopped, and as he was outside foreman in charge of the works, he considered it useless to read the meter. When the report was published in the paper Parham took the matter up, and wrote the letter of August 21. On August 30 defendant wrote a letter which formed the subject of the claim in convention. The letter seemed to his lordship to be as clearly libellous as any letter could be. Here there was a clear, distinct charge of dishonesty, which was never withdrawn. Instead of withdrawing this charge, he pleaded the truth of his statement, and up to the last moment he never withdrew the charge, although it was disproved. It struck his lordship that the Magistrate could only have considered all the other circumstances of the case and the previous letter in mitigation of damages. If the letter of August 21 had not been written, he felt confident that the Magistrate would have given him the highest damages it was com-

petent for him to award. The Magistrate, however, taking everything into consideration, gave only 1s. damages. This was a fair judgment, in his lordship's opinion, and the damages might have been considerably more without any injustice to the defendant. Then the defendant set up the claim in reconvention. Damages were claimed because of plaintiff's letter of August 21, but that letter was only published after the previous report of August 6 by defendant had been made public; the plaintiff was only defending himself against the statement that he had stopped the meter, and that he said was a lie. Now it was admitted that he did not stop the meter. Therefore the defendant's statement was not true. It was a strong thing for plaintiff to say that it was a lie, but it was not a true statement, and he could not have known at the time that Johnson believed it to be true. If an untrue statement was made publicly in regard to a person, and the person defended himself against that statement, his lordship did not think it could be held that, because he said "that is a lie," he was therefore guilty of libel, and could be mulcted in damages. The Magistrate's decision was quite right, and the appeal must be dismissed, with costs.

Buchanan, J., in concurring, said it seemed to him that the Magistrate had acted in a very commonsense way.

[Appellant's Attorneys: Walker and Jacobsen; Respondent's Attorneys: Innes and Hutton.]

REED V. GUMENKE. { 1902.
{ June 30th.

Trespass to movable property—
Spoliation—Appeal to Chief
Magistrate—Transkeian Pro-
clamation No. 110—Act 40 of
1882, Sec. 21—Act 26 of 1894
Act 32 of 1898.

*By Acts 40 of 1882 and 26 of
1894 an appeal lies in all cases
in which natives only are
interested from the Court of a
Resident Magistrate in the
Transkei to that of the Chief
Magistrate, but not to any
superior Court. In cases to
which a European is a party*

Act 32 of 1898 allows an appeal from the Court of the Chief Magistrate to the Supreme Court.

If a man by subterfuge or violence becomes possessed of an article which was previously in the possession of another, acting in the belief that it is his own, he is guilty of a trespass, and the onus is cast upon him of proving beyond all reasonable doubt that he is the lawful owner of the property.

This was an appeal from a decision of the Chief Magistrate of Griqualand East. The question in dispute referred to the ownership of a carpenter's claw hammer, worth about 2s., and bought originally for 4s. 6d. The facts of the case were as follows: Reed and Gumenke were employed at the shop of one Barclay, at Mount Currie; one of them left the shop before the other, and shortly after Reed missed his hammer. The two men went their separate ways, but about eighteen months later they again were brought together, as they worked on different parts of one farm, and while on the farm Reed saw the hammer in the possession of Gumenke. Reid again became possessed of the hammer, and in February Gumenke sued him for its return before the Assistant Magistrate of Mount Currie, who held that Reed was entitled to the hammer. The Assistant Magistrate, in his reasons for giving judgment, observed that the case resolved itself into one of the credibility of witnesses, and in his opinion the evidence of Reed was more valuable than that tendered by Gumenke. The native appealed to the Chief Magistrate of East Griqualand, who reversed the Assistant Magistrate's decision, awarding the hammer to the native, with £1 as damages. It was from the final decision that Reed now appealed.

The original summons, issued out of the Court of the Resident Magistrate of the district of Mount Currie, called upon the defendant to show cause why he had not paid to Josiah Gumenke, a native of Kokstad, carpenter, the sum of £5 by way of damages, and further returned to him a certain claw hammer, which the

said plaintiff complains that he owes him, and therefore the plaintiff says: That the defendant, on or about the 22nd of October, 1901, and at the residence of Septimus Bannes, at Kronidraai, wrongfully, unlawfully, and forcibly took from the plaintiff the said claw hammer, the property of the plaintiff, and refused to restore the same; that by reason of such wrongful and unlawful act on the part of the defendant, the plaintiff has sustained damages in the sum of £5.

Wherefore the plaintiff claims from the defendant: (1) damages for £5, as aforesaid; (2) the return of the said hammer.

The defendant pleaded to this summons: (1) that he denied the allegations contained in the said summons, and specially, that the hammer sued for is the property of the defendant.

The Assistant Resident Magistrate of the district of Mount Currie gave judgment for the defendant, with costs.

His judgment reads as follows: The claim in this case is for the return of a hammer, which plaintiff in the summons alleges was unlawfully and forcibly taken away from him, and £5 damages, in consequence of defendant's said act. It appears from the evidence that defendant recognised the hammer in question in the plaintiff's possession as the one he had lost two years previously, and claimed it from him, giving him in return another hammer to go on with some work which the plaintiff was then employed on. Defendant swears positively to a certain mark on the handle, and to the trade-mark on the head. The identity of the hammer is also borne out by the other witnesses for the defendant. It appeared to the Court, although the evidence on the point is somewhat contradictory and uncertain, that the plaintiff, who was working at Barclay's with the defendant, left that workshop before the defendant, and that it was about that time that the hammer was lost by the defendant, thus giving the impression that the hammer was taken away *bona fide* and not simply in mistake.

The plaintiff, in his evidence, which is strongly corroborated by his witnesses, states that he brought the hammer with him to Barclay's from Natal, and swears to the marks on it. The little holes at the back of the handle are too insignificant to be taken into consideration, and do not appear to be of very ancient

origin. The case therefore resolves itself into one of the credibility of the witnesses. In my opinion, the quality of the evidence adduced by the defendant was from the social status of the witnesses, and their manner of giving evidence, more valuable in all respects than that brought by the plaintiff. Mr. Barclay's evidence can hardly be looked upon as proving any very material facts directly connected with the case, and, if anything, is more favourable to the defendant than to the plaintiff.

Judgment was therefore given for the defendant, with costs.

Thereupon the plaintiff, in the Court below, appealed to the Court of the Chief Magistrate of Griqualand East, who, reversing the judgment of the Court below, gave the following judgment: It appears that some two years ago parties were working together in a carpenter's shop in Kokstad, and that, during that time, respondent lost a favourite hammer, for which diligent search was made, but without its being recovered.

Recently the parties met casually at a farm where they were employed on separate jobs. Reed, having occasion to borrow a hammer from Gumenke, at once recognised the hammer lent as the one he had lost, and Gumenke refusing to exchange it for one Reed offered him, took possession of what he believed was his property against the will of Gumenke.

The law as to taking possession of lost property when found in possession (*prima facie* lawful) of another person is clear. Where this can be done without violence or committing a trespass the claimant is justified in possessing himself, leaving the adverse claimant (if he can) to establish his superior rights by action.

But when a trespass has been committed the trespasser must prove his rights to the property by such clear and indisputable evidence as would, in case of his having brought an action for the property instead of having summarily taken possession of it, have practically compelled a judgment in his favour. Reed is clearly in the position of a trespasser.

If lost property, soon after its loss is found in the possession of a third party, the onus of proving lawful possession is on this third party; but with such an article as a hammer, and after the lapse of such a long period as two years, Reed

has not only to prove that the hammer was originally his, but also to show that it was unlawfully in appellant's possession. The question between the parties was treated in the Court below purely as one of credibility of witnesses. But if the fullest credit be given to claimant and his two witnesses, it only amounts to this, that he honestly believes that the hammer in question was the one lost. It was for the Court carefully to consider on what this belief rested, and whether it was justified. Reed and Connor showed themselves to be very reckless witnesses. The former swore that the particular make of hammer could only be purchased at one store in Maritzburg, and Connor that there was no hammer like it in Kokstad. Reed also was confident it was his hammer because of its feel to his hand. Mr. Barclay gave expert evidence that a workman could recognise a tool he was often using by its feel to the hand, but not after a long period of disuse of the particular tool. Brown at first did not recognise the hammer, but afterwards identified it by a scratch, deep at one part, which he said he had given to the handle by missing a screw when roofing. The accident is not an uncommon one, and after a lapse of two years a careful witness would not have sworn positively to such a mark. There is an imperfection on one claw apparently of very old standing, if not there when the hammer was made, which could not have escaped the notice of any workman using the hammer, but neither respondent nor his witnesses refer to this. The hammer is of American make, and probably this particular brand was imported in considerable numbers. Appellant alleges that he bought the hammer at a store in Ladismith for 2s., an extraordinarily low price, but the point is entirely in appellant's favour, for if he were lying he would certainly have told a probable lie. He also used the tool openly and freely lent it to Reed. Without deciding the question of the ownership of the hammer, and without interfering with the Magistrate's finding as to the credibility of the witnesses, this Court is clearly of opinion that the respondent's case did not justify the trespass he committed. The appeal is allowed with costs, and the judgment of the Court below altered to judgment for the plaintiff, with costs, the hammer to be handed to plaintiff by

the Court, and defendant to pay plaintiff the sum of £1 as damages for the trespass. Against this judgment Reed now appealed.

Mr. Close (for appellant): The powers of the Chief Magistrate of the Transkei are determined by section 25 of the the Transkeian Proclamation No. 110. Section 21 of Act 40, 1882, allows an appeal either to the Chief Magistrate or to the Eastern Districts Court. Act 26 of 1894 extends this right of appeal, and the right is even more clearly set forth in Section 1 of Act 32 of 1898.

[De Villiers, C.J.: Section 3 of Act 26, 1894, seems to restrict the right of appeal to the Chief Magistrate.]

[Buchanan, J.: The Act 26 of 1894 abolishes the right of appeal to the Chief Magistrate where one of the parties is a European. You may appeal from a judgment of the Chief Magistrate, but can you appeal to him against a judgment given by the Resident Magistrate?]

I cannot find that the right of appeal to the Chief Magistrate has ever been abolished. Act 40 of 1882 gave a right of appeal to the Colonial Courts. It was not my client who appealed to the Chief Magistrate.

[De Villiers, C.J.: Act 2 of 1898 seems to say that there is an appeal from the Chief Magistrate, except where both parties are natives.]

It seems to be so, though it is not in my favour to admit it.

[De Villiers, C.J.: The Chief Magistrate seems to have jurisdiction in the first instance.]

[Buchanan, J.: I think that when Act 32 of 1898 was passed it was doubtful whether there was an appeal to the Chief Magistrate.]

The object of Section 21 of Act 40 of 1882 was to extend the right of appeal from the Chief Magistrate to this Court. Act 26 of 1894 is intelligible only by reading it in connection with Act 40 of 1882.

[Buchanan, J.: The question is, does the Act of 1894 take away the right of appeal to the Chief Magistrate where Europeans are concerned?]

Section 25 of Proclamation 110 has never been repealed (*Clegg v. Greene*, 11, S.C., 352, and 4, Sheil, 361). In that case the Court assumed that there was a right of appeal to the Chief Magistrate. Act 26 of 1894 was not promulgated till

after the date of that case. In the present case, if there is no appeal to the Chief Magistrate, the judgment of the Resident Magistrate must stand.

[De Villiers, C.J.: The Court will assume that there has been an appeal to the Chief Magistrate and that such appeal involves a right of appeal to this Court.]

Counsel proceeded to argue on the facts as to the ownership of the hammer. The Resident Magistrate believed Reed's witnesses, and the evidence supports his finding. This is no case of *Spoliation*, which is based on the fact that a thing has been taken either by force or by stealth. Reed obtained the hammer in a perfectly peaceable manner. It is true that the Chief Magistrate found that he had obtained it by trespass, but this finding is against the evidence.

Mr. Gardiner (for respondent): This is purely a question of spoliation. Violence is not a necessary condition for spoliation *Leyscr Med. ad Pandor* (Spec. 504).

[De Villiers, C.J.: The appellant offered to return the hammer, and the respondent allowed him to keep it.]

The onus was on the appellant to prove ownership, and the evidence was so unsatisfactory that the Resident Magistrate could not say that he had discharged that onus *Loots v. Van Wijk* (16, S.C.R. 419). Reed may have thought that the hammer was his property, but the judgment in his favour would amount to accusing Gumenke of perjury. The evidence in the appellant's favour is very weak, and there are no marks of identification on the hammer save those on the claw, and it was by those marks that Gumenke and his witnesses identified it. I submit that the judgment of the Chief Magistrate should be sustained.

Mr. Close (in reply) denied that the evidence in the Court below was unsatisfactory. It was merely a question as to whose witnesses were to be believed, and the Resident Magistrate believed those of the present appellant. He had the witnesses before him, and his judgment as to their credibility ought not to be disturbed.

De Villiers, C.J., in giving judgment, said for the purpose of this case the Court would assume that there was the right of appeal from the lower to the Chief Magistrate's Court. It was clear

under the Act of 1898 that there was an appeal to this Court. The Chief Magistrate of East Griqualand had reversed the decision of the lower Court, and under ordinary circumstances his lordship thought it would be better for a Court of Appeal not to interfere with the verdict of a Court of first instance upon a pure question of credibility, but there were circumstances in this case which he thought justified the Chief Magistrate in reversing the decision of the Court below. The hammer must have been in Gumenke's possession for a long time, and Reed one day perceiving this, got possession of the hammer, apparently by a trick, and refused to give it back. Now, that was an act so wrong in itself as to throw entirely upon Reed the onus of proving that the hammer was his. His lordship thought the Court ought not to have awarded the hammer to defendant without the most conclusive evidence that it belonged to him. Now, this conclusive evidence did not exist; it was an extremely doubtful case. The Magistrate should have required the clearest and most conclusive evidence that the hammer belonged to defendant, for the native would be branded as a thief if it were shown that the hammer did not belong to him, whereas with regard to the defendant it might have been a case of mistaken identity. The evidence was not strong enough to conclusively show that the hammer belonged to the defendant, and under these circumstances, his lordship thought the Court should not interfere with the decision of the Chief Magistrate, and the appeal must be dismissed with costs.

Buchanan, J., in concurring, wished it to be understood that the question of the right of appeal from the Lower to the Chief Magistrate's Court had not been brought up in this case, and there were many important circumstances to be taken into consideration when it should be brought up.

BROWN V. HICKS. } 1902.
June 30th.

Contract—Locutio—Letting and hiring—Wages—Rent.

The defendant, having engaged the services of the plaintiff as manager of an eating-room at

a rate of remuneration to be thereafter arranged when the profits should have been ascertained, afterwards informed the plaintiff that his services would not be required.

Held, that until the rate of wages was agreed upon there was no contract, and that the plaintiff was not entitled to claim damages.

This was an appeal from a decision of the Acting Resident Magistrate of Mafeking.

The case was heard at Mafeking on March 21, respondent suing for £20 damages for breach of contract. Hicks was employed as a cook at the Mafeking Hotel at a salary of £20 per month, and on February 13 he had a conversation with Brown, who was the manager of the Central Hotel, when it was agreed that Hicks should have the management of the eating-room and kitchen of the Central Hotel, the rate of remuneration to be arranged subsequently when the profits on the dining-room and kitchen had been ascertained. On February 19, however, Brown, said he had altered his mind. Hicks had given notice at the Mafeking Hotel, but in view of the altered circumstances, the proprietor of that hotel arranged that he should stay on until another cook was engaged in his place.

The Acting Resident Magistrate awarded Hicks £10 as damages, the following being his reasons: "In this case I found that the allegation that plaintiff should have the management of defendant's dining-room from March 16, 1902, as stated, proved; that plaintiff terminated his monthly engagement as cook at the Mafeking Hotel in consequence, and though still employed there at the same salary, his position is not of the same value as formerly, and that he lost his opportunity of making the profits he expected under his arrangement with defendant; also that plaintiff had always been ready to abide by his agreement with defendant. I considered the plaintiff was fairly entitled to some damages, and assessed the same at £10 sterling."

The appeal was brought on the ground that there was no contract, and that there were no damages which could be assessed in any way, because the salary had to be fixed later on. The plea was the general issue.

Mr. Searle, K.C. (for appellant): The plaintiff sustained no damage, he was still receiving the same wages as formerly, and no contract had been entered into with the defendant. *Loftus v. Roberts* (Times L. Rep., Vol. 18, 532.) This is a similar case. The plaintiff was not engaged at a fixed salary. The salary was to be fixed by subsequent arrangement. I submit that the Magistrate ought to have granted absolution from the instance.

Mr. Gardiner (for the respondent): The point that there was no contract was not raised in the Court below. In *Loftus v. Roberts* the arrangement was far more indefinite than in this case.

[De Villiers, C.J.: For what do you claim, for wages, or for breach of contract which has not been completed?]

Respondent can claim damages for loss of employment subject to deduction of the wages received by him from some other employer. *Haupt v. Diebel* (5 H.C. 185.) Ross could dismiss him at any moment. The employment he lost was worth £20 a month. It is not necessary that the question of salary should be arranged before a contract of service is entered into.

[De Villiers, C.J.: A man who does work is entitled to a *quantum meruit*, but how can he sue for breach of contract unless a contract with his employer has been completed?]

A man is always entitled to remuneration in accordance with the usual custom of his trade, business or profession. *Denny v. S.A. Loan Co.* (3. E.D.C., 47).

Mr. Searle was not called upon in reply.

De Villiers, C.J.: There was, in my opinion, no concluded contract between the parties. The defendant engaged the services of the plaintiff as manager of the eating-room and kitchen of the defendant's hotel, but the rate of wages was not agreed upon, but left to be fixed when the profits were ascertained. Until the wages were so determined, or some definite basis fixed upon which the wages could be calculated, there was no letting—no *locatio*—of the plaintiff's services. If it had been a case of letting a house there would have been

no question about it. Until the rent, or some definite mode of fixing the rent, is agreed upon, there is no contract of letting and hiring of the house. The letting of services stands upon the same footing. The Magistrate erred in awarding damages to the plaintiff, and the judgment must therefore be altered into one of absolution from the instance, with costs in this Court and in the Court below.

[Appellant's attorneys: Findlay and Tait. Respondent's attorneys: Minchin and Sonnenberg.]

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Horne and another v. Struben and another; from the Supreme Court of the Cape of Good Hope; delivered the 18th June, 1902.

Present at the Hearing:

Lord MACNAGHTEN.

Lord DAVEY.

Lord ROBERTSON.

Lord LINDLEY.

Sir FORD NORTH.

Sir ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

This was an appeal against a judgment of the Supreme Court of the Cape of Good Hope declaring the boundary of the respondents' farm; and the controversy relates to two parts only of the boundary declared. The lands adjoining the farm in question are Crown lands and the appellants represent the Crown.

The respondents purchased the farm in 1899, and they are now in right of the original grant on perpetual quitrent which was made in 1843. Prior to 1843 the farm had been held on loan lease, and the grant on quitrent was made under the system established by the Proclamation of 6th August, 1813, entitled "Conversion of Loan Places to Perpetual Quitrent." The description of the farm in the grant is as follows: "A piece of land containing 2,520 morgen, situated in the division of Stellenbosch Field-cornetcy of Hottentots Holland, being the loan place 'Kogel

Baay' or 'Langgezocht.' extending west to the seashore, south, south-east and east to the mountains and north to the Steenbrazem River, as will further appear by the diagram framed by the surveyor." On acquiring the farm the respondents had it surveyed by one Charles Marais, and made application to the appellant, the Surveyor-General, for an amended title and diagram in accordance with the diagram which embodied Mr. Marais's survey. This application was made under the Act No. 9 of 1879, and the competency and appropriateness of this application and of the subsequent judicial procedure are unquestioned. The Surveyor-General objected to Mr. Marais's line at certain points, but those objections ultimately resolved themselves into two. The matter came into Court by summons on 28th April, 1900, the respondents claiming an order declaring the boundary in accordance with the line marked on the plan annexed to their declaration and an order for an amended title showing the boundary accordingly. The defendants appeared, and in their plea stated their points of challenge; issue was joined and evidence led, with the result that the Court, by the judgment appealed against, decided both the controverted points in the respondents' favour, and (with an omission which does not touch that controversy) granted judgment in the terms of the prayer.

Before stating the two points of controversy between the parties it is convenient to mention one matter which bears equally upon both and tells in favour of the respondents. The farm, according to the title, contains 2,520 morgen. If the boundary line proposed by the respondents be accepted, so far from exceeding this amount they will have considerably less. On the other hand, if the appellants' theory be adopted in whole, the farm will be less by about 10 per cent. than it is stated to be in the title—the two disputed points contributing nearly equally to this further deficiency.

1. The farm in dispute, according to the title above set forth, is situated between the seashore and the mountains, those forming respectively its western and eastern boundaries, while its northern boundary is the Steenbrazem River. Now, the first of the two disputed

points is the whole of the western boundary; and the respondents' line is drawn at high-water mark, or rather, as it sometimes is on the top of rocks, never nearer the sea than high-water mark. There is, therefore, no claim to foreshore, and, *prima facie*, the respondents' claim would seem to be in exact accordance with the words of the grant "extending west to the seashore."

On the other hand, the contention of the appellants is much less simple. It was thus stated in their plea: "The defendants deny that the western boundary of the said farm extends to high-water mark. They contend that the true boundary is as shown on the diagram referred to in paragraph 2 herof" (i.e., the diagram referred to in the title of 1843 sought to be amended) "a distance of 200 feet inland from such high-water mark." And the Assistant Surveyor-General, in his evidence, thus stated the view of the Crown. "The words 'to the seashore' do not mean the seashore but ought to be 200 feet."

It is difficult to comprehend on what theory this contention for 200 feet was rested or how the figure was reached, for the statute under which the Crown is now disabled from making grants within 200 feet of the sea was not passed until long after 1843. Again, while it is true that on the diagram of 1843 a line is drawn some distance within high-water mark, which seems intended to delimit the farm, and to separate it from the sea shore, the distance is not uniform but quite irregular; and at their lordships' bar the theory of 200 feet was abandoned in favour of an absolute adherence to the line laid down in the diagram of 1843. The appellants' contention therefore rests solely on the diagram, and the question is thus raised what is the degree of authority of that diagram in relation to the text of the grant in which it is mentioned. This discussion necessarily and very directly affects the other disputed piece of boundary, but it may conveniently be taken primarily in regard to that now under review, viz., the seashore.

Their lordships consider that assuming, as appears to be the case in regard to the western boundary, that the diagram contradicts the unambiguous text of the title, it must give way to the text. The words in the grant which

introduce the diagram are "as will further appear by the diagram framed by the surveyor." Now, as matter of construction, this is merely an appeal to the diagram for further elucidation of the text and not a subordination of the text to the diagram. If in a matter not requiring elucidation the diagram is repugnant to the text this merely shows (what in the present instance is abundantly proved by other circumstances), that the diagram is not exact and affords only a rough delineation of the farm. Of the circumstances referred to what is perhaps the most palpable and the most relevant to the present dispute may be mentioned. The northern boundary is said in the title to be the Steenbrazem River, a perfectly unmistakable boundary; but the diagram, ignoring the somewhat tortuous course of the river, makes the northern boundary a straight line inland from a rock on the seashore considerably to the south of the mouth of the river, which, as well as the rock, is depicted on the diagram.

In face of facts like these, it would be impossible to override the clear verbal description of the western boundary as the seashore merely out of respect to a diagram which, as regards the northern boundary, fails to depict the equally certain expression of the title, viz., the river, an arbitrary line being in each case substituted. But from the evidence and also from the opinion of the Chief Justice, it appears that these old plans are "usually inaccurate, and afford only an approximate idea of the land to be conveyed."

It was argued, however, on the part of the appellants that the Proclamation only authorises grants of the land which had been previously held on loan, and that to diagrams there was assigned by the Proclamation a higher importance than belongs to a plan referred to in a title, for they were made the basis of all quitrent grants. Those two points are separate, and may easily be disposed of. First, it is quite true that the grant on quitrent must not exceed in extent the loan place; but as in the present case there is no evidence (apart from the grant of 1843 and the diagram) of the actual possession under the loan lease, the diagram must stand or fall on its merits where it differs from the words of the title. Second, if the Proclamation be examined, it will be found

to give no support to the theory that it subordinates the words of the grant to the diagram, or gives to the diagram any exceptional authority. It is true that, under Articles 8 and 13 of the Proclamation, before a title can be granted there must be a diagram, in order that the Government may be fully certified before granting the title as to the land proposed to be granted complying with the requirements of the Proclamation. But, this condition having been fulfilled, the right of the grantee is to be expressed in his title, and it does not appear from the Proclamation that the title need even refer to the diagram or have it attached. In short, the Proclamation gives to the diagram no independent authority as limiting the terms of the grant.

Their lordships are clearly of opinion that the objection of the Crown on the western boundary entirely fails.

2. The other question is about the north-eastern boundary, and involves a triangular piece of ground enclosed on plan A by the letters Y B C. The true question, however, is simply whether the northern boundary of the farm ends at B, as the Court has held, or at Y, as the appellants contend.

Here the case for the Crown rests solely upon the diagram being exactly and minutely accurate on a point on which it makes hardly a pretence. As has already been seen, the northern boundary, as laid down on the diagram, is a straight line drawn with complete disregard to the course of the river. Now the point Y which is said to be the eastern end of the line is reached simply by measuring on the ground the length of this arbitrary line, and stopping where it stops. This is frankly explained in evidence by the surveyor employed by the appellants to survey the farm. It so happened that this measurement landed them at a place about which it is almost incredible that it should be the salient point of a boundary, for it is almost inaccessible and invisible from the surrounding country. But further, owing to the nature of the gorge through which the Steenbrazem River runs, it would result from the adoption of Y as the eastern point at which the respondents' farm abuts on the river that they would have for practical purposes no access to the river. The Appellants have, therefore, neither authority nor probability to sup-

port their contention. On the other hand, the point B has at least three substantial recommendations. Physically its situation stands out as a suitable boundary. It has, in fact, been the site of a beacon erected in 1863 by a former proprietor to mark the boundary, and observed as doing so; and this, although not giving any prescriptive right, is yet evidence, as far as it goes, of boundary. The probability of this being the true boundary is in-

creased by the fact that it admits of the farm being profitably occupied so far as access to water is concerned.

In these circumstances their Lordships consider that the appeal entirely fails on this point also. They are fully satisfied with the judgment of the learned Judges of the Supreme Court and will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.



mitted the crime on February 15, while the evidence was to the effect that the alleged sale took place on February 16, but this application was refused by the Special Court.

In argument, appellant, who appeared in person said the trapping system had never been sanctioned by Parliament, and was *ultra vires* of the very spirit of the common law of the Colony, as well as diametrically opposed to the precepts of Christ. He also contended that the defined powers of detectives under the Act had been exceeded in his case, and the whole case, *ab initio*, had been characterised by irregularities. He repeated the objection he had raised before the Special Court in regard to his having been charged with having committed a specific crime on February 15, while the evidence alleged that the crime had been committed on the 16th.

In reply to the Court, Mr. Jones (for the Crown) read section 13 of the Act of 1861 referring to cases where crime should be proved to have been committed on a different day to that mentioned in the indictment. An amendment was not required if it was proved that the crime had been committed within three months of the time specified.

[De Villiers, C.J., ruled that the indictment did not require amendment, and that it was good as it stood.]

The appellant said he would accept the decision of the Court on that point, and would proceed to deal with the evidence as to February 16. After pointing out that the trap was in the employment of the Telegraphic Department, as well as being in the employ of the Detective Department, he referred to the rewards given to traps, amounting sometimes to hundreds of pounds, and submitted that these items must be taken into consideration by the Court when he suggested foul motives.

[De Villiers, C.J.: Were you defending at the trial?]

Appellant: No, my lord.

[De Villiers, C.J.: But you defended yourself, and brought these matters to the notice of the Court?]

Appellant: No, my lord. I relied upon my objection to the irregularity of the indictment. I rested secure upon that, that the judgment of the Court would

be that the case must be dismissed. Appellant contended that there was no evidence to show that the diamonds had been handed to the trap by the Detective Department or that the trap had been duly authorised, within the meaning of the Act, to deal in diamonds.

[De Villiers, C.J.: It did not matter whether or not the trap had any right to the diamonds. The point was that you had no right to have them in your possession. Do you deny that you received the diamonds from the native?]

Appellant: *In toto*, my lord.

[De Villiers, C.J.: And you did not give your own evidence?]

Appellant repeated that he offered to do so, but the Court said that if he did his antecedents would be severely cross-examined, and he decided not to give evidence.

Further questioned by the Court, appellant said that he had been in this colony since boyhood, but was an American citizen by birth, having been brought here by his parents.

Dealing with the evidence, appellant contended that in several instances the trap contradicted himself. Questioned as to the origin of a promissory note which he had given to the native trap, he said he gave it in satisfaction of a debt five years ago. He added that he was manager of a bioscope company, with which he toured the country, but they found he had been mixed up in some trouble and he received his *conge*. He declared that the whole attitude proved that he was not a consenting party. The evidence of the trap was nullified by his admitting the sale of illicit diamonds to him on previous occasions, and by the unreliability of his whole evidence. The prisoner proceeded to make charges against one of the detectives concerned in his arrest, and referred to a scandal which he said had taken place in the Diamond Detective Department at Kimberley, in which four detectives were concerned. Three of these, he said, turned King's evidence against the fourth. He trusted that such a grave scandal had not occurred in the annals of any other country. The prisoner went on to comment on the fact that he was not arrested by the detectives at once. He submitted that the detective should have arrested him with the diamonds on him before he left the

house. That was the procedure adopted in another case.

The Chief Justice said that appeared to be the only point that the prisoner had made so far. His lordship understood, however, that the detectives were hidden in the roof, and could not come down soon enough to catch him.

The prisoner next urged the fact that the European detective with his intelligence and the ignorant Kafir both repeated a conversation of 800 words in exactly the same form, and asserted that the similarity suggested collusion. He commented on the non-production of a material witness for the defence—the trap's wife—and insinuated that the Detective Department had sent her away. He complained that no notice was given to him that the previous conviction would be brought up against him.

[De Villiers, C.J.: There is much truth in what the prisoner has said as to the abuses to which the trapping system is liable, but the Court has repeatedly decided that it will not quash a conviction merely because that conviction rests upon the evidence of a trap, if the evidence of that trap is confirmed by other trustworthy testimony. In the present case the evidence of the trap is confirmed by Graham at all events. The prisoner has stated that there is much similarity between the evidence of the two that no credence ought to be given to it, but, of course, if two men have to depose to the same facts, there must be a certain amount of similarity. If there had been a contradiction the argument would of course have been that because there was such contradiction no credence could be given to the evidence. Seeing that the conduct which the two witnesses deposed to was the same, and the facts were the same there must necessarily be similarity. Now the gravamen of the charge is that the prisoner received these two diamonds by way of barter, pledge, sale, or otherwise from the trap. To prove this, there is the evidence of the trap, and there is the evidence of the detective who was in hiding and saw them given, and there is the further fact that the prisoner did give the trap a promissory note, as to which there is no explanation, unless it was given for the diamonds illicitly bought. The prisoner has gone through the whole of the evidence, and

it is not necessary for the Court to follow him. It is sufficient to say that the Court is satisfied that the evidence justifies the conviction. The prisoner did not himself give evidence. He says it was suggested to him that it would not be advisable for him to submit to cross-examination. That is his misfortune. This Court, as a Court of Appeal, can only be guided by the evidence actually given, not by the evidence which might have been given. We can only go upon the evidence upon record, and upon that evidence there seems to be no doubt whatever as to the guilt of the prisoner. I must say it seems a very unfortunate case, because the prisoner is an exceedingly intelligent and well-educated man. He has argued his case as well as any man could have done, and has brought up every point that could be brought forward in his favour. Notwithstanding that, it is impossible for the Court to assist him in any way. As the prisoner has been previously convicted, and sentenced to five years—I don't know how long he has served—it is very much to be regretted that, having experienced the hardships to which he refers now in being associated with the class of people he meets on the Breakwater, instead of profiting by his experience of the past, he seems to have again engaged in this miserable traffic which has brought him into the position in which he now stands. The appeal must be dismissed.

Buchanan, J., said that he concurred. The evidence given in the Court below seemed to be so clear that no ingenuity could escape it.

Maasdorp, J., also concurred.

PEACOCK V. BEN RANGO. { 1902.
July 1st.

Native custom—Dowry cattle—Attachment.

The respondent, a native in the Transkei, delivered certain dowry cattle to the father of his intended bride in anticipation of the intended marriage, but she afterwards refused to marry him, and he thereupon claimed back the dowry cattle from the father, who had in the

meantime sold some of the cattle to the appellant. The respondent obtained judgment against the father for the cattle or their value and, in execution of the judgment, the messenger attached the cattle which had been sold to the appellant.

Held, confirming the judgment of the Chief Magistrate, that by native custom the property in the cattle did not pass to the father until marriage, and that the cattle had been properly attached.

This was an appeal from a judgment dated March 21, 1902, of the Court of the Assistant Chief Magistrate for Tembuland in an action heard in the Court of the Resident Magistrate for Tsomo, wherein Gavin Peacock, the claimant (now appellant) claimed certain two black oxen, attached by the messenger of the said Court by virtue of a writ of execution issued out of the said Court in a certain case wherein the said respondent was plaintiff, and one Makonza was defendant; as being his (the said Peacock's) property, and not liable to execution; and in which said action the said Court of the Resident Magistrate on February 14th, 1902, declared that the said oxen were so liable, with costs, from which judgment the claimant having appealed to the Court of the Assistant Chief Magistrate for Tembuland, that Court on the said 21st March, 1902, dismissed the appeal, with costs.

It appeared from the evidence taken in the Resident Magistrate's Court that one Mkosi had promised his daughter to Ben Rango in marriage, and seven dowry cattle had to be given to him by Ben. Five cattle were given, and Ben had to give the other two later on. The cattle were given before the marriage; as a matter of fact, about two years had elapsed. Ben went away, not having yet given the two cattle. Meanwhile Mkosi exchanged two out of the five cattle with Peacock. Then Ben came back, but Mkosi's daughter refused to marry him. Mkosi offered other cattle to Ben in return for the five cattle which Ben had already

given. Ben would not take them. Then Ben got judgment against Mkosi for four head of cattle, or their value, £39. He executed a writ, and there was a return of *nulla bona*. Then he came on Peacock, who had given value for the cattle *bona fide*. There was an inter-pleader action, the Messenger having attached the cattle in Peacock's possession at the instance of Ben, who pointed out these cattle to the Messenger. There was no doubt that these were the cattle given by Ben to Mkosi. The Magistrate decided against Peacock, and the Chief Magistrate, on appeal, supported the decision.

The summons issued by the Court of the Resident Magistrate in the case which gave rise to the present one for the District of Tsomo, called upon the defendant Makonza, of Qombolo, Tsomo, to answer Ben of Trojana, in the above district (the plaintiff) in an action for the recovery of certain stock and progeny; and thereupon the plaintiff complains and says that heretofore, to wit, about three years ago, and at Qombolo aforesaid, he did become engaged to marry one Maria, a daughter of defendant, and was duly accepted by the said Maria, and the defendant as the future husband of the said Maria, that at the request of defendant, the plaintiff paid to him as dowry for the said Maria, five head of cattle of the value of £50; that the said Maria of her own free will and accord, and without cause therefore on the part of the plaintiff doth now refuse to marry plaintiff; that it is therefore incumbent on defendant to return to plaintiff the said dowry stock and all progeny thereof, but the defendant unjustly delays to do so. Wherefore plaintiff, who is, and always has been ready and willing to marry the said Maria, prays that defendant be adjudged to return to him the said stock or its value as aforesaid, and also all progeny thereof, or in lieu the sum of £20 with costs of suit.

The evidence showed that the said cattle had been paid as dowry, but that one of them had died at plaintiff's kraal. When the marriage was broken off, defendant offered plaintiff ten sheep, a small gelding, and a young ox, and promised in addition to give him £5. He made an alternative offer of four head of cattle, but plaintiff demanded five head, and also two head as progeny or

£10. There was some conflict of evidence as to whether any of the said dowry cattle had had progeny. The Court gave judgment for plaintiff for four head of cattle or £39 with costs. On the defendant failing to pay the said judgment debt, a writ of execution was obtained in the said Magistrate's Court, and in his return thereto, the Deputy Messenger of the Court stated that on December 13, 1901, he had repaired to the residence of Gavin Peacock, of Isikobeni, as directed by plaintiff, and there attached two black oxen pointed out by plaintiff as being the property of the defendant, and that on the same day he repaired to the residence of George of Isikobeni, and there attached one white heifer also pointed out by plaintiff as being his property.

Thereupon the said G. Peacock summoned Ben Rango in the Court of the Resident Magistrate of Tsomo, to answer in an interpleader action as to whether the said two head of cattle attached while in his possession were, or were not the property of the said G. Peacock, and were or were not liable to attachment for the debts of Makonza.

The said cattle, portion of the dowry paid to Makonza had been sold by him to Peacock. Evidence was led, in the course of which certain native witnesses deposed that by native law and custom dowry stock paid over before marriage is regarded as the property of the father, but that should the marriage subsequently be broken off by the girl refusing to marry, her father is bound to refund the dowry, and that if any of the said stock have died, the father must replace them from his own stock. On the other side evidence was led to show that by native law, no property in the dowry cattle passes until the actual celebration of the marriage. The case of *Stride v. Dnujer*, in which this view was not taken by the Court of the Resident Magistrate of Tsomo (heard October 18th, 1901), but his judgment had been reversed on appeal by the Chief Magistrate of the Transkei, was cited by the Rango's agent in argument, and the Resident Magistrate gave judgment in accordance therewith. On appeal to the Court of the Chief Magistrate for Tembuland, this judgment was upheld. The judgment of the Chief Magistrate was as follows:

"When cattle are paid on account of dowry for a marriage to be contracted, the ownership of the cattle does not pass until the marriage takes place. If any of the cattle die prior to the marriage, the loss is that of the intended husband, who has to replace them, and who, if the marriage does not take place, is entitled to recover all the cattle paid, and their increase (if any) as well. This opinion on native custom has been repeatedly given by the assessors attending the sittings of the Appeal Court, both at Butterworth and at Umtata.

"As the ownership in the cattle in dispute had not passed from the respondent (Rango) to Makonza, no consideration having been given for them, the latter had no right to dispose of them - the cattle at the time of the sale to the appellant (Peacock) being still the property of the respondent; and as the appellant could only acquire by purchase the same right in them as Makonza had

which, at the best, was only a prospective or contingent right; it is clear that the appellant is in no better position with regard to the ownership of these cattle than Makonza, from whom he obtained them.

"The appeal is dismissed with costs."

From this judgment the appellant now appealed.

Mr. Searle, K.C. (for appellant): The point is, can cattle paid for *bona fide* value be followed up and claimed as against a *bona fide* holder?

[De Villiers, C.J.: The question is whether the cattle were delivered before, or after the marriage.]

In any case if *mobilia non habent sequelam*, possession holds good, unless in a case of fraud. If the marriage does not take place, all the father is bound to do is to restore similar cattle. The whole of the native evidence is to that effect. Property in the cattle passes with the obligation to restore similar cattle. This was really a donation of the cattle in consideration of the father giving his consent to the marriage of his daughter. He did not get the cattle by fraud. He was perfectly *bona fide*, and did not persuade his daughter not to marry.

[Maasdorp, J.: Suppose the Kafir law is that the cattle do not pass till the marriage?]

It is a very nice point in Roman Dutch law as to how far a *bona fide* purchaser from the donee would be affected by such a rule.

[De Villiers, C.J.: Is not the contract this: that the father holds the cattle in trust till the marriage?]

It is a common practice for the father to hold such cattle for some time till the marriage, and they are recognised as his property. See *Vort.* (6-1-11 and 12). *mobilia non habent sequelam.*

[Maasdorp, J.: He does not quite say that that is the law of Holland.]

No, but see *Schorer* (sec. 334). In this case it has not even been suggested that the father committed a fraud, and unless in the case of fraud, moveable property cannot be recovered from a *bona fide* possessor. The decision of the Chief Magistrate is quite opposed to Native Custom; see Section 23 of Proclamation 40 of 1885 (Tembuland Proclamations). The cases chiefly applicable are *Sengane's* case (1 E.D.C., 195-209 and 203) as to possession of dowry, *Hamise v. Mzulunzu* (7 E.D.C., 149). This was a claim for the return of certain cattle, where the decision of the Magistrate was reversed by the E.D. Court; *Xyqobela v. Sikele* (10 S.C.R., 346); *Nhno v. Manaxoweni* (6 E.D.C., 62). Here the father held these cattle by a *justus titulus*, and if the law is not that in such cases property passes no man would be safe in dealing with any native in regard to cattle.

Sir H. Juta (for the respondent) was not called upon.

De Villiers, C.J.: If the decision in this case depended entirely upon the evidence given in the Court below, there would have been much force in Mr. Searle's contention that the weight of evidence was in favour of the appellant. There was some evidence the other way, and the decision of the Chief Magistrate, as well as of the Court in the first instance, was entirely in favour of the respondent. Before this case was tried there had been a decision of the Court of the Chief Magistrate, and the opinion of three very experienced Magistrates in that case placed the whole matter in a nutshell. They held that when cattle was paid as dowry on account of a marriage to be contracted, until the marriage had been contracted the ownership did not pass, and that if any died before marriage, the intended

husband bore the loss, and if any of them had progeny, he was entitled to the increase. If that is correct, it settles the matter. Because that would clearly show that it was not the intention of the intended bridegroom to pass any property at all, but that the father of the bride was merely to hold these cattle in trust for the bridegroom until the marriage took place. Until the marriage took place the father had no interest in the cattle, beyond keeping it as security until the marriage took place. In the present case the view of the law given in the previous case was somewhat amplified, and the law was very clearly stated. If this custom had been an unreasonable custom, or if it had been quite inconsistent with the principles of our own laws, I would have hesitated to confirm the decision of the Magistrate. But I do not see that it is in any way inconsistent with the general principles of our own law. There is no such rule of law as that contended for by the appellant's counsel that a person who leaves moveables in the possession of another loses his ownership if the goods are sold to a third party. There are no doubt cases in which the mind has led the third parties to believe that the person in possession is the owner, or is entitled to dispose of the property, and in which he would be justified in claiming the ownership for himself, but the present is not such a case. The intended bridegroom handed the property to the father of the intended bride, his intention being that it should be kept for him until his marriage. There was nothing dishonest in the transaction. It is quite true, as has been argued by Mr. Searle, that the rule laid down by the Chief Magistrate might sometimes entail hardships or lead to fraud, but a contrary rule might equally entail hardship or lead to fraud. The appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's attorneys: Van Zyl and Buissinne; Respondent's attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Ex parte BURNS. { 1902.
July 2nd.

Mr. Alfred L. Burns appeared before the Court, and said that on the 13th of last month he had a case against De Vries and Co., and after hearing evidence, the Court awarded him £50 and costs. He was not there to complain against that verdict, for the simple reason that, as a British subject, he had always respected those who were his superiors, and were placed in authority, but of £50 awarded him by the Court he had only got 4s. from his attorney. He said that costs which should have been paid by the defendants he had to pay himself. Continuing, Mr. Burns said that it was for the Court to consider whether he had been treated right, seeing that, instead of getting the amount awarded him by the Court, he had only got the sum of 4s.

The Chief Justice: You see, there are always some costs between attorney and client which cannot be recovered from the other side.

Mr. Burns: But surely £50 and costs means that the costs must be paid by the defendants, and that I should get more than 4s.

The Chief Justice: The costs between attorney and client can also be taxed. If your attorney charges you too much, the Taxing Officer will strike it off.

Mr. Burns: But surely I should get more than 4s.

The Chief Justice: Does he offer you 4s. out of the £50, and does the balance represent costs which he could not recover from the other side?

Mr. Burns said the order of the Court was that the defendants should pay the costs.

The Chief Justice: I am afraid there are so many costs nowadays that cannot be recovered from the opposite side.

Mr. Burns said that surely if there were any costs they should be paid by the other side, as he had not caused the

trouble. He also complained that his attorney had insulted him, and ordered him out of his office, because he disagreed with him. Complainant further stated that his attorney had threatened him with an action.

The Chief Justice: Now your next course before you again apply to the Court should be to appear before the Taxing Officer and object to the costs. That is what you ought to have done.

Mr. Burns: But, my lord, my reading is plain that £50 and costs means that I should not have to pay any costs.

The Chief Justice: The reason that you get such a small amount is that your attorney makes certain charges, and these charges reduce the amount you have to get, but you can go before the Taxing Officer and object to the charges which he makes against you. If your attorney has made improper charges, the Taxing Officer will strike these off. Of course, there are certain costs you cannot get from the other side. Supposing you retain counsel, you pay him so much as a retainer to take up your case, and you cannot charge the other side with that.

Mr. Burns: But I did not do that.

The Chief Justice: I am only pointing that out as an instance of the costs you cannot recover from the other side.

Mr. Burns: I ask you, in the name of justice, what redress I have?

The Chief Justice: You can go before the Taxing Officer and object to the items that your attorney charges against you, and if you are dissatisfied with his decision, you can come to this court, and we will redress matters.

Mr. Burns thanked their lordships for listening to him, and said he had only come there in the name of justice.

Mr. Searle, K.C., said that the attorney had asked him to mention to the Court that he had always been ready and willing to have the bill taxed. He had offered to have it taxed, but Mr. Burns took up the position throughout that £50 and costs meant all the costs, and he would not have the bill taxed.

The Chief Justice: Now, Mr. Searle, if the attorney receives £50 from the opposite side, is he entitled to keep the £50 for himself? Has he a lien on that £50 for the amount of his own costs?

Mr. Searle: I should think he has. I think it is always the practice to have the bill taxed between attorney and

client. Surely the attorney is entitled to have his bill taxed at once.

The Chief Justice: He receives the amount in trust for his client, and he keeps it.

Mr. Searle: See what would happen otherwise.

The Chief Justice remarked that the costs seemed to be very disproportionate.

Mr. Searle said that was a matter for the Taxing Officer. There were special circumstances in this case. A large amount was in connection with witnesses that the plaintiff wanted put before the Court who were not really witnesses who advanced his case further, and their costs were not allowed. There was also an amount of £12 for rent which had to be paid on Burns's behalf. There was a considerable amount of actual disbursements. A portion of the Sheriff's fees and counsel's fees had been struck off, and certain witnesses' expenses were in the same position.

The Chief Justice advised Mr. Burns to get someone else to appear for him before the Taxing Officer, but in any case, he would be able to go before the taxing officer and object to those charges, and should he be dissatisfied with that officer's decision, he could again come to the Court.

Mr. Burns said that, including the £12, he only had 4s. As to the witnesses, there was one witness whose evidence was important, as he saw the premises in question in the action, and yet he (Mr. Burns) was called upon to pay that witness's fees.

Mr. Searle said that the witness charged a special fee, of which only a small amount was allowed. Mr. Burns knew what the amount of the special fee was.

Mr. Burns said he knew nothing about special fees.

BOWLING V. KING WILLIAM'S } 1902.
TOWN BOROUGH COUNCIL. } July 2nd.

Wrongful dismissal—Acquiescence.

The plaintiff, who had been engaged by a Borough Council as foreman of works at an annual salary payable monthly, applied before the expiration of twelve months to another municipality for a situation, and obtained from the Borough

Engineer a certificate that he was leaving of his own free will and accord. The Borough Council soon after gave him a month's notice to leave, such notice expiring before the expiration of the twelve months. He continued thereafter in the service of the Borough Council at daily wages, and obtained another certificate from the engineer to the effect that he left because the work for which he had been engaged was completed.

Held, that even if the plaintiff's engagement was for a year certain, he had acquiesced in the dismissal, and could not claim damages for wrongful dismissal.

This was an appeal from a decision of the Resident Magistrate of King William's Town in an action brought on March 7 last by George Bowling against the Mayor and Borough Council of King William's Town, in which the plaintiff had claimed £20 as damages for wrongful dismissal. The summons set forth that on or about April 1, 1901, the defendants engaged the plaintiff as foreman of works at an annual salary of £180; that plaintiff on or about April 2, 1901, entered the service of the defendants as foreman of works in terms of the agreement, and continued in their service until January 31, 1902, when the defendants wrongfully and unlawfully and without cause dismissed the plaintiff from their service; that the defendants had paid plaintiff salary to January 31, 1902, at the rate of £180 per annum; that by reason of such wrongful dismissal of the plaintiff by the defendants as aforesaid, he (the plaintiff) had sustained damage to the extent of £20.

The plea was: (1) A denial of the debt; (2) specially that plaintiff was engaged as a monthly servant, and that the month's notice to which he was entitled dispensing with his services was duly given to and accepted by him, his salary being paid to him up to the date of the expiration of such notice; (3) general issue.

The plaintiff's agent advised that the plaintiff received notice on January 2, 1902, and further pleaded that such notice was according to law insufficient.

In his evidence in the Court below the plaintiff deposed that he was engaged on the following advertisement, which therefore contained the contract: "Foreman of Works.—Notice is hereby given that the Council is prepared to receive applications from persons competent to undertake the duty of foreman of works for the borough of King William's Town, and to be under the control of the Borough Engineer; salary at the rate of £130 per annum; applications, etc." He worked continuously until he received notice on January 3, and he was paid until the end of January. After he left he did a little work as contractor for the Council at 12s. 6d. per day. He was so employed for four days. On February 4 his agent wrote to the Council to the effect that the notice was insufficient and not in accordance with law, and requesting payment of plaintiff's salary up to the end of March, when his twelve months would expire. A reply was received declining to accede to this request. In cross-examination, plaintiff said that he got legal advice at the end of January. He had on January 1 applied for the position of overseer of works at Queen's Town, because he was not in good health, and his doctor had advised him to get away from King William's Town. The Town Engineer gave plaintiff a testimonial in view of his application to Queen's Town. In reply to the Resident Magistrate, plaintiff said that the Mayor also gave him a testimonial, a copy of which he sent to Queen's Town. If plaintiff had been successful in getting the Queen's Town appointment, the Mayor knew when he would have had to take over the appointment. The applications for Queen's Town were decided on February 21, and plaintiff was not successful. Plaintiff did not question the notice from the Council, as he thought he had no right to question it.

The Magistrate gave judgment of absolute from the instance, with costs, giving his reasons as follows: I was of opinion the service was a monthly one. It seemed to me plaintiff might possibly have some claim in connection with the month's notice (which was short), although he had apparently accepted it. The claim as put forward seemed to me to be

unwarrantable, and application for amendment of it was not under the circumstances worth consideration. I was not certain but that the plaintiff had by his own action cut away ground for any claim. After hesitating between judgment for defendant with costs and absolute from the instance with costs, I recorded the latter.

Against the above decision plaintiff appealed.

Mr. Close appeared for the appellant; Mr. Upington appeared for the respondent.

Mr. Close (for the appellant): The first point to be considered is—what was the nature of Bowling's contract with the Council. No term of the engagement was fixed. In *Hunt v. Eastern Province Boating Company* (3, E.D.C., 12), a number of authorities were cited to show that an indefinite hiring is presumably for one year. There are no doubt exceptions to this rule, *c.g.*, in the case of a ship-master (*Smith on Masters and Servants*). As to domestic servants, we have the rule laid down (in Act 15 of 1856, Ch. 2, Sec. 7) that they are hired for one month; but a man of the appellant's class does not fall under this Act, and if the Court holds that he does not, then I submit he falls under the rule maintained in *Hunt's* case.

[De Villiers, C.J.: But did not he himself give notice, and having done so, could he have been sued for leaving when that notice expired.]

No, but he never gave an unconditional notice.

[De Villiers, C.J.: But he accepted a testimonial after his dismissal?]

He thought he could not sue the Council while he was still in their employ.

[De Villiers, C.J.: The testimonial says "he is leaving of his own accord."]

The important words there are "*of his own accord*." If he wanted to leave he was to be at liberty to leave, but if he wanted to stay, he could. The testimonials must be read in connexion with all the circumstances of the case.

[De Villiers, C.J.: Did he not waive his rights by accepting work under the Council after he got notice?]

No, all the time he was taking this temporary work, he was in consultation with his attorney. He was not engaged for any particular work, as the correspondence shows. Then, again, the testimonial says that he was "leaving of his

own accord." If so, he was not leaving because some special work for which he had been engaged was completed. It is true that the first testimonial (of January 14) says that "owing to the completion of the special work on which he was engaged, his services are no longer required." The two testimonials are, no doubt, contradictory; but he was appointed in terms of the Corporation Notice (No. 13 of 1901), and that Notice was simply for "a Foreman of Works." There was nothing in it about any special work.

Mr. Upton (for respondents) was not heard.

The Court dismissed the appeal, with costs.

De Villiers, C.J., in giving judgment, said: It is not necessary now to go into the question as to whether the engagement was a yearly or a monthly one. For the purposes of this case I will assume that it was to be a yearly one, and that plaintiff's services could not be dispensed with until the end, at all events, of the first year. But two months before the expiration of the year the plaintiff himself sought an engagement elsewhere, and he then induced the Borough Engineer to write a letter to the Mayor of Queen's Town, as follows: "Understanding from Mr. G. Bowling that he is applying for the position of overseer of works to your Municipality, I have pleasure in testifying to his abilities. He has occupied the position of foreman of works since March of last year, and has given me entire satisfaction, and I have confidence in recommending him to you. . . . He is leaving here of his own free will and accord." After this letter had been written notice was given to the plaintiff, and after that notice had expired plaintiff accepted service from the Borough, at a daily wage of 12s. 6d., and not only that, but he obtained another certificate from the Borough Engineer, which goes even further than the previous one, and in which it is stated that he leaves because he has finished the work for which he was originally engaged. Now, clearly there was acquiescence on the part of the plaintiff to the notice of dismissal. Now, the rule of law is *volenti non fit injuria*. Where a person himself is willing, and consents to a certain course, he cannot turn round afterwards and say:

"You had no right to do what I voluntarily consented to." Plaintiff himself could have left at any time before the year had expired after what had passed between him and the Borough Engineer, and what took place justified the defendants in coming to the conclusion that the plaintiff no longer wished to remain. In my opinion, it is not a case in which damages could have been given, and the appeal must be dismissed. The only point that might have been urged on behalf of the appellant is that this defence was not specifically set up, but by way of replication it has been pleaded that the form of notice was according to law insufficient, and therefore it may be said to have been raised indirectly. There is not the same strictness of pleading in Magistrates' Courts as in the higher Courts, and if the evidence was given and the matter brought before the notice of the Court, the mere fact that it was not specifically pleaded will not induce us now to alter the judgment of the Magistrate. The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys: Godlonton and Low: Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. } 1902.
July 12th.

Mr. Buchanan moved for the admission of Reginald Mowbray Hayton as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Registrar of the Eastern Districts Court.

Mr. Benjamin moved for the admission of William Gordon Coulton, jun., as an attorney.

Order granted and the oaths administered.

Mr. Benjamin moved for the admission of Evelyn William Krige as attorney and notary.

Order granted and the oaths administered.

Mr. Upington moved for the admission of Ernest Murray Layton as an attorney and notary. He pointed out that a portion of applicant's service was with H. W. Trollip, of Bedford, and they had not Mr. Trollip's affidavit, but there was a certificate put in in which the service was set out. The Law Society had had notice of this, but had raised no objection to the application.

An order was granted, the oaths to be taken before the Registrar, subject to the production of the affidavit from Mr. Trollip.

Mr. Alexander moved for the admission of Julius William Rossettenstein as a sworn translator.

Order granted and the oath administered.

PROVISIONAL ROLL.

CRABTREE V. THE GRAND JUNCTION RAILWAYS.

Mr. C. de Villiers appeared to ask for provisional sentence for an amount due.

Mr. Buchanan appeared for the defendants, and asked that the matter be postponed until August 31. There was another application on the roll for the final adjudication of defendant's estate as insolvent, but the petitioning creditors, the S.A. Milling Company, had consented to a postponement until the date mentioned.

Mr. Benjamin said he appeared for the S.A. Milling Company to consent to the application to the sequestration standing over, and he presumed that all the other matters would also stand over.

Mr. Buchanan said that the case of the Grand Junction Railways v. The Colonial Government was to be brought for hearing during the August term, and that was the reason of a postponement of these applications being asked for. If the action was decided in their favour, they would probably be able to pay all the debts.

The postponement was allowed in the case of Crabtree, and also in regard to several other applications for provisional sentence, as well as for the sequestration of the defendants' estate.

GREEFF. V. MACLEOD.

Mr. M. Bisset moved for provisional sentence for £150, due on a promissory note.

Mr. C. de Villiers moved for a postponement until August 1. The defendant alleged that he had a counter-claim against plaintiff, which reduced the amount of his indebtedness to £10 odd, which he tendered with costs to date. They had not had time to get the necessary affidavit from defendant.

Mr. Bisset said the defendant had had ample time to file an affidavit.

The case was allowed to stand over until August 1, defendant to pay the costs of the day.

VAN HEERDEN V. VAN EEDEN.

Mr. Rowson moved for provisional sentence on a mortgage bond for £200, with interest at the rate of 7 per cent. from August 10, 1898, and further, that the property specially hypothecated be declared executable. The bond had become due by reason of notice given.

Provisional sentence granted as prayed and the property declared executable.

SLABBART V. SLABBART AND ANOTHER.

Mr. Buchanan moved for provisional sentence for £500 due on a promissory note and costs of suit.

The Chief Justice pointed out that, in this case, the summons had not been returned to the Registrar's office. The Sheriff had written as far back as the 10th of June saying that it had been sent, but it must have gone astray.

The Court granted provisional sentence as prayed, subject to the production of a copy of the summons endorsed by the Sheriff to the effect that the summons was a copy of that which had been duly served on the defendant.

Mr. Buchanan: Can we get any extra costs thus incurred from the defendant?

The Chief Justice: Oh, no; it would be hard upon the defendant to have to pay for the summons going astray.

Mr. Buchanan: It will be equally hard upon the plaintiff, my lord.

The Chief Justice: Oh, well, that is your misfortune.

SILBEBBAUER, WAHL AND (1902.
FULLER V. WARD. (July 12th.

Mr. Benjamin moved for provisional sentence for £34 odd, being the amount of a certain bill of costs, less £13 paid on account. Counsel said that the costs were incurred in an action brought by the defendant against a Mrs. Ness. In that action Ward was successful, but Mrs. Ness could not pay, and had left the country. This was, therefore, a question of the personal liability of the client to his attorney for the costs incurred.

The defendant appeared in person, and said he had been told by the plaintiffs' representative that the costs would not exceed £7. He had not, however, any written agreement to that effect.

The Chief Justice pointed out that the attorneys could not tell beforehand what the costs would be. The defendant ought to have had an undertaking in writing that the costs would not exceed a certain amount. The Court would have to give provisional sentence, but the defendant could reopen the matter by going into the principal case, and should he do so, he had better consult a legal adviser.

On the application of defendant, a stay of execution until August 1 was granted, in order to allow him to take further proceedings if he wished to do so.

VAN DER BYL V. SIKKENS.

Mr. De Waal moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

CROSBIE V. LE ROUX AND ANOTHER.

Mr. Currey moved for provisional sentence for £350, due on a mortgage bond, with interest at the rate of 6 per cent. from July 1, 1899, with costs of suit; also that the property specially hypothecated be declared executable.

Order granted as prayed, and the property declared executable.

WITHINSHAW AND CO. V. PEDERSEN.

Mr. Benjamin moved for provisional sentence for £45 5s., due on a promissory note.

Provisional order granted as prayed.

LABE AND ANOTHER V. FRANK.

Mr. Alexander moved for provisional sentence for £575, with interest at the rate of 6 per cent. from May 28, 1901, and costs. The amount was due under certain conditions of sale. The total amount defendant undertook to pay was £675, but £100 cash had been paid on the day of sale.

Provisional sentence granted as prayed.

COLONIAL ORPHAN CHAMBER V. WAHL

Mr. Alexander applied for provisional sentence on a mortgage bond for £1,850, with interest at 6 per cent.

Granted.

JAGGER AND CO. V. HARRIS BROS.

Mr. Benjamin applied for the final adjudication of defendants' insolvent estate.

The application was granted.

VAN REENEN V. ISAACS.

Mr. Buchanan asked for provisional sentence on two promissory notes, one for £150 and the other for £100, together with interest and costs.

Application granted.

COLONIAL GOVERNMENT V. VORSTER.

Mr. Macgregor asked for judgment on a mortgage bond for £156, with interest at 4 per cent. and costs.

Granted.

ESTATE DE VILLIERS V. VISAGIE.

Mr. Goch applied for provisional sentence on a mortgage bond for the sum of £170, with interest at 6 per cent.

Application granted as prayed.

MORRIS V. GUEST.

Mr. P. S. Jones asked for provisional sentence on a promissory note for £20.

Granted.

MICHAU V. FRANK.

Mr. Goch moved for provisional judgment on a mortgage bond for £100, with interest.

Granted.

HEINAMANN V. SCOTT.

Mr. Alexander applied for a decree of civil imprisonment against the defendant Scott for £245, with £9 7s. costs.

Granted.

HEATH V. SERRURIER.

Mr. Buchanan moved for a writ of civil imprisonment against the defendant Serrurier for £20.

Granted.

ILLIQUID ROLL.

BLAKE V. BOSCH. { 1902.
{ July 12th.

Mr. Alexander moved, under Rule 329d, for judgment for £4 19s., for goods sold and delivered.

Granted.

COOTE, NOBLE AND CO. V. ISAACSON.

Mr. De Villiers moved, under Rule 329d, for judgment for £49, balance of account for goods sold and delivered, with interest at 8 per cent. and costs.

Granted.

ROSENBLATT V. WEINTROB.

Mr. Goch moved, under Rule 329d, for judgment for £5,000, the purchase price of certain landed property, with interest and costs.

Defendant, who appeared in person, asked for one month's extension of time.

Stay of execution was granted until July 31.

GARLICK V. SAPHIER.

Mr. Benjamin moved, under Rule 319, for judgment for £34 13s., balance of account for goods sold and delivered to plaintiff.

Granted.

MCINTYRE V. MCINTYRE.

Mr. Russell moved on behalf of Margaret McIntyre, for an order for the restitution of a certain watch, a pair of field glasses, or payment of their value, viz., £5.

Charles McIntyre, the defendant, having failed to enter appearance, the Court granted judgment as prayed, with costs.

OLIVER V. NYS.

Mr. Buchanan moved for judgment, under Rule 329d, for £36, for goods sold and delivered.

Granted.

HENDRICKS V. PEDERSEN.

Mr. P. S. Jones, on behalf of plaintiff, moved, under Rule 329d, for judgment for the sum of £20.

Granted.

EDWARDS V. FORD.

Mr. Buchanan moved, under Rule 329d, for judgment against defendant in the sum of £70, the purchase price of a certain piece of ground at Claremont.

Granted.

FARO V. PAKKIES AND OTHERS. { 1902.
{ July 12th.

Chief Magistrate's Court — Review—Gross irregularity.

In a civil action heard in the Resident Magistrate's Court of Matatiele, after the case had been closed, the defendant applied for absolution from the instance, which was granted. On appeal to the Court of the Chief Magistrate of Griqualand East, he reversed the judgment, and gave judgment for the plaintiff on the ground that upon the plaintiff's evidence he was entitled to succeed.

Held, that there was no gross irregularity in the proceedings of the Chief Magistrate to justify a review.

This was an application for review of a decision of the Court of the Chief Magistrate of Griqualand East. Faro was sued in the Resident Magistrate's Court at Matatiele by Pakkies for the sum of £12, the value of a mare, whose death was alleged to have been caused through Faro's negligence. The Magistrate, without calling upon the defendant, gave judgment of absolution from the instance, as he held that there was no negligence. The Native Appeal Court at Kokstad reversed the Magistrate's de-

cision, altering the judgment to judgment for Pakkies for £12 and costs.

The grounds of review were: (1) The gross irregularity of the proceedings, in that the Native Appeal Court reversed a decision upon fact of the Resident Magistrate's Court; (2) because the proceedings in the case by the Native Appeal Court were otherwise wholly irregular and contrary to law.

The Acting R.M. of Matatiele gave his reasons for his judgment as follows:

"This is a claim for damages £12 for and by reason of the loss of a certain mare and foal. From the commencement of the case it was understood that it was merely brought before the Court for arbitration, as the parties were on friendly terms with each other. No negligence has been disclosed. Had the mare got out of the paddock, and thus come by its death, there would have been some cause for action, but the fact that defendant had it knee-haltered to ensure its safe-keeping, shows that he meant to take proper care of the animal. The only charge made by him was for the cover. Upon these grounds the Court gave absolution from the instance."

From this judgment the plaintiff appealed to the Court of the Chief Magistrate, which allowed the appeal with costs, and gave judgment for the plaintiff for £12 and costs.

The Chief Magistrate, in his reasons for his judgment, after setting forth the facts of the case, proceeds: "It would have been much better if all the evidence had been taken. Defendant might then have shown that the property was not worth the sum claimed, or that there were circumstances, either in plaintiff's action or on his own part which removed, or reduced his liability should it eventually be held that the admitted facts amounted to such negligence, as *prima facie* evidence made the defendant liable for the loss. Defendant, who was represented by an attorney, elected not to do this, but to take his stand on the single point that the facts alleged by plaintiff did not disclose any such negligence as rendered the defendant liable for the loss.

The facts alleged by plaintiff are these, and as the record stands, must be taken as admitted by defendant. Plaintiff took a mare and foal of the value of £12 to defendant for the mare to be served by the latter's stallion. The cover did not take

place, and defendant offered to take charge of the mare, put her in a paddock, and again put her to the horse. To this plaintiff consented. In this paddock was a water hole, and the gate, being out of repair, without the knowledge or consent of plaintiff, defendant had the mare knee-haltered to prevent her straying out of the defective paddock. The mare fell into the water hole, and, being knee-haltered, was drowned, and the foal died also, in consequence of the mother's death.

The Court below held that these facts disclosed no negligence. This Court regrets that it cannot agree with this view. To knee-halter a horse in a paddock where there was a water hole, to which the horse had access and fell into, which, in its knee-altered condition, would probably cause its death, appeared to me to be such negligence as *prima facie* rendered the defendant liable for the loss. Such accidents are of not infrequent occurrence, and the possibility of their happening should be kept in view by every prudent horse owner. The mare might have been hobbled, and then she could hardly have come to harm, or the consent of plaintiff might have been obtained to the knee-haltering. Probably the defendant hardly gave the matter a thought, but thoughtlessness, where thought should have been given, is legal negligence. The case is a hard one, and from the position taken up by the defendant in the Court below, probably bears harder on him than it would otherwise have done. This Court can see no alternative to allowing the appeal.

The respondent (Faro) now applied for a review of this judgment.

Mr. Gardiner (for the respondent Koppies) cited *Queen v. Nathanson* (5 Juta, 105), and referred to Rule of Court 190. No legal ground for review has been stated, and no irregularity such as that contemplated by the Ordinance 40 of 1828 has been committed. Defendant had applied for absolution from the instance in the Court of the R.M., and that was the judgment given.

Mr. Buchanan (for the appellant): The mare was killed owing to defendant's negligence. The Resident Magistrate gave judgment, it is true, for absolution from the instance, but the Chief Magistrate reversed that judgment, and gave judgment for the plaintiff. He did not (as he ought to have done) send the case

back to the R.M. There was gross irregularity in the proceedings in the Chief Magistrate's Court. He should have remitted the case back, to ascertain whether negligence had been proved in the Court below or not. There is nothing on the Record to show that the defendant's attorney asked for absolution from the instance.

[De Villiers, C.J.: You ask for Review on the ground of irregularity. Where was the irregularity?]

The Chief Magistrate's Court reversed the decision of the R.M. on a matter of fact without obtaining any fresh evidence. Under Act 20 of 1856 the Court has power to refer the case back to the R.M. for further information, and I would ask that that should be done. The Chief Magistrate assumes that the defendant asked for absolution from the instance, but he did not.

Mr. Gardiner was not heard in reply.

De Villiers, C.J., in giving judgment, said the ground for review was the gross irregularity which was said to have occurred in the Chief Magistrate's Court in altering the Resident Magistrate's judgment of absolution from the instance to one of judgment for the plaintiff. But when one looked through the record there was nothing to show that plaintiff was prepared to give or tender evidence, but, on the contrary, the record was closed. If it had been otherwise there would surely have been a protest in the Chief Magistrate's Court, and it would have been pointed out that the Chief Magistrate had made a mistake, but nothing of that kind appeared to have been done. It was obvious that there could be no review for irregularity unless the irregularity was clear. In the present case it was not clear. The case was closed, all the evidence heard, and on that evidence, as far as his lordship could judge, the Chief Magistrate's Court was justified in giving judgment. The review would be dismissed with costs.

Maasdorp, J., concurred.

[Applicant's attorneys: Findlay and Tait; Respondent's: Silberbauer, Wahl and Fuller.]

REX. V. VAN REENAN AND (1902.
OTHERS. (July 12th.

Martial Law—Inferior Court—
Review.

The applicants were tried "in the Court of the Deputy Administrator of Martial Law at D" for contravention of certain Martial Law regulations, and sentenced to six weeks imprisonment with hard labour.

Held, that such Court was not a Court whose proceedings the Supreme Court could review, whatever other remedy the applicants might have.

While undergoing their sentence the applicants were tried "in the "Court of the Resident Magistrate and Deputy Administrator of Martial Law at M" for practically the same offence, and were sentenced to imprisonment with hard labour for two weeks and to pay a fine of £50, failing payment of which to further imprisonment with hard labour for three months.

Held, that the Supreme Court had jurisdiction to review the proceedings, and that as the offence was unknown to the law, and the punishment was one which the Magistrate's Court had no power to award, the proceedings should be quashed on the ground of gross irregularity.

The accused had been charged in the Court of the Deputy Administrator of Martial Law at Durbanville, with contravening section 4 of certain Martial Law Regulations, dated January 1, 1902, in that upon or about March 28, 1902, and at or near Koeberg in the Cape District, the said Bailie van Reenen and Daniel van Reenen did wrongfully and unlawfully enter into the Cape district from the Malmesbury district, and left

the Cape district for the Malmesbury district without the necessary permit, they not being persons excepted under par. 1 to 5 of the said regulations. Each of the prisoners pleaded "Guilty," and each was sentenced to six weeks hard labour.

On April 22, the said accused were tried before the Resident Magistrate and Deputy Administrator of Martial Law at Malmesbury for having (1) on March 28, 1902, moved to and fro in the district of Malmesbury, and left and entered that district without a proper permit, as required by the regulations; and (2) having removed two mules from the district of Malmesbury without the necessary permit. Each of the accused pleaded guilty to both counts. On the first they were sentenced to 14 days' imprisonment with hard labour each, and on the second they were fined £50, with the alternative of three months' imprisonment with hard labour, the sentences to take effect from the expiration of the former one.

The said Bailie van Reenen and Daniel van Reenen now applied for a review of the said proceedings.

Mr. Burton appeared for the applicants, Mr. McGregor appeared for the Attorney-General, who, he explained, had had no official control or responsibility in the case. The military authorities were in default.

[De Villiers, C.J.: The Durbanville Court was not an inferior Court, and we cannot review its doings under Martial Law. At Malmesbury, however, the Court was an inferior Court.]

Mr. McGregor said the question was, "Before what Court was the case tried?" The case apparently was tried before the Magistrate's Court, adding to its duties that of administering martial law. The case was headed "Martial Law," and the certificate stated that the case was tried by the Magistrate as Deputy Administrator of Martial Law.

Mr. Burton (for the appellant): The whole question in this case is, were these proceedings of an inferior Court, or not. We say that they were, and ask the Court to review them under Rule 190, and in terms of Sec. 47 of Act 20 of 1856. We ask for this review on the grounds of: (1) Gross irregularity in the proceedings in the Courts below; (2) the incompetency of these Courts to deal with the offences charged; (3) that the Magistrate

in one case at all events imposed a penalty in excess of his jurisdiction. The one trial took place before the Assistant R.M. at Durbanville, but as he does not appear to have acted in that capacity, I do not propose to go into the record in that case. Bailie van Reenen and Daniel van Reenen were charged with contravening Sec. 4 of Martial Law Regulations by travelling from the district of Malmesbury into that of the Cape without a "permit," and they were each sentenced to six weeks' imprisonment with hard labour. That sentence was pronounced on the 11th of April. On the 22nd of the same month, communications having taken place between the A.R.M. at Durbanville, and the R.M. of Malmesbury; after having been already punished by the former, these two young men were brought before the R.M. of Malmesbury, and again sentenced for what was practically the same offence. The charge-sheet in the Court at Malmesbury states that the charge was brought under the ordinary jurisdiction.

[De Villiers, C.J.: They both pleaded "guilty."]

The affidavits to which your lordship refers were taken for the purpose of a certain application to be made to this Court, and it would be irregular for me to refer to them. But I wish to emphasise the fact that they were twice sentenced for the same offence. The Magistrate at Malmesbury certifies, it is true that these proceedings were taken before him as Deputy Administrator of Martial Law; but from Van Reenen's affidavit it is evident that the charge-sheet has been tampered with since the case was heard. It was originally headed, "In the Resident Magistrate's Court." That is an inferior Court of this colony, and, therefore, this Court will exercise jurisdiction over it. The whole of the proceedings were grossly irregular. The charge was one not known to the law of this country, and the men were punished twice over. The only question is, were these proceedings those of an inferior Court, if so they could not well have been more irregular. The Magistrate says that, "he believed the words Martial Law appeared on the charge-sheet, but they certainly do not appear on the copy furnished to us."

[De Villiers, C.J.: What is your case, Mr. McGregor; are you prepared to ar-

gue against the jurisdiction of this Court over that of the Resident Magistrate?]

No, but we say that these proceedings were not in the Magistrate's Court, and that to take cognizance of his acts as an Administrator of Martial Law would amount to a recognition of Martial Law. I cannot admit that these were civil legal proceedings. They were extra legal. The affidavit of the Magistrate states that he acted as Deputy Administrator of Martial Law. If there be an enquiry, no doubt the Military will be represented. I do not appear for them now. The words "Court of Resident Magistrate" instead of "Martial Law" no doubt appeared on the charge sheet *per incuriam*. But the Magistrate is styled "Resident Magistrate and D.A.M.L." He cannot act at the same time in both capacities, and hence he must be presumed to have acted in that capacity in which he could legally act. Then, again, the accused having pleaded "guilty," cannot now take the point that the tribunal was incompetent. In *Queen v. Scholtz* (2 H.C., 372), where the Magistrate was by a clerical error said to be acting under his ordinary jurisdiction, whereas he was acting under Act 17 of 1867, the Court held that this clerical error did not vitiate the Record.

Mr. Burton was not called upon in reply.

De Villiers, C.J.: This case affords another illustration of the soundness of the view taken by the Court in a recent case as to the inexpediency of appointing Resident Magistrates as Deputy Administrators of Martial Law. I cannot suppose that any more cases will be tried before them in that capacity in the future, seeing that peace has been re-established and that the Privy Council has decided in the case of Marais that Martial Law can only be justified by the existence of actual hostilities. The application is for the review of two criminal judgments. As to the first judgment, namely, that of the Resident Magistrate of Durbanville, the Court cannot interfere. He purported to act not in his capacity as Magistrate, but as Deputy Administrator of Martial Law. This Court cannot recognise the Court of the Deputy Administrator of Martial Law without recognising it as a legal Court. But it was not a legal Court, because its constitution is not authorised by the law,

and it administers a system of laws in the shape of Martial Law regulations which have no legal validity whatever. The offence of which the applicants were convicted was that of entering into the Cape district from the Malmesbury district and returning to the Malmesbury district without a permit, and for this offence they were sentenced to six weeks' imprisonment with hard labour. It is not clear that the particular regulations which they were charged with contravening justified the sentence, but this is not a matter into which this Court will enter. It is sufficient to say that the Court has no jurisdiction to review the judgment, whatever other remedy the applicants may have. After they had been sentenced and while they were undergoing the imprisonment with hard labour, they were tried before the Resident Magistrate of Malmesbury for substantially the same offence, and sentenced to fourteen days' hard labour and the payment of a fine of £50, or in default of payment to a further term of imprisonment with hard labour for three months. According to the record the trial took place "in the Court of the Resident Magistrate and Deputy Administrator of Martial Law," before the "Resident Magistrate and D.A.M.L." So far as the Court purported to be a Court of Resident Magistrate it was an inferior Court recognised as such by the law of the land. According to the record, therefore, the applicants have been convicted of an alleged criminal offence in a Criminal Court of the Colony and sentenced to a severe sentence. The addition of the words "and Deputy Administrator of Martial Law" does not make the proceedings valid so far as they purported to take place in the Magistrate's Court. The applicants were tried in that Court for an offence wholly unknown to the law, and were sentenced to a punishment which that Court had no power to award. The proceedings were, therefore, grossly irregular, and must be ordered to be quashed.

[Applicants' Attorney: D. Tennant, jun.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.] and the Hon. Mr. Justice MAASDORP.]

REHABILITATIONS. } 1902.
July 14th.

REHABILITATIONS.

Mr. P. S. Jones moved for the rehabilitation of Jacobus Petrus Delpont.
Granted.

Mr. Goch moved for the rehabilitation of Arthur Edward Coomer.
Granted.

Mr. Buchanan applied for the rehabilitation of Joseph John Westwater Scott.
Granted, subject to the production of an affidavit of service.

On the motion of Mr. Upington, an order for the rehabilitation of Wm. Thomas Birch was granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHANNES JACOBUS NORVAL.

Mr. Russell moved to make absolute a rule *nisi* granted under the Derelicts Lands Act.

Granted.

Ex parte CAVANAGH.

On the motion of Mr. Close, the Court made absolute a rule *nisi* granted under the Derelict Lands Act on July 12th, 1902.

COHEN V. COLONIAL GOVERNMENT.

Mr. McGregor, on behalf of the Government, moved for leave to sign judgment against plaintiff for not proceeding with his action.

Granted.

MACKIE, DUNN AND CO. V. FARQUHAR.

Mr. Benjamin made application for a rule *nisi* restraining the Resident Magistrate of Port Elizabeth and the Chief of Police from paying over certain moneys to the respondent to be made absolute, and for a further interdict in regard to certain immovable property.

It was stated, on affidavit, that the respondent, John P. Farquhar, entered

into the service of the applicants in 1895, at a salary of £8 a month. That salary was increased from time to time until it reached £12 a month. It was alleged that beyond his salary the respondent had no means, and he was a married man with two children. On May 20, 1902, he was arrested on a charge of theft, and being accessory to the theft of very large quantities of merchandise, to the value of £3,000, from the applicants' warehouse. He underwent a preliminary examination on the charges in conjunction with others, who were charged with having received the merchandise, and they were committed for trial. Farquhar had not been able to find bail, which had been fixed at £1,000. The affidavits proceeded to state that the respondent had become the owner of certain property at Port Elizabeth, and that there was also a sum of £400 in the hands of the Resident Magistrate or of the Inspector of Police, which was claimed as the property of Farquhar, and which the applicants alleged was part of the proceeds of the thefts. The applicants sought to interdict this property and money being dealt with.

The Court granted the application, with a reservation of the rights of third parties.

MCDONALD V. MCKENZIE.

Mr. Buchanan moved to sign judgment, with costs, against plaintiff for not proceeding with his action.

Granted.

JONES AND CO. V. FRIEDMAN.

This was originally an application for an order compelling respondent to enter into and execute a certain lease, but the respondent had entered into the lease, and the present motion was now for costs of the application.

On the motion of Mr. Benjamin, the application for costs was granted.

GREEN AND SEA POINT MUNICIPALITY V. KRAMER. } 1902.
July 12th.
" 14th.
" 15th.

Municipal regulations—Building line—Air space—*Ultra vires*—Compensation—Interdict.

The respondent, intending to build on his own land adjoining

a road, which had been laid out forty-two years previously with a width of about eighteen feet, complied with all the requirements of the municipal engineer, except that he refused to put the building back to a distance of twenty feet from the centre of the road, in terms of a municipal regulation which prohibits the erection without the consent of the Municipal Council of any building within twenty feet from the centre of a road. The building was not proposed to be extended beyond the line of frontage.

Held, that the regulation, in so far as it prevents the enjoyment by the owner of a substantial portion of his property adjoining a road which was in existence before the framing of the regulations, without compensation to the owner, is ultra vires, and that, as the Municipal Council was not justified in insisting upon a setting back without compensation, the respondent should not be interdicted from proceeding with the erection of the building.

This was an application to make absolute a rule *nisi* restraining respondent from proceeding with certain buildings. The building in question was No. 3, Clydebank Cottages, Green Point, and the application was based on the ground that the building was not in conformity with the building regulations of the Municipality in regard to the building line.

The respondent submitted to the Council plans for a shop in Clyde-road, Sea Point. The Council refused to pass the plans, on the ground that they did not comply with the Municipal regulations, in that the shop was not the necessary distance (20 feet) from the centre of the road. As the respondent proceeded with the work, the applicants made an *ex parte* application to the Court, and a rule *nisi* to oper-

ate as a temporary interdict was granted by the Court on July 2nd, forbidding the Respondents to proceed with the erection of the said buildings. Applicants now applied to have this rule made absolute. The affidavit of Richard Henry Heward, Engineer of the Municipality of Green and Sea Point, stated:—

(1) That no permission was granted to the Respondent to commence the said building in Clyde-road.

(2) That no inspection had been made of the excavations and foundations, as required by the bye-laws. In fact, the Bye-laws had been ignored by the Respondent.

(3) I visited the works this morning (July 2nd, 1902), and found one side wall nearly erected and the foundations in for the remainder of the walls, and part of the same already erected.

In a supplementary affidavit the aforesaid deponent stated:—

(1) That I inspected the buildings yesterday afternoon (1st July, 1902), and found that they are proceeding with the work at such a rate that unless an interdict be granted immediately the works will be finished before the 12th, the date on which we originally intended to apply for an interdict.

(2) Notices have already been drawn calling upon the Respondent to show cause on July 12th why an interdict shall not be granted, but if we wait until the 12th inst. there will be no occasion for an interdict, as the work will be completed by then.

On April 24, 1902, the architects had written to the Town Engineer asking whether their plans submitted were in accordance with the Municipal regulations. In a letter of even date the Engineer replied that the Council could not approve of the said plans as the proposed front shop was beyond the building line, and was also less than 20 feet from the centre of the road, and that by the erection of the shop at the back the necessary air-space was not provided at the rear of No. 3. On April 25 the architects wrote traversing these statements.

Further correspondence ensued, and finally the Respondent referred the matter to his attorneys, who pointed out to the Engineer that as the only objection raised by the Council was one which would impose upon the Respondent the obligation of setting back his buildings beyond the building line of the street and

beyond his own boundary, the said Respondent would proceed with the erection of his buildings in accordance with the plans submitted.

Mr. Close (for the Respondent): Our defence is based on the case of *Town Council of Cape Town v. Shenker* (12, Sheil, 120). In that case it was held that if the Town Council wished to widen a street they must expropriate, and pay the owners of property in terms of Act 20 of 1896. They cannot make regulations to enable them to seize a man's land without expropriation and compensation. They may make what rules they please as to new streets, but they cannot interfere with private property abutting on old streets.

[De Villiers, C.J.: Did Schenke's case come before the Court under circumstances similar to this case?]

I believe so. Schenke built, not with a view to contravening the building regulations, but to compel the Town Council to take action. That was, practically, his only course. The Court would not have granted a *mandamus* against the Town Council unless he could show that their refusal to sanction his plans was *malu fide* and improper. See *Clark v. Town Council of Cape Town* (4 Sheil, 42). To require the respondent to prove *malu fides* on the part of the Council would have amounted to throwing a very heavy onus on him.

[Maasdorp, J.: In that case the Court did not hold that he could proceed with his building without the sanction of the Council, but that as he had acted *bona fide* he was entitled to costs.]

[De Villiers, C. J.: The point as to whether he was justified in proceeding was raised, but the Court expressed no opinion on that point.]

I would wish to point out that in the present case this road was laid out in 1860, and it is therefore an old road. In any action the respondent might bring he would have to prove some improper motives against the Town Council. Such motives could not be proved if the Council were acting *bona fide* in the public interest, however illegal their action might be. As to new streets, see section 22 and 24 of the regulations, but this is an old street, and we say that the Town Council cannot alter the building line without compensating the owners of property affected.

Mr. Gardiner (for applicants): We do not wish to expropriate the respondent's

property. He may cultivate his front property as a garden, or do anything he likes with it, provided he does not build on it. He must keep his building in line. Our case differs from Schenke's case. There the Town Council attempted to deal with an old street as if it had been a new one; but here we are not dealing with this property under section 74, which applies to new streets, but under 267 and 268, which clearly apply to old streets. All we want is to secure sufficient air space. We gain nothing, because the property still remains that of the respondent. Whatever may have been the previous building line, we are entitled by sections 267 and 268 to insist on these buildings being put back twenty feet from the centre of the road.

[De Villiers, C. J.: But should you not pay for that? Suppose a man has a very narrow strip of ground abutting on the road, is he to be debarred from using it?]

Under all municipal regulations cases of individual hardship will occur. The only question is, "Is the regulation wholly unreasonable?" We want to set respondent's buildings back some 10 feet; we objected, too, to certain back premises on the ground that they encroached upon the necessary air space, but the respondent has consented to give up those. The only question is whether these regulations are *ultra vires*. I submit that they are fully authorised by section 4 (c) of Act 20 of 1896. At any time the respondent might build another story to his house, and then there would not be sufficient air space, unless he kept back 20 feet from the centre of the road. The question is, do two buildings in this road, both below respondent's building, constitute a building line? I submit there must be at least one building on each side of the property in question to fix such building line. Sub-section (g) of section 4 of the Act 20 of 1896, it is true, provides for compensation in the event of the Council removing projections or obstructions, but we are not seeking to remove anything. Even if respondent's plans are all in order we are still entitled to an interdict restraining him from proceeding with his buildings, on account of his having violated section 220 of the regulations. Respondents cannot be allowed to take the law into their own hands, and treat our regulations with contempt. If they had anything to complain of they should have brought their

action. Then, again, they have given us no notice of the completion of their foundations, as they are bound by the regulations to do. I submit that the rule *nisi* should be made absolute: (1) Because our regulations are *intra vires*, and we could not approve of these buildings; (2) because respondents have not obtained our consent; (3) because they have still further violated the regulations by not giving us notice to inspect their foundations.

Mr. Close (for respondents): The houses already existing in the street are sufficient to determine a building line. In no case can the Council compel us to set back our buildings without giving compensation. See Act 20 of 1896, sec. 3. The Municipal Council wish to make use of our property to the extent of depriving us of the free use of it, and this they cannot do without compensation. Regulation 24 (b) authorises them to lay out new streets of 30 feet wide, and why then should a width of 40 feet be considered necessary in the case of an old road. The Council may have a right of expropriation or not, but they cannot take private property without payment.

[De Villiers, C.J.: Do you content that section 216 of the regulations is *ultra vires*?]

Yes, because in Schenke's case it was held that a man was justified in building up to the building line.

[De Villiers, C.J.: That case referred to an old street?]

But in that case this section was particularly relied upon.

[De Villiers, C.J.: No; the whole point was that that was not a new street.]

Mr. Gardiner (in reply): The regulations provide for compensation in the case of old buildings removed by us, and also in case we should wish to set back new buildings beyond the building line. The present case does not fall under either of these heads. We do not wish to make any use of this land.

Cur. Adr. Vult.

Postea, July 15. The Court gave judgment.

De Villiers, C.J.: In this case the applicants obtained a rule *nisi*, operating as a temporary interdict, restraining the respondent Kramer from proceeding with the erection of certain buildings at No. 3, Clydebank Cottages, Green Point. The ground upon which the application was

made was that there had been a contravention by the respondent of one of the municipal regulations, viz., the 267th, which provides that "no building shall, without the consent in writing of the Council, be erected within twenty feet of the centre of any of the streets, roads, or thoroughfares in which it is or is intended to be situated, other than the main road or Beach-road." Some other objections to respondent's building had been made, but these objections were withdrawn, and the real objection made was that no permission had been given in terms of the 267th regulation. The respondent objects to this regulation, as being really in excess of the powers of the Council, that it is hard and fast, applicable to old as well as new roads, and that in his particular case it would be a great hardship if he were compelled to set back his building in the way in which it is proposed. The regulation, I presume, must have been made under the Act of 1896. Well, Act 20 of 1896 undoubtedly gives very large powers to municipalities. It gives them powers to frame regulations, and also gives them large powers for awarding compensation where it is necessary for the public good to expropriate land for whatever purpose. The powers of expropriation are great, and the powers of giving compensation was also great. Then comes the fourth section, which gives power to make regulations, and one of the powers is to make regulations for regulating the sufficiency of space about buildings, to secure the free circulation of air, and with respect to ventilation of buildings, and, further, under sub-section (g), for securing the regularity of lines and levels of buildings, the class of architecture of new buildings, and the removal, alteration, and the preventing of projections or of obstructions in front of buildings, and what compensation to be paid to owners for any damage they may sustain by reason of such removal or alteration." It is stated in this case that the respondent has gone beyond the line of buildings, but I think that the affidavits clearly disprove the statement, the affidavit of Mr. Sherwood being to the effect that the line of frontage of the said shop falls 2 feet 6 inches within the respondent's boundary, and is slightly behind the line of frontage of all existing buildings on that side, so that this regulation does not apply to his case, and the only

regulation which would apply would be the regulation (c) for regulating the sufficiency of space about buildings to secure the free circulation of air. The evidence in this case goes to show that Clyde-road was laid out as far back as 1860. It has been a road for forty-two years, and it is a narrow road, only 18 or 19 feet wide, and can only be widened to a width of 40 feet by taking down all, or nearly all, the existing buildings fronting thereon. The effect of this regulation, if it is to be applied to this case, would be that this old road, 18 or 19 feet wide, existing from 1860, shall no longer be treated as a road 18 or 19 feet wide, but shall be treated as if it were a road 40 feet wide. Now if a person buys property adjoining a certain road which has been of a certain width for a great number of years, he buys in the belief that if he builds within the line of his land frontage, he is not to be molested, and I don't think the 267th regulation, so far as it affects a case like the present, can be held to be at all within the powers of the Council. It is surely not necessary to have a road 40 feet wide for the free circulation of air, because that is all that the Act speaks of: "To regulate the sufficiency of space about buildings, to secure the free circulation of air, and with respect to ventilation." The free circulation of air can surely be secured with 18 or 20 feet, and it does not, in my opinion, require 40 feet for the purpose of free circulation of air. In my opinion this regulation is, so far as it affects a case like the present, *ultra vires*, inasmuch as 18 or 19 feet would, under the circumstances of this case, be sufficient to secure the free circulation of air. A regulation requiring that this old road, 18 feet wide, shall in future be treated as a road 40 feet wide amounts to a very substantial curtailment of the rights of the persons who bought property along that road, and is not authorised by this Act, unless the Municipality is prepared to take advantage of that section of the Act which allows them to take the land upon giving compensation. In the present case there is no tender of compensation. It was simply a peremptory order that the house is not to be placed in a line of frontage less than 20 feet from the centre of the road. Now the application was made for a rule, and under ordinary circumstances, the Coun-

cil would be quite within its rights in preventing persons from building without its consent. I do not wish to say anything that would justify anyone in obstructing the Council in any way in carrying out their building regulations. It is for the public interest that there should be such regulations to secure the health as well as the uniformity of the neighbourhood. But there is no question in the present case as to the regularity of the line of buildings, and, as to the free circulation of air, there is no evidence that eighteen feet would be an insufficient width for the road. This last being the only ground on which the building is objected to. I am of opinion that the rule should be discharged, with costs.

Maasdorp, J., concurred.

[Applicant's attorneys: Van Zyl and Buissinné; Respondent's attorneys: Tredgold, McIntyre, and Bissett.]

Ex parte VAN RENEN.

Mr. Uppington moved for leave to the petitioner to mortgage certain property in the estate of his mother, the late J. H. van Renen, for the purpose of paying off the liabilities of the testatrix. Petitioner and his wife had the usufruct of the estate. The three major heirs had signified their consent, and the report of the Master was favourable.

Order granted.

SKLAAR V. SKLAAR. { 1902.
July 14th.

Divorce—Jurisdiction—Domicile.

Mr. Buchanan moved for leave to the petitioner, Barnett Sklaar, to sue his wife, Sarah Sklaar (born Rotenberg) by edictal citation for divorce *a vinculo matrimonii*, by reason of her bigamous marriage and consequent adultery.

The petitioner stated in his petition that he was married to one Sarah Rotenberg, a spinster, at the Registrar's Office in the district of Prestwich, in the counties of Manchester and Lancaster, England, on July 27, 1891, and that the marriage was still of full force and effect. Petitioner never cohabited with his said wife, they not having been married by Jewish law, and after the marriage they resided with their respective parents. A few weeks after July 27, 1891, peti-

tioner's father-in-law, Abram Rotenberg, suffered severe financial disaster, as a result of which he prevailed upon petitioner to accompany him to South Africa, and it was arranged that petitioner's wife should remain in England with her mother. Petitioner accordingly came to this colony in the month of August, 1891, and has resided here ever since, with the exception of a temporary stay in Johannesburg of one year and seven months, in the years 1895 and 1896. The petitioner had, therefore, acquired a domicile in this colony, and he was naturalised as a British subject about eight years ago. Petitioner's father-in-law returned to England some three months after his first landing here in 1891, and immediately afterwards went to America, taking with him one of his children, a boy, and thereafter he was joined by his wife and other children in New York, including petitioner's wife. About the same time petitioner's father and mother went to New York, and petitioner's mother was still alive and residing there. One of petitioner's brothers married a sister of petitioner's wife, and the latter had at all times known the whereabouts of petitioner. Notwithstanding such knowledge she contracted a bigamous marriage on January 27, 1900, with one Abraham Jacobowitz, and was now the mother of a child by the said Jacobowitz. In the certificate of that bigamous marriage it was stated that Sarah Rotenberg was a single woman, and as a matter of fact by the Jewish law she was a single woman, as petitioner's marriage had never been solemnised by the Hebrew rites, nor had the legal marriage ever been consummated.

The Chief Justice: It would be rather an extension of the doctrine of domicile in a case like this. The applicant has come out here, but the respondent has never come out here. Then nominally they are husband and wife, but strictly the marriage had never been consummated.

Mr. Buchanan said that all the legal formalities had been complied with, although the Jewish rites had not. As to applicant coming out here, that was by arrangement with respondent's family. English courts have often held that the wife's domicile is that of her husband. *Footnote, Priv. Internat. Law* (p. 31, 2nd edit.). See *Van Rhyn v. Van Rhyn* (9,

Sheil, 563), and *Mannering v. Mannering* (11, Sheil, 174).

The Chief Justice: Yes, but this case is rather different, as the parties have not even cohabited. However, I suppose they were married, as I see the certificate of the Registrar, and a rule will be granted, but personal service will have to be effected.

Mr. Buchanan said he believed that could be done, as respondent appeared to be still in New York, and applicant's mother was also there.

The Court granted leave to sue by edictal citation, personal service to be effected, rule to be made returnable on October 15. Leave was also granted to serve the intendment and notice of trial along with the citation.

[Applicant's Attorneys: Silberbauer, Wahl & Fuller.]

MARSBERG V. MARSBERG.

Mr. Goch moved in this matter, which was for leave to the applicant to sue her husband *in forma pauperis* for restitution of conjugal rights, failing which, for divorce.

The applicant entered the witness-box, and deposed that she had no means to bring an action in the ordinary way. Her husband had been away for five years. He went to Port Elizabeth, and since then witness had heard nothing from him. Applicant wanted a divorce, because when she had saved a little money respondent might come and take everything. He had actually done so on a previous occasion.

Counsel pointed out that applicant resided at Kimberley, and respondent was last heard of in the jurisdiction of the Eastern Districts Court, and therefore it might be advisable to send the case to the High Court of Griqualand.

The Chief Justice said that there might be an application to that effect at a later stage, but at present the only question was the granting of leave to sue *in forma pauperis*.

In reply to the Court, counsel said respondent had last been heard of at Queen's Town, where he had apparently been on a visit, in 1900.

The Court granted a rule, returnable on August 1, calling upon respondent to show cause, if any, why leave should not be granted applicant to sue him *in forma pauperis*, personal service to be

effected, if possible, failing which, one publication in a Queen's Town newspaper.

Re ESTATE OF THE LATE OOSTHUIZEN.

Mr. De Waal moved, on behalf of the executors testamentary in the above estate, for leave to sell certain property in the estate. The consent of the major heirs had been obtained. The Master's report was favourable, provided the property purchased with the proceeds of the sale be transferred to the executors subject to the terms of the will.

An order was granted in terms of the Master's report.

Re ESTATE OF THE LATE ROSSOUW.

Mr. Nightingale moved for an order authorising the Registrar of Deeds to transfer certain property in the above estate to the petitioner, who is the widow of the late Daniel J. A. Rossouw and executrix testamentary in the estate. Affidavits were put in to show that it was a *bona fide* sale, the petitioner having purchased the property at public auction for £750. A certificate put in showed that the Divisional Council valuation of the property was £350.

Order granted as prayed.

[Before the Hon. Mr. Justice MAASDORP]

SEBBA V. HIGHAM. { 1902.
{ July 14th.

Mr. Alexander moved that a certain award of arbitrators be made a rule of Court, with costs against the respondent.

Award made a rule of Court, respondent to pay the costs.

DE VILLIERS V. HOLLOWAY { 1902.
AND ANOTHER. { July 14th.

Spoliation—Interdict.

Mr. Burton moved for an order making absolute a rule *nisi* granted by Maasdorp, J., in chambers, on July 2, 1902, calling upon the respondents to show cause why they should not be (1) compelled to remove, and (2) restrained from replacing a certain wire fence. The applicant, the Right Hon. Sir J. H. de Villiers, is the owner of the farm Rustenvrede, in the Paarl division, and the respondent, Holloway, is the owner of the adjoining

farm, Le Plaisir Merle. There is a dispute as to a certain piece of land, which the plaintiff claimed as his, mainly upon the ground that his title to ownership was established by prescription, he, his predecessors in title or servants, having continued in possession of the land in question for over 30 years. Respondent claimed the land by title, and had erected a fence, which prevented applicant from cultivating the land. This fence applicant wished removed, pending an action which is to be brought at the forthcoming Paarl Circuit Court to decide the question of the ownership of the land. It was contended that applicant, being in peaceable possession of the land, respondents' action in erecting the fence was one of spoliation, and that, before the action to establish the ownership can be brought, respondent must restore to applicant his peaceable possession.

Mr. Close appeared for the respondents.

Lengthy affidavits were read, in which negotiations which had been carried on between the parties for the amicable settlement of the matter were set forth. Plans showing the locality of the ground and the fence were also put in.

Mr. Close (for respondents): The respondents are called upon to show cause (1) why they should not be ordered to remove the fence in question, and (2) why they should not be interdicted from replacing it or from trespassing on the land in dispute. The applicant claims this land on the ground of prescription; but the only proofs of such prescription are (1) the statement made to him by Mr. Basson; (2) the fact that there was an orchard on the river in 1862. Mr. Foster says that the farm Rustenvrede was bounded by the river, but he was not one of the applicant's predecessors in title. The Court will not grant an interdict on such vague evidence, but will require proof of a clear right.

[Maasdorp, J.: The question before the Court is not who is the owner of this land, but who was in quiet possession of it?]

The case raised by the applicant when he applied for the rule *nisi* was that he is the owner.

[Maasdorp, J.: He only said that he believed he was the owner, and as such was in quiet possession of the land.]

Van der Linden (1, 13, 3), gives a very good summary of possessory writs. Possibly the applicant might have had his remedy by *Mandament van Maintenu*, but he is proceeding by *Mandament van Complainte*. That remedy is clearly inapplicable, because recourse must be had to it within one year of the alleged trespass. As to the *Mandament van Spolie*, that is applicable only when the ouster had been accomplished either by force or by stealth. Here no force was used, and it is impossible to contend that a long and substantial fence like this could be put up by stealth. Mr. P. de Villiers knew it was in course of erection, and never objected.

[Maasdorp, J.: Before the fence was put up did the parties know that this ground was in dispute?]

Yes; see applicant's letter of October 30, 1899. He then knew that Holloway claimed it.

[Maasdorp, J.: But applicant disputed the claim. The question is, "Who was in quiet possession?"]

There is no allegation that applicant was. Respondent saw that his poplar trees were being cut down.

[Mr. Burton: The applicant says that no notice was given to anybody of the putting up of this fence.]

That was not necessary, the putting up of the fence (a thing that could not be done in a day) was itself a notice.

[Maasdorp, J.: When was the fence put up?]

We have not the exact date, but we know it was partly up on February 12. Applicant's manager says that he always regarded the river as the boundary of the farms, and yet he writes to Mr. P. de Villiers that the orange trees (on applicant's side of the river) were on Holloway's ground. Hence he must clearly have had notice that Holloway was claiming this ground, and he never disputed the claim. Then, again, in his affidavit the applicant states that he wishes to have the question of the ownership of this ground in dispute tried at the ensuing Circuit Court at the Paarl. That will be held very soon, and as there is clearly no question of urgency, such as is required for an interdict, I submit the Court will not order the respondent to remove an expensive fence.

[Maasdorp, J.: How is the applicant to get at his trees?]

It would do us more harm to take down the fence than it would do to the respondent to leave the trees as they are for a few weeks at this season of the year. Or we will undertake either to cultivate the trees or to transplant them and hold ourselves liable for any damage done.

Maasdorp, J.: Would it be necessary to have the whole fence moved?]

Mr. Burton (in reply): Yes. Respondent made us no tender, and we did everything we could to meet him. We even offered to buy the ground in dispute, although we contend that it is already our own. We have made a road for the convenience of Respondent and have widened it at his request, but as there seemed to be no finality to his demands, the Applicant has now "put his foot down," and refuses to do anything more until this fence is removed. The Respondent makes no tender of a gate in his fence; and it is a high barbed wire fence, which it is impossible to either get through or to get over. It is absolutely necessary that Applicant should cultivate this land for the benefit of his orchard. I submit that he is suffering injury, and I am not instructed to accept a gate in the fence even if now tendered.

[Mr. Close: I am instructed that we will give you a hole in the fence, so that you can get in to cultivate your fruit trees.]

That is not our claim. We ask to be put in quiet possession of the land adjoining the orchard. Our rights have been interfered with; and as *Van der Linden* has been quoted on the other side, I should wish to refer to (1, 13, 2) "*Spoliatus ante omnia restituendus*." Applicant's quiet possession of this ground is not denied.

[Mr. Close: Oh, yes, we do deny it.]

They say that they picked the fruit from the shaddock trees, which they may well have done without any person observing them; but they do not deny that applicant planted his orchard in such a way as to carry it right through into this ground. He was also in the habit of dealing with the poplar bush thereon as his own property. In short, he was clearly a *bona-fide* possessor in quiet possession.

Maasdorp, J.: It seems that there can be no doubt that there are some very important and serious disputes between the applicant, as the owner of Rustenvrede, and

the respondent as the owner of Le Plaisir Merle, and that these disputes depend upon matters both of fact and of law. The dispute is not confined to the question of this particular strip of land, but it appears from the affidavits that there are several other matters upon which the parties cannot agree, and it seems very probable that these other matters will also have to be decided by a court of law, unless the parties can still come to some settlement. It is not for me now to decide the ownership of the land in question. The applicant may base his claim upon the right of prescription, or he may base his claim upon the contention that it would appear that it was originally intended that the river itself should be the boundary of his farm. Now we know what important questions always arise in disputes of that kind; questions as to whether the Court should have reference in deciding the matter to diagrams or description of the farm, or the natural formation, etc., and upon the question of prescription we also know that it is a matter that can only be decided after hearing, generally speaking, a large number of witnesses, and after sifting evidence which may be in very violent conflict. That question I shall not now go into. I shall not even express any opinion as to the probabilities of success of the parties when this question comes on for decision. I merely say that the question I have now to decide is, who is entitled, pending the action which is almost sure to be brought for the settlement of these disputes, to the possession of the land which is in dispute? That will have to be decided upon the determination of the question as to who was in peaceable possession, or who was entitled to continue in such peaceable possession. There can be no dispute as to certain facts that have been brought before the Court. We find that it is admitted by both parties that upon this bit of ground there was a certain number of trees, evidently a portion of some cultivated garden. Now the only cultivated garden in this neighbourhood is that upon the property of the applicant. It is perfectly clear that these few trees do not in themselves constitute an orchard, and the only one existing there is on the property of the applicant, which lies just across this fence, which has been erected by the respondent. It appears that the river is almost impassable at this point,

and that these trees could not be a portion of any cultivated ground or any orchard upon the other side of the river. Therefore, I take it, that the occupier of the orchard lying on the other side of the fence must at one time long ago have dealt with this portion of the property as his own. I don't say that that makes it his own, but some years back he must have dealt with it as his own, and must have extended his orchard in a peaceable manner on to this piece of ground. That may not create any rights on the part of the applicant, but still it takes the Court back for a considerable number of years as to the question of peaceable possession during some indefinite number of years. When we come to a later period, we find that some six years ago the applicant quietly and peaceably entered upon this piece of land, which he regarded as his own, that he then converted a certain portion of it into his orchard, and since that period has cultivated the ground, and has reaped the fruit of those young trees planted six years ago, while his servants have also taken the fruit from the older trees mentioned, besides making use of the wood of the bush. All this was done in a peaceable and quiet manner, and that brings in the matter of the motion: that the applicant at that time, whether rightly or wrongly, regarding the property as his, enjoyed it peaceably, and that he was entitled to continue such peaceable possession until deprived of it in due process of law. It appears that in 1899 the parties were well aware that both of them claimed this land. Nothing was done, however, by the respondent for some time after that, and I am satisfied that the first step the respondent took to enter upon this land was after the applicant had left the country, and was absent from the farm; that at a time when the applicant could not possibly have protected himself, the respondent entered upon this land without giving notice to the applicant or to his representative of what he intended to do, but proceeded to erect this fence, which traverses the orchard of the applicant. It strikes one as rather a strong measure to actually take possession of cultivated land—portion of an orchard—without notice to the person in peaceable possession, and that seems to be an indication that it was done in terms of the law by stealth. The respondent

states that the applicant was well aware of his intention, because he had commenced to take possession of the ground and erect this fence before the applicant left. but when we regard this letter written by the overseer it seems that the respondent is wrong in that. If the applicant had been aware of what the respondent had done, and if the overseer knew that the applicant was present, and could see what was going on, it would have been absolutely unnecessary for him to write this letter to the son and representative of the applicant to inform him what steps had been taken by the respondent. I take it that the applicant was deprived of the peaceable possession of this ground at a time when the respondent was aware that he claimed it as his property, and that the respondent did it in a manner which the law does not approve of, and did it under circumstances under which he will be held to have acted illegally, and will be bound to restore possession before the further question as to the real rights of the parties to the property can be considered. Many other questions have been raised in this case, which are really irrelevant to this present application. They seem to have come in this case through being inextricably mixed up in certain negotiations that the parties had entered into when they attempted to arrive at some settlement in the matter. When the applicant returned from Europe he found what had been done by respondent. He found a fence placed upon the ground, and it is said that having lain by so long it must be taken that he acquiesced in what had been done by the respondent to such an extent as to deprive the conduct of the respondent of the character of forcible spoliation. But it seems from the affidavits that the applicant immediately objected to what had been done. Immediate steps were not taken because, as I have said, the parties seem to have endeavoured from time to time to let this question abide the settlement of some other disputes, and there was some probability that they would have arrived at such a settlement, and that no legal proceedings would be found to be necessary. Therefore the mere fact that the applicant did not press forward legal proceedings immediately was not such an acquiescence in what had been done by the respondent as to deprive the appli-

cant of the right of now asking the Court to put him in the position he would have been in had he not been deprived of peaceable possession by the respondent. Under these circumstances, therefore, it is necessary to put the parties back, pending litigation, in the same position as they would have occupied if the respondent had not been guilty of what I consider a wrongful act. That can only be done now by ordering the respondent to remove the fence along the boundary line of the south side of applicant's farm from the point marked A upon the plan to the river. Whether it would be possible for the parties to modify this order to some extent, and whether the applicant might be satisfied with taking what might enable him to cultivate his orchard and no more, that the parties will have to decide themselves. It may be that this fence runs through the whole length of the cultivated portion of the orchard, making it necessary to insist upon the whole fence being removed. However, the order of the Court now will be to make the rule *nisi* absolute, as prayed.

Counsel were then heard as to costs of the application, and his lordship decided that the question of costs should stand over, pending the action to be brought.

[Applicant's Attorneys: Van der Byl and Van der Horst; Respondent's Attorneys: Reid and Nephew.]

BOYD V. OLSEN AND ANOTHER.

Mr. Burton mentioned, as a matter of urgency, the above application for an interdict restraining the respondents from trespassing upon certain property at Roodebloem

Mr. Alexander appeared for the respondents, and said that they were not prepared to go into the matter just then. The affidavits had only been served upon them on Saturday morning, and there had been no time to file replying affidavits.

The Chief Justice: If you got these affidavits on Saturday morning, have you not had time to file replying affidavits?

Mr. Alexander said they were ordered to appear on Saturday morning at ten o'clock, and the affidavits were served upon them just before that hour. The respondents had been in occupation of the property in question for 25 days, and

applicants had therefore no excuse for not serving the affidavits until twenty minutes before the time at which they ordered respondents to appear.

The Chief Justice said the Court would hear the application on Wednesday morning, and the affidavits must then be ready.

RANER V. MUTZENBACH. { 1902.
July 15th.
Costs—Taxation—Material Witnesses.

The mere fact that a witness has not been called at a trial is not a sufficient reason for disallowing his expenses against the opposite side, for if he was a material witness but was not called by reason of the breakdown of the case for the opposite side, his expenses would form part of the costs of the case.

This was an application for a review of taxation of costs in a case recently heard in the Supreme Court, on May 12th and 13th, 1902.

The summons called upon the respondent to show cause why the taxation by the Taxing Officer of the plaintiff's bill of costs in the case of *Raner v. Mutzenbach* should not be reviewed, so far as concerned a number of items, amounting in all to £29 6s. 8d., and why the Taxing Officer's taxation thereof should not be set aside, on the ground that the evidence of certain seventeen witnesses, whose expenses had been disallowed, was material and necessary to the plaintiff's case, in view of the defendant's claim in reconvention. Applicant had originally objected to certain counsel's fees, but now accepted the ruling of the Taxing Officer in that respect, and accordingly that item and another small one had been withdrawn. The reasons given by the Taxing Officer for not allowing the expenses of certain witnesses were as follows: "The practice hitherto has been to disallow the expenses of all witnesses not called, provided the successful parties had an opportunity of calling them, but had declined to avail themselves of such opportunity. In this case the plaintiff did not call any of seven-

teen witnesses subpoenaed by him, he was not prevented by the Court from doing so." The only matter now in dispute was the costs incurred in connection with the evidence of those seventeen witnesses who were subpoenaed, but not called. The case in question was heard before Buchanan and Maasdorp, J.J., on the 12th and 13th of May last. The plaintiff's claim was for £26, as rent of certain premises in Hanover-street, Cape Town, and for an order of ejectment, and in connection with that only the plaintiff himself was called as a witness. The defendant claimed in reconvention that there was a partnership between himself and plaintiff in certain three building ventures in Cape Town, and claimed a full account in that partnership, and, in addition, £1,000 damages. After the evidence of the plaintiff had been given, the Court said that the onus of proving the partnership and damages was on defendant (plaintiff in reconvention), and ordered him to go on with his case. Three or four witnesses were then called, but as the defendant failed entirely to substantiate his case, it was quite unnecessary for plaintiff (defendant in reconvention) to call any of his witnesses, and eventually Mr. Schreiner, who led in this case, was not heard in argument at all.

[De Villiers, C.J.: How is it these facts are not on affidavit, because these are very important statements, seeing that if a man's witnesses are not called, owing to the failure of the other side to prove their case, it is only fair that he should get his witnesses' expenses.]

Mr. Currey (for applicant) said that he did not know why affidavits were not filed, but Mr. Benjamin, who appeared in the case, would admit that he had stated the facts fairly.

The Chief Justice later on pointed out that the summons alleged that the evidence of these witnesses was material, and as there was an affidavit stating that the summons set forth the facts, it might be taken to be in a sort of way on affidavit. It would have been better, however, to have had the facts stated by counsel on affidavit.

Mr. Benjamin (for respondent): The Taxing Master found that the evidence to be given by the witnesses not called was not material. There is nothing to show that it was material save Michau's affidavit. That was

denied by Van Zyl's affidavit. See *Van Zyl on Costs* (p. 33). The applicant should be prepared to show in what way the evidence of these witnesses was material. There is nothing before the Court to show that it was so. *Beryl v. Equitable Insurance Company* (heard August, 1883; not reported). The onus is on the applicants to show that this evidence was material.

[De Villiers, C.J.: Was the advice of counsel taken on the evidence?]

[Mr. Currey: Yes, as to its nature, but not as to the number of the witnesses.]

Mr. Currey was not called upon in reply.

De Villiers, C.J.: The grounds upon which the Taxing Officer proceeded are stated by himself as follows: "The practice hitherto has been to disallow the expenses of all witnesses not called, provided the successful parties had an opportunity of calling them and had declined to avail themselves of such opportunity. In this case the plaintiff did not call any of the seventeen witnesses subpoenaed by him, and I understand, although I was not in court on the second day, that he was not prevented by the Court from doing so." It is clear, therefore, from this statement that the Taxing Officer did not go into the question at all as to whether these witnesses were material, and it cannot be supposed that all these seventeen witnesses would have been wholly immaterial. It appears that there was a claim in reconvention, and that the plaintiff had to be prepared to meet the case of the claim in reconvention. Inasmuch as that claim in reconvention broke down, naturally he would not take up the time of the Court in calling all these seventeen witnesses whom he had subpoenaed, but if any of them were material, surely the plaintiff ought to have his costs, because he could not know beforehand that the claim in reconvention would break down. The same thing frequently happens where the defendant comes prepared to meet the plaintiff's case, and subpoenas a large number of witnesses, but the plaintiff's case breaks down, and it would be absurd to call all these witnesses and unnecessarily occupy the time of the Court. I assume, in this case, that some of these witnesses must be material, and I think the matter should

now be remitted to the Taxing Officer, to allow the expenses of those witnesses whom he finds to have been material. As to the costs of this application, I think they should be paid by the respondent.

Maasdorp, J.: I concur, and I may say that the statement made by Mr. Currey as to what took place in court and the circumstances surrounding this case have been very correctly given. I only wish to add that it appeared that the case alleged by the plaintiff in reconvention was that a contract had been entered into between him and the defendant in reconvention for a joint venture in the erection of some houses. That was the question, and I conclude that it must have struck the parties that there would be a conflict of evidence, and that witnesses would be necessary. However, the defendant (plaintiff in reconvention) called his witnesses, and they made positive statements as to the existence of this contract, which, if they had carried conviction, would certainly have resulted in the success of the plaintiff in reconvention, but the impression in my mind is that the evidence was given in such a way that it did not make upon the mind of the Court an impression favourable to the plaintiff in reconvention. Whether there was any suggestion then made by the Court to the plaintiff (defendant in reconvention) that he need not call witnesses I do not know, but he must have seen what the effect of the evidence would be, and therefore, in his discretion, would not call any witnesses. Whether these witnesses he had there would have been really able to give evidence which would have been material is another question, but certainly witnesses were, in all probability, necessary to answer the claim of the plaintiff in reconvention.

[Applicant's Attorney: J. J. Michau; Respondent's Attorneys: Van Zyl and Buissinné.]

COLONIAL GOVERNMENT V. UMHLANA.

This was an application for leave to sue by edictal citation.

Mr. McGregor appeared for the petitioner, the Hon. John Frost, Secretary for Agriculture.

The defendant, Thomas Umhlana, is the registered owner of certain land,

granted in 1859, the quitrent on which has not been paid for some years, the amount in arrear being £4 7s. 6d. Leave was sought to sue defendant by edictal citation.

The case was ordered to stand over, the Court suggesting that defendant should be proceeded against under the Derelict Lands Act, rather than by common law.

Ex parte THERON.

Mr. Upington moved for the rule nisi restraining Messrs. De Heton and Patterson from paying over certain moneys to one Carter to be made absolute.

A letter had been filed with the Registrar from Messrs. De Heton and Patterson stating that they were perfectly willing to hold the sum of £249, the balance of a certain sum paid by applicant. The money was claimed by Mrs. Carter, and an action was pending between the applicant and either Mrs. Carter or Messrs. De Heton and Patterson.

The rule was ordered to be made absolute.

WASSERMAN V. WASSERMAN.

Mr. Buchanan moved for an extension of the return of citation and for substituted service.

Mr. Buchanan read an affidavit showing that defendant had been seen in Paris, and that there was reason to believe that he was still there.

The Court granted an extension of the return of citation until October 12, and substituted service by advertisements in the "Cape Government Gazette" and a Parisian journal.

Ex parte HARRIS AND ANOTHER.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to pass transfer of certain property.

The applicants, John H. Harris, jun., and Eliza Janet Harris (born Rice), were married out of community of property, and a piece of ground at Lady Grey was settled in trust on the husband. The ground had since been sold for £200, and authority was now sought to have transfer effected.

Order granted as prayed.

Re THE ESTATE OF THE LATE HAMMOND.

Mr. Gardiner moved for leave to sell certain property in the above estate.

Petitioner is the widow of the late Samuel Hammond, by whom she and her children were left a certain piece of ground at Port Elizabeth, with a wood and iron house thereon, which it was now desired to sell.

Leave was granted in terms of the Master's order, costs to come out of the proceeds.

LISHMAN V. LISHMAN.

This was an application for an interdict.

Mr. Close, who appeared for the applicant, read affidavits, from which it appeared that the parties, who had been married for several years, had latterly been on bad terms. The husband had been employed as an Intelligence Officer by the military, and had written from Edenburg to his wife, stating his intention of selling the house in which she resided at King William's Town and of discontinuing her monthly allowance. The parties were married in community of property.

A rule was granted calling upon respondent to show cause by August 1 why he should not be interdicted from selling the house, and why he should not pay the applicant the sum of £75 to enable her to bring an action for judicial separation.

Re THE MINOR DU PLESSIS.

Mr. Russell moved for an order authorising the Master to pay out certain moneys for the maintenance of the above minor.

The order was granted, in the terms of the Master's report.

Ex parte MURPHY.

Mr. Upington moved for an order authorising the Registrar of Deeds to amend, under the Derelict Lands Act, the deed of transfer of a certain property at Somerset East, the boundaries of which had been incorrectly described in the deed of transfer.

The order was granted.

Ex parte TWINE. { 1902.
July 15th.

Mr. Gardiner moved for an order authorising the Registrar of Deeds to release certain property from the operation of a certain mortgage bond.

Applicant is the owner of a piece of land at Woodstock, which he recently sold. The land was mortgaged to one Armstrong, who was up-country, but his sister, Mary Jane Armstrong, had sole control of his estate, and she consented to the bond being cancelled, so that applicant might give transfer.

The Court granted the application.

Ex parte VAN AARDT.

Mr. Goch moved for the confirmation of the sale of certain property.

The property in question was sold in 1898 to the applicant for the sum of £142 10s., applicant being an executor in the estate to which the land belonged. He bought the property at an open and *bona fide* sale. The Divisional Council valuation of the land was £100.

The order was granted.

AFRICAN BANKING CORPORATION (LTD.)
V. G. AND JUNCTION RAILWAYS (LTD.).

Mr. Currey moved, on behalf of the African Banking Corporation, for an order for the liquidation and winding-up of the respondent company, which was indebted to the petitioners in the sum of £5,000, interest on mortgage bonds.

Mr. Currey produced the Sheriff's return, showing that no goods belonging to the respondents could be found. He was instructed to suggest Mr. E. R. Syfret as liquidator.

The Chief Justice: It is not usual at once to appoint a liquidator, is it?

Mr. Currey replied that that was the procedure followed in the case of the building society.

The Chief Justice: Oh, it has often been done. I suppose notice has been given to the secretary?

Mr. Currey: Yes, to Mr. Tonkin, who does not appear.

The Chief Justice: Is there any knowledge of the assets of the company?

Mr. Currey: No, I have no instructions on that point.

The application was granted, Mr. Syfret being appointed liquidator with powers mentioned in the 149th section, security being fixed at £5,000.

KUTTEL V. THOMAS.

Mr. Russell moved for an order calling upon respondent to show cause why an order should not be granted for the cancellation of the sale of a certain property at Woodstock. The conditions of sale had not been complied with; transfer had not been effected, but possession had been given.

The order was granted.

Re THE MINOR ROSENBERG.

Mr. Benjamin moved for an order authorising the Master to pay out certain moneys on behalf of the above minor.

RIDINGER V. FOX.

Mr. Buchanan moved, on behalf of George Ridinger, of Wynberg, for leave to sue the respondent, one Lane Fox by edictal citation. Fox is believed to be in England.

Leave was given to sue by edictal citation, returnable on September 12, personal service to be effected.

Re THE ESTATE OF THE { 1902.
LATE FOURIE. { July 15th

This was an application for leave to transfer certain landed property in the above Estate.

The facts sufficiently appear from the Master's Report, which is as follows:

By the will of the late Christiaan F. G. Fourie and his surviving spouse, Johanna B. H. Fourie (born Du Toit) about 650 morgen of the farm "Dwaalhoek," in the Division of Caledon, was bequeathed to their three grandchildren, the sons of Sara C. W. Fourie, of Dwaalhoek, the widow of the late Jan J. de V. Fourie (the said widow being the present petitioner), for the sum of £1 per morgen to be paid into the estate of the said testators, on condition that in the event of the testatrix being the survivor, which has happened, the executor shall have the right to transfer the property to the legatees on payment of the bequest amount.

The minors are still very young, the eldest not being of age yet; but their father's estate, in which they have a share, of which petitioner is in possession until her re-marriage, owns an adjoining portion of the farm "Dwaalhoek," and petitioner considers that it

would be greatly to their advantage to acquire the property now.

If the loan could be obtained on favourable terms, it may not be a difficult matter to meet the interest, and petitioner may, by having the use of the property, be placed in a better position to support the minors.

It would be more advantageous also to apply the money due to the minors out of the estate in reduction of the purchase money of the property.

I beg to recommend that the prayer of petitioner be granted, and that the amount for which the loan is required and the rate of interest be subject to the approval of the Master.

On the motion of Mr. De Waal, the Court granted an Order in terms of the Master's Report.

[Applicant's Attorneys: Dempers and Van Ryneveld.]

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Re THE ESTATE OF THE { 1902.
LATE WILLS. { July 15th.
 .. 16th.

This was an application for leave to mortgage certain property, situate in Queen-street, Port Elizabeth.

The petition of Jane Wills (born Newton), widow of the late John H. Wills, John R. Wills and Alfred G. T. Wills, in their capacity as executors of the estate of the late John H. Wills, stated that the buildings on the ground were in a most dilapidated condition, owing to old age and damage by floods. That portions of these buildings had been condemned and removed by order of the Municipal authorities. That some of the heirs of the estate are wholly dependent on the rents received therefrom. That landed property and house property in the immediate vicinity of the said old buildings had recently greatly increased in value. The petitioners now asked:

(a) For leave to demolish these old buildings, and to erect warehouses and other buildings on the said site.

(b) For authority to raise a loan, not exceeding £4,000, and to pass a mortgage bond hypothecating such of the property as might be necessary.

Verifying affidavits of the petitioners and others were annexed.

All the major heirs interested in the property had signified their consent to the proposed arrangement. There were, however, a number of minors also interested.

The Master's report was as follows:

The spouses were married without community of property. After making provision for his wife out of the income of his estate, the testator directs that the rest of the income shall be divided amongst his five children by a former marriage named in the will and his stepdaughter, in the proportion stated. After the death or re-marriage of his wife, his estate shall be realised, and the proceeds divided amongst the abovenamed heirs in the same proportions as directed, provided that the shares accruing to the testator's daughter and his stepdaughter under this paragraph shall be invested, and the income paid to them, so long as they live, and upon their deaths, the shares bequeathed to them shall devolve upon their issue. There is another provision in favour of the children in case of the insolvency or assignment of the estate of any of the heirs. If the heirs had been appointed to succeed unconditionally at the death of the testator's wife, there would have been no objection to the proposed mortgage for the purpose for which the money is required; but one son has four children, and another son three children, who are all minors; while the daughter has one son, who is a minor, and the stepdaughter has five children, all of whom are minors. By the happening of the events, by which, under the conditions of the will, the minors would become entitled to a share in the distribution of the estate, their share would be reduced by a proportionate contribution towards payment of the mortgage, and they would only obtain a share in the distribution of the proceeds realised in excess of the mortgage, while the parents would meanwhile have drawn the increased rents. I do not think, for these reasons, that the application should be granted unconditionally. But it is stated in the estimate framed of the returns expected from the proposed new buildings that the net income will be £727 12s. per annum. At present the net income derived from the property is £141 1s. 9d., or £24 18s. for each heir. If the loan be repaid in instalments of £500 per annum out of the income, there would, instead of £141 1s. 9d., be £227 12s. available for distribution among the heirs for the first year, and this amount would be increased by £25 per annum, until it reaches £400, before the last instalment of the loan is paid off. There-

after, under the same conditions, the heirs would be entitled to the full amount of income. The minors would not be quite free from risk or loss under this arrangement, but the risk would be greatly reduced yearly, until it finally disappears; while the benefit derived from the income would increase in proportion. Should your lordships concur in these views, I beg to recommend that the application be granted, in terms of the above suggestion, and that the executors be ordered to lodge annual accounts with the Master until the loan has been repaid, to show that the income has been properly applied.

Postea, July 16th.

On the motion of Mr. Benjamin, an order was granted in terms of the Master's report, with the exception that the bond be reduced by payment of instalments of £300 per annum, instead of £500 per annum, as recommended by the Master.

[Applicant's Attorneys: Godlonton and Low.]

SACK V. HARBOUR BOARD.

Mr. Alexander moved for a commission *de bene esse* to take the evidence of certain witnesses resident at Johannesburg.

Mr. Close appeared for the respondents to consent to the application.

The motion was granted.

BOYD V. OLSEN AND { 1902.
ANOTHER. { July 16th.

Spoliation—Trespass—Costs.

The respondents, without the permission of the applicant, who had bought a certain house and had obtained possession but not transfer, entered upon the premises and continued to occupy the house although requested to vacate the same. They refused to leave on the ground that the property had belonged to an ancestor of theirs, through whom they were entitled to succeed to the property.

Held, that even if their claim was a bona fide one, their remedy is by action. That by

taking the law into their own hands they were guilty of spoliation, and that they should be ejected, and pay the costs of the application to eject them before any further proceedings are taken.

This was an application, upon notice given on behalf of the above applicant, Charles Boyd, to the respondents, Helena Olsen, of Woodstock, and Pieter Laubscher, a blacksmith, of Woodstock, calling upon them to show cause, if any, why an interdict should not be granted restraining them from trespassing in the house and upon the grounds and garden of the applicant's property at Roodebloem, pending the decision of an action now being instituted by the respondents against the applicant in the Supreme Court, and why the respondents should not be ordered to pay the costs of this applications.

In his affidavit the applicant, Charles Boyd, stated:

1. That on or about the 4th day of April, 1902, I purchased at public auction from the Roodebloem Estates (Limited) the main dwelling-house, with ground surrounding, for the sum of £6,300 sterling.

2. That according to the conditions of sale, which I duly signed, I took possession thereof on the same day, when all the keys of the place were handed over to me.

3. That I at once engaged a gardener to keep the ground and garden in good order, as also to superintend the house, conservatory, etc., as I did not intend letting the place just yet, my idea being to float the place into an hotel syndicate.

4. That the doors were all duly kept locked and the gates secured, when my gardener reported to me that some people had been there, and walked about the garden and plucked the roses, and that they would not listen when remonstrated with.

5. That on one occasion the padlock had been removed and the gate left open, in consequence of which horses strayed into the garden at night and caused a considerable amount of damage.

6. That on the 19th day of June the respondents, in company with others of

their friends, men, women, and children, obtained entrance into the house, and when remonstrated with by the gardener, replied: "We are coming to the home of our ancestors, and we are to have a dance."

7. That on the 20th June I, accompanied by my solicitor, repaired to the police-station at Woodstock, where we obtained the assistance of a policeman, who accompanied us to my property, when on our arrival at my property we found the following parties: John Greeff, of Myer's Farm, Salt River; Angelo Costanza, of Cape Town; Susan Schiffman, of Dickson-street, Woodstock; Elizabeth Wallace, of Aberdeen-street, Woodstock; Helena Olsen, of Aberdeen-street, Woodstock; Margaret Johnson, of 40, Gympie-street, Woodstock; and Pieter Laubscher, of 125, Bromwell-street, Woodstock, walking on the balcony. They had secured the doors against me, and upon the policeman calling upon them to open the door and come down, they came. Their names were duly taken down, and when told to go, the respondents replied, "This is the home of our ancestor, Pieter Laubscher, and we will go when we please."

8. That the same evening I, in company with my solicitor, again visited the place, and found the same parties there, and about twenty to thirty others, resident about Woodstock, and the respondents again refused to leave, saying that they were going to sleep there, and I saw some mattresses on the floor and candles stuck here and there in a most careless manner, endangering the place, and when remonstrated with, the respondents were most insolent.

9. That I thereafter had the respondents summoned for trespassing, under the Criminal Offences Act, but the defence put up was that, after receipt of the summons, they had a civil summons issued in the Supreme Court, claiming Roodebloem, etc., as will more fully appear from the summons hereunto annexed, marked A.

10. That the Acting Magistrate gave judgment that he did not think it a case that came under the Police Offences Act, and therefore refused to punish the accused, and they were accordingly dismissed.

11. That the Roodebloem Estates (Limited) purchased the estate from Mr.

Adriaan van der Byl about two years ago, and that the said company obtained transfer, and thereafter obtained amended title of their holding. That the respondents have been giving me a great deal of trouble, causing damage to my garden, and which damage they will not be in a position to pay.

12. That I have been losing my garden implements and other things from my ground, and the place generally is being spoiled, my gardener being unable to prevent it.

The civil summons of the Supreme Court referred to above as being marked A called upon Charles Boyd, the Roodebloem Estates (Limited), and William Hare to cause an appearance to be entered in the Supreme Court to answer Helena Olsen, widow of Daniel Olsen (deceased), and Pieter Laubscher, both of Woodstock, in connection with the plaintiffs' claim on behalf of themselves and others (descendants of the late Pieter Laubscher, deceased, who died in 1842), being numerous parties having the same interest, that they may be declared lawful owners and entitled to the possession of the land and dwelling-houses thereon, known as Roodebloem, Leliebloem, and Kalkbrandery, situated at Woodstock, and that the defendants may be adjudged to have no lawful right or title thereto or to any part or parts thereof, and that they may forthwith be ejected from the respective portions that they are at present in possession of, and also that the defendants may be condemned to account for all rents or profits made or received by them by reason of their unlawful occupation of the said lands, or otherwise, so far as the Roodebloem Estates (Limited) and William Hare are concerned, each to pay to the said plaintiffs the sum of £250,000 sterling as and for compensation in damages, in lieu of interest of such rents and profits.

The affidavit of Alexander John Chiappini was as follows:

1. That I am the secretary of the Roodebloem Estates (Limited).

2. That my company purchased the property known as Roodebloem from Mr. Adriaan van der Byl about two years ago, and obtained transfer on the 29th August, 1901.

3. That my said company sold the main dwelling-house and grounds surrounding to Mr. Charles Boyd at public

auktion on the 4th April, 1902, for the sum of £6,300 sterling.

4. That my said company duly gave Mr. Boyd possession of the main dwelling-house and grounds, and that the said house and grounds remained at the risk of the said Charles Boyd from the said date of sale.

5. That I have personally seen the respondents trespassing on the grounds, and have warned them to desist from so doing.

6. That my said company obtained transfer from Mr. Van der Byl on August 29, 1901, and thereafter applied for and obtained amended title on the 16th April, 1902.

Vintcent Alexander van der Byl deposed on affidavit:

1. That I am well acquainted with that portion of the Roodebloem estates sold by my father, Adriaan van der Byl, to the Roodebloem Estates (Limited) in or about November, 1900.

2. That I was born on the said property on the 4th of November, 1873, and resided there the greater part of my life with my said father, until March this year.

3. That I was informed by my father, which information I verily believe to be correct, that at the time that he left the said property he had been in occupation thereof for over thirty years.

The following affidavits were read on behalf of the respondents:

Helena Olsen deposed:

1. I am the granddaughter of Pieter Laubscher, the younger, deceased, who died in 1842, and through whom I and Pieter Laubscher, my co-plaintiff, on behalf of ourselves and the other descendants of the said deceased, claim the property, the subject of the present application, together with other property in respect of which other actions in this Honourable Court to recover possession are about to be brought.

2. The reason my claim has not been prosecuted sooner by us is that Helena, the daughter of the said Pieter Laubscher, the younger, has the last thirty years informed us that her solicitors were taking the necessary steps to recover possession, and led us to believe that the matter was in course of settlement.

3. I have perused the affidavits of the applicant, Alexander Chiappini, and

Vintcent van der Byl in support of this application, and I crave leave to refer to them. With reference to the affidavit of the last named, I verily believe that the statement made by him in paragraph 3 is incorrect, and that he misunderstood what his father told him, and I am informed, and verily believe, that the said Adriaan van der Byl took possession of the land in question in the beginning of the year 1873, and that he then had no valid title thereto.

4. In the month of April last I saw an advertisement of the sale of the property, the subject of this action, by the Roodebloem Estates (Limited), and called upon the said Adriaan van der Byl, and told him that the descendants of Pieter Laubscher were the owners of the land. I was accompanied by my sister, Isabella, the wife of Carl Schiffman. The said Adriaan van der Byl admitted that we had a claim, but stated that he would not part with the land, but was willing to pay us £10,000 if we would abandon our claim and leave him alone. We declined this offer.

5. My sister and myself subsequently attended upon the said Adriaan van der Byl, and reiterated our demand for possession of the Roodebloem estate. He repeated his refusal to give us possession, but offered to pay us on behalf of the descendants of the said Pieter Laubscher £20,000, which offer we refused.

6. Upon the day of the sale I, accompanied by my sister and her daughter Susan, Margaret Johnson, widow of John Johnson, deceased, and other descendants of the deceased, and Susan Greeff, attended and protested against it. We saw Mr. Van Ryneveld, solicitor for the Roodebloem Estates (Limited). He asked us if we and the other claimants, who number about twenty-five, would agree to let the sale proceed, and take £1,000 each in settlement. He told us that we could not object to the Roodebloem Estates selling it, but that we might make a claim against the said Adriaan van der Byl. This was in the presence of the applicant, who was cognisant of all that took place. No sale took place to our knowledge by public auction, and I verily believe that a private arrangement was come to, whereby the applicant should pose as the nominal owner of the land, in order to avoid any difficulty which might arise

in the title of the said Adriaan van der Byl or the Roodebloem Estates (Limited).

7. With reference to paragraph 4 of the applicants' affidavit, I say that the grounds surrounding the house can be entered by four gates, whereof two were open when we entered, and have been opened since. Workmen are continually passing through in considerable numbers, and we have no control over them.

8. With reference to paragraph 5 of the said affidavit I saw that the fence on one side of the ground was broken before we took possession. Behind this broken fence is a plot of land where one Potgieter keeps a number of mules and oxen. These beasts roam about the ground and spoil and trample over the burial place where our deceased relatives, the late Pieter Laubscher's ancestors and descendants are buried. This burial place, which we claim has been allowed to go to ruin by gross inattention, in consequence of us, who I submit are the lawful owners, being kept out of possession. The walls have been broken by the mules and oxen, and the graves have been trampled over.

9. With reference to paragraph 8 of the same affidavit, I say that the applicant's memory has failed him. The same parties referred to were not, with about twenty to thirty others. There were five of us altogether—Mr. Costanza, Miss Johnson, Miss Greeff, my co-plaintiff, and myself. The statement concerning the candles is untrue. The applicant and his solicitor arrived when it was quite dark, and we lit one candle for their convenience, so that they might see us. We are taking great care of the place for our own sakes.

10. With reference to the statement contained in paragraph 9, I say that the said applicant has misunderstood the defence. The defence was that we claimed the estate on letter of demand from our solicitor, dated the 28th day of May last, and that following such letter we took possession. Our solicitor was instructed to issue summons in this Honourable Court long before it was actually issued. The Magistrate, in giving judgment, stated that he actually believed that we had acted in a *bona-fide* manner, and dismissed the summons without any question of refusing to punish us, as alleged in paragraph 10 of the applicant's affidavit.

11. With reference to paragraph 11 of the applicant's affidavit, applicant's statement that we have done damage to the garden is wholly untrue. We have looked after the garden very carefully, and have allowed applicant's gardener, who is a Cape boy, to stay there and attend to it. Applicant's statement that we should not be in a position to pay for any damage done is untrue, to his knowledge.

12. With reference to paragraph 12, I say that if the applicant has been losing garden implements and other things, it is through the carelessness of his gardener, with whom we have frequently remonstrated for leaving things about, when so many strangers walk through the property.

Isabella Schiffman, Susan Schiffman, Susannah Greeff, and Margaret Johnson, all descendants of the late Pieter Laubscher, made a joint affidavit as follows:

1. We have perused the affidavit of Helena Olsen, and crave leave to refer to paragraph 6 thereof. We were all present at the interview with Mr. Ryneveld referred to. He offered to pay us, the descendants of the said Pieter Laubscher, who number about 25, £1,000 each on behalf of the Roodebloem Estates (Limited), to settle their claim. We declined the offer. To the best of our knowledge and belief, no sale by public auction to the applicant was made.

And I, the said Isabella Schiffman, for myself, say: That I was present at both interviews with reference to Mr. Adriaan van der Byl, and heard him make the two offers—first, of £10,000, and secondly, of £20,000—therein referred to. We declined the offers.

Mr. Burton for the applicant; Mr. Alexander for the respondents.

De Villiers, C.J., asked whether Mr. Van Ryneveld denied the allegations that he offered £1,000 to each of the descendants to settle the claim.

Mr. Burton said he was instructed that Mr. Van Ryneveld denied that positively.

De Villiers, C.J.: Because if it is untrue, it is scandalous, and I should like to hear Mr. Van Ryneveld's statement on oath.

Mr. Anthony van Ryneveld was then sworn, and stated that he was attorney for the applicant. He had heard the

statement made by Helena Olsen that he had offered each of the descendants £1,000. No offer was ever made. The respondent Olsen came to his office, as she had been doing for months past—they appeared to him to be treating the matter as a huge joke—and made the statement that Mr. Van der Byl had offered them £20,000. Witness said: "Did you not perhaps misunderstand him, and that he said he would give you £1,000?" That was all that took place.

De Villiers, C.J.: You positively deny that you offered to pay each of them £1,000, making £25,000 in all?

Witness: Absolutely; I had no instructions from my syndicate or Mr. Boyd, and could not possibly have done so. Continuing, witness said that Mrs. Olsen, when she came to his office, said to him in a laughing manner, "Mr. Van der Byl once offered me £20,000 in this matter." It really so amused him that he remembered remarking at the time, "Was it perhaps £1,000 he offered you?"

Cross-examined by Mr. Alexander: The others might have heard what he said to Mrs. Olsen.

Mr. Alexander said he had another affidavit, made by one of the respondents, Pieter Laubscher, but it was mainly as to there having been no damage done to the garden or the place by the respondents.

[De Villiers, C.J.: The point is not the damage; the point is that they were there at all.]

Mr. Alexander: The house was unoccupied when these people took possession.

[De Villiers, C.J.: There was a gardener who acted as caretaker.]

The applicant's affidavit does not allege that they broke open doors to enter the house. Presumably, then, the house was open. They acted quite *bona fide*, as is shown by the fact that they claimed this property as far back as May 28. I submit that no injury can result to the property from leaving these people in possession, pending an action to be brought. An interdict can only be granted in cases in which the applicant has no other remedy.

Mr. Burton was not called upon.

De Villiers, C.J., in giving judgment, said: There is no principle more clearly established in our law than this: that

no one has a right to take the law into his own hands. If a person believes he is entitled to a property there are the courts of law open to him to come to and assert his rights, but he has no right to go upon land in the possession of others for the purpose of asserting these rights. The present case seems to be a particularly scandalous one, because although the property was temporarily vacant, it certainly had not been given up, it was not derelict, and these people in numbers came and occupied the house, and when asked to leave the premises they refused to do so, and now they have instructed their counsel to say that they have a *bona fide* claim to this property, and that in consequence of this claim they have taken possession there. Their claim may be a *bona fide* one, but their proper way was to assert it in a court of law, and not go upon the premises in this way. It is a clear case of spoliation, for they have taken the law into their own hands, and must be ejected, and pay the costs of this application before any further proceedings are taken.

Maasdorp, J., concurred.

[Applicant's Attorney, A. van Ryneveldt; Respondent's Attorney, R. Greening.]

Ex parte DEWEY.

Mr. Benjamin moved on behalf of the executors testamentary in the estate for an order cancelling a certain mortgage bond.

The Court granted a rule *nisi* calling upon all concerned to show cause, if any, by the 1st of August, why such an order should not be granted; rule to be published once in a Cape Town newspaper.

Postea, August 5th.—The rule was made absolute.

Ex parte BERMAN.

Mr. Buchanan moved on behalf of Jenny Berman for the appointment of a *curator ad litem* to her husband, in connection with an application to be made to have her said husband declared of unsound mind and incapable of managing his property. Mr. A. C. Partridge was suggested as *curator ad litem*.

Order granted, and Mr. Partridge appointed *curator ad litem*, the summons

calling upon the curator to show cause why Berman should not be declared of unsound mind to be returnable on August 4.

IN re BURNS.

Alfred L. Burns again appeared in person, to object to the taxation of his bill of costs in the case of Burns v. De Vries and Co.

Mr. Alexander said he had been instructed by Mr. Tennant, the attorney in the case, to state that no notice had been given him, as required by the rules of the Court.

De Villiers, C.J. (to applicant): Have you given notice to Mr. Tennant?

Mr. Burns: I have not given notice, but your lordship will remember that you told me to come back if I was not satisfied.

De Villiers, C.J.: But not without giving due notice, according to law. If you have any charge to make against a person, you must give him notice, so that he may know what your charge is.

The applicant was beginning to detail his alleged grievance, when he was stopped by the Court.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

(1902)
(Aug. 1st.)

Mr. Goch moved for the admission of Johannes Wynand Louw as an advocate.

Granted, applicant to take the oath at Pretoria.

Mr. Benjamin applied for the admission as an attorney, notary, and conveyancer of Reginald Simpson.

Granted.

Mr. Buchanan moved for the admission of Ian Willem van Coppenhagen, jun., as attorney and notary.

Granted.

Mr. Benjamin moved for the admission of Thomas Penrose Peters as an attorney.

Granted.

Mr. Benjamin moved for the admission of Henry Wrensch as attorney and notary.

Granted.

On the motion of Mr. Alexander, Frank Martin was admitted as an attorney and notary, the oath to be taken before the Resident Magistrate of Cradock.

Mr. Bisset moved for the admission of Gysbertus Johannes van Reenen d'Oliveira as an attorney and notary.

Granted.

Mr. C. de Villiers applied for the admission of Coenraad Gie Murray as a sworn translator.

Granted.

PROVISIONAL CASES.

WILMOT V. HUGO.

Mr. Bisset applied for provisional sentence for £395 2s. for value received as per promissory note.

Granted.

JOHNSTON V. BRUCE.

Mr. Benjamin moved for provisional sentence on a dishonoured cheque for £200, payable to plaintiff, and made by defendant, less £30 paid on account.

Granted.

GREEFF V. MCLEOD.

Mr. Bisset appeared for plaintiff; Mr. C. de Villiers for defendant.

This was an application for provisional sentence for the sum of £150 and interest. There was a counter claim by defendant, who tendered the sum of £10 4s. 6d., which he said was due to plaintiff after the amount of the claim in re-convention had been satisfied.

The case was ordered to stand over in order that an affidavit might be filed by plaintiff, the question of costs to stand over.

LABE AND ANOTHER V. HOTZ.

Mr. Close moved for provisional sentence for £2,797, balance of purchase price of certain property.

Granted.

JUTA V. VIVIERS.

Mr. Buchanan applied for a decree of civil imprisonment. The debt was one

of £55 odd, for costs in an action brought by the present defendant against Messrs. Juta in respect to the destruction by fire of certain books belonging to the defendant while they were in the plaintiffs' custody. Defendant's action was based on the ground that Messrs. Juta should have insured the books, but the claim was dismissed on exception, and judgment entered for defendants, with costs.

Defendant appeared, and said he had no means of paying. He earned £2 10s. a month, and had a wife and child. He had tried to get more remunerative work. He earned £2 10s. by teaching Dutch at Maitland three hours a week. His friends helped him in regard to paying rent and other expenses.

In answer to Mr. Buchanan, defendant said he was living on credit and charity.

The Chief Justice said the Court was not satisfied that the defendant had sufficient property wherewith to pay. Of course, when a person brought an action, he should be held responsible, but it was not a clear case, and there was much to be said for the view that these goods ought to have been insured. In law, the present respondent was wrong, but it was a perfectly *bona fide* case. No order would be made.

LAWRIE V. PERRENS AND ANOTHER.

Mr. Alexander moved for provisional sentence on a mortgage bond for £250, and for certain specially hypothecated property to be declared executable.

Granted.

SOLOMON V. ERASMUS.

Mr. P. S. T. Jones applied for provisional sentence for the sum of £60 and interest, due on a certain mortgage bond, and for specially hypothecated property to be declared executable.

Granted.

BOSMAN, POWIS AND CO. V. JACKSON.

Mr. Bisset moved for a decree of civil imprisonment.

Defendant gave evidence, after which counsel for the applicant agreed to accept payment of £2 per month.

A decree was granted, suspended on payment of £2 per month.

STEER V. McDONALD.

Mr. Russell moved for confirmation of a writ of arrest.

Defendant appeared and admitted the debt sued on, which was for £37.

The Court gave judgment for the amount claimed, with costs, the Chief Justice saying that the defendant was entitled to discharge from arrest.

STEER V. BOKELMANN.

Mr. Russell moved for provisional sentence on a certain promissory note.

Granted.

FISK V. CLEWS.

Mr. Alexander moved for provisional sentence on a mortgage bond for £150, and for specially hypothecated property to be declared executable.

Granted.

SWARTZ V. FICK.

Mr. Buchanan applied for provisional sentence for £828 on a certain mortgage bond, and for hypothecated property to be declared executable.

The Chief Justice informed counsel that the defendant was a leper at Robben Island, and had requested time in which to make an affidavit to defend the action. He did not state what the ground of defence was.

Counsel consented to the case being allowed to stand over until the 7th instant.

Postea, August 7th. Provisional sentence was granted and the property hypothecated was declared executable, but stay of execution was granted for two months.

BOSMAN, POWIS AND CO. V. FITZGERALD.

Mr. De Waal moved for provisional sentence for £184.

Granted.

BOSMAN, POWIS AND CO. V. JUDELMAN.

Mr. Goch applied for provisional sentence for £81, less £5, and interest.

Granted.

PAULING V. TODD AND OTHERS.

Mr. Rowson moved for provisional sentence for £600 and interest on a certain bond, less £24, paid, and for certain hypothecated property to be declared executable.

Granted.

COOPER V. SLABBERT.

Mr. Alexander moved for provisional sentence on two promissory notes for £376 1s. and £18 6s. 1d.

Granted.

HEROLD V. ISAACS.

Mr. Close moved for provisional sentence for £240, balance due on a certain bond, and for specially hypothecated property to be declared executable.

Granted.

ILLIQUID ROLL.**GIE V. SNYMAN.**

1912.
(Aug. 1st.

Mr. Buchanan moved, under Rule 329 (d), for judgment for £39, for cash lent and professional services.

Granted.

WESTERMAN V. MANSCHESSTER.

Mr. Alexander moved for judgment, under rule 319, for cancellation for a certain sale and costs against respondent.

Granted.

MEADOWS V. HUDSON.

Sir Henry Juta, K.C., moved for judgment, in default of plea, for £224 6s. 2d.

Granted.

KELLER V. SCHALKWYK.

Mr. Bisset moved for judgment, under Rule 329d for the sum of £219, for goods sold and delivered.

Granted.

KELLER V. KRUGER.

Mr. P. S. T. Jones moved, under Rule 329d for judgment for £144 17s. 11d. for goods sold and delivered.

Granted.

CONRADIE V. SCHALKWYK.

Mr. Joubert applied for judgment, in default of appearance, for £353 15s. 2d., for goods sold and delivered.

Granted.

BLAKE V. WARREN.

Sir Henry Juta, K.C., appeared for plaintiff; Mr. Nightingale for respondent.

Mr. Nightingale applied for permission to defendant to purge his default of plea.

Sir Henry Juta said he would offer no objection, provided it were made a condition that defendant should file his plea in time to go to trial this term.

The application to purge the default was granted, subject to the plea being filed in time to go to trial during the present term; defendant to pay costs.

REX V. VAN REENEN.

Mr. Burton appeared for the applicant, and applied for review of a decision in a case in which two farmers—Bailie van Reenen and Daniel van Reenen—were convicted for contravening Martial Law regulations at Durbanville and Malmesbury.

Mr. McGregor appeared for the Government.

Mr. McGregor applied that the matter should be allowed to stand over to a future date. The Supreme Court was not yet in possession of the record of proceedings in the Court below. The original records had been handed over to the military authorities, and the Attorney-General had asked for either the originals or certified copies of the record to be placed at the disposal of the Law Department, so that they might be furnished to this Court. As soon as these were supplied by the military they would be submitted for the inspection of the applicants, and handed over to the Court.

Mr. Burton did not object to the case standing over for the purpose indicated.

The Chief Justice said the case would stand over until the 21st August. In the meantime he had no doubt the record would be sent.

REHABILITATION.

Mr. Benjamin applied for the rehabilitation of Jacobus Petrus Kock.

Granted.

GENERAL MOTIONS.

Ex parte LEYGOONIE. { 1902.
Aug. 1st.

Registration of land—Mistake in transfer—Acquiescence—Act 28 of 1881.

A. being the owner of $\frac{1}{8}$ th share of a farm, sold such $\frac{1}{8}$ th share to B. and gave him possession, but by mistake he transferred to him $\frac{1}{8}$ th of a portion only, viz., of $\frac{1}{8}$ th of the farm.

B. sold his share to C., who applied to the Court for transfer under Act 28 of 1881. D., one of A.'s sons, objected on the ground that at the time of the sale in 1874 A., being the surviving spouse of D.'s mother, to whom A. had been married in community and who had died intestate, could only dispose of one-half of his $\frac{1}{8}$ th share, viz., $\frac{1}{16}$ th of the farm. It appeared that before the sale by A. he had taken over his deceased wife's share in the farm from her executor at a valuation, and had paid out her heirs upon the basis of such valuation, that no objection was made by those children who were of age at the time of the sale or by those who became of age afterwards, and that for 27 years the children had raised no objection although they knew that strangers were in possession of the land.

Held, that even if the children could have objected to the sale at the time it was effected, their acquiescence debarred them from now objecting to the transfer of the full interest purchased by B. and by him sold to C.

This was a motion to make absolute a rule nisi, granted by the Court on May 22, 1902, under the Derelict Lands Act of 1881.

The petition of Anthony Paulin Leygoine, of Krowne Rivier, in the division of Humandorp, showed:

1. That the said petitioner is the registered owner of one-eighth part of and in the remaining extent of a certain piece of perpetual quitrent land called Kromme Rivier, situate in the division of Humansdorp, measuring 421 morgen and $67\frac{1}{2}$ square roods, as per deed of transfer.

2. That the said abovenamed place, measuring in its whole extent 1,561 morgen and $373\frac{1}{2}$ square roods, was granted to one Thomas L. Ackerman, on October 20, 1825.

3. That thereafter the whole farm Kromme Rivier was owned as follows: (a) Thomas L. H. P. M. Ackerman, $\frac{2}{3}$ shares; (b) Roedolf H. Ackerman, $\frac{1}{3}$ share; (c) Alexander Wait, $\frac{1}{3}$ share.

4. That on November 14, 1870, the said place, Kromme Rivier, was partitioned by the three registered owners mentioned in the last preceding paragraph, and the ownership of the farm distributed as follows: (a) To the said Thomas L. H. P. M. Ackerman, 1,140 morgen 306 square roods; (b) to said Roedolf H. Ackerman $\frac{1}{2}$ share in the remaining extent (421 morgen and $67\frac{1}{2}$ square roods); (c) to said Alexander Wait, $\frac{1}{2}$ share in the remaining extent.

5. That the said Roedolf H. Ackerman was, before the partition mentioned in the last preceding paragraph the registered owner of $\frac{1}{3}$ share in the whole of Kromme Rivier, or approximately 195 morgen, and that after the said partition he was the owner of a half-share in the remaining extent, on approximately 210 morgen.

6. That on March 30, 1874, the said Roedolf H. Ackerman transferred to one August Deschamps one-eighth part of and in the remaining extent of Kromme Rivier.

7. That thereafter, viz., on March 8, 1897, petitioner purchased from the said August Deschamps all the property in Kromme Rivier purchased by the latter from the said Roedolf H. Ackerman, in the year 1874, which property was represented to the petitioner as being half of the remaining extent of Kromme Rivier, but that petitioner received from the said Deschamps transfer of only one-eighth share in the said remaining extent of 421 morgen and $67\frac{1}{2}$ square roods.

remaining extent, intended to convey to the said August Deschamps all his interest therein, and that the occurrence in the deed of the one-eighth fraction was an error caused through the confusing of the seller's interest prior to partition (which was one-eighth in the original place), with his interest subsequent to partition, and which was one-half in the said remaining extent.

13. That a one-eighth share in the said remaining extent was at the time of petitioner's said purchase, and is at the present time not worth more than about £80, whereas he paid £300 for his purchase, which sum of £300 covers the value of one-half share in the remaining extent.

14. That petitioner duly paid transfer duty on the said sum of £300.

15. That petitioner is now desirous of obtaining transfer of the remaining $\frac{3}{4}$ shares of, and in the said remaining extent, but owing to the said Roedolf H. Ackerman, having died some time ago, petitioner has no alternative, but to approach your lordships in the matter, the estate, if any, of the said Roedolf H.

spondents said that when Ackerman sold the property he was a widower. His wife, to whom he was married in community, had died in 1871 or 1873, and it was contended that the children were entitled to the one-half of Ackerman's interest in the land, which half belonged to the wife's estate. The property was registered in Ackerman's name. It was denied that Ackerman could do more than pass to Degonia the half interest in the land. Mr. Benjamin argued that one-quarter of the land belonged to Ackerman and the rest to the children. If this were held to be so, the applicant was only entitled to an additional eighth of the land to that which he already held transfer of.

Mr. Buchanan was not called upon in reply.

De Villiers, C.J. : It is quite clear that there was a mistake in the transfer. The original power showed that the intention was to transfer one-eighth of the whole of the property, but instead of that, there was transfer of one-eighth of the remaining extent. In spite of this mistake occupa-

tion has always been in accordance with the original purchase. Deschamps, the purchaser, and after him the present applicant, have always been in possession. The children—one of whom now objects—never objected before, and now when application is made to remedy a clear mistake one of the children comes forward and wishes to take exception. I think it is far too late for him to take advantage of this mistake. The main objection is that the father had no right to take over this property. I do not, however, wish to go into that question, because the children should have objected at the time. If any of them were minors at the time, they have had ample opportunity during the intervening 27 years to come forward and raise objections. They have shared in the £75 paid by the father, and they have seen strangers on the estate without making any protest, and it is now far too late to raise this objection. I therefore think that the rule should be made absolute. The costs of the opposition should be paid by the respondents. Of course there are certain necessary costs in all these cases which will have to be paid by the applicant.

Maasdorp, J., concurred.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Dempers and Van Ryneveld.]

Ex parte WRENSCH. { 1902.
Aug. 1st.

Mr. Rowson moved for the rule *nisi* under the Derelict Lands Act, granted on May 1, 1902, to be made absolute.

The Court granted the application.

Ex parte HOWARD

This was an application for the rule nisi under the Derelicts Lands Act to be made absolute.

Mr. Buchanan, who appeared for the petitioner, stated that there was no objection.

The application was granted.

Re THE ESTATE OF THE LATE BUCKTON.

Mr. Benjamin moved for the rule nisi under the Derelict Lands Act to be made absolute.

The Court granted the application.

Ex parte **BURGDORF.**

Mr. Rowson moved that the rule *nisi* in this case granted under the Derelict Lands Act be made absolute.

The application was granted.

Er parte STOFFEIS.

Mr. Benjamin moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Granted.

Ex parte GUNTER AND ANOTHER.

Mr. J. E. R. de Villiers moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

The application was granted.

KRITZINGER V. ESTATE FERREIRA.

This was an application for amendment of pleadings.

Mr. Schreiner, K.C., was for the applicant; Sir Henry Juta, K.C., for the respondent.

Defendant was the executor in the estate of Ferreira, who owned a farm in the Humansdorp district, and applicant sought to have the name of Ignatius Barnard substituted as arbitrator for that of George Frederick Ferreira, the other arbitrator being Daniel Jacobus Kritzing.

The Court granted leave to amend the declaration, with leave to respondent to file a fresh plea. The question of costs was deferred till the trial of the action.

THE MASTER V. KEMLO.

Mr. McGregor moved, on behalf of the Master, that respondent, as trustee in the insolvent estate of one Mather, be ordered to file a distribution account, as required by section 108 of the Insolvent Ordinance.

The order was granted.

E.r parte MOSTERT.

As a matter of urgency, affecting the liberty of the subject, Mr. Wilkinson moved, on behalf of the Rev. Matthys Christian Mostert, for release from custody on bail. The applicant is a minister of the Dutch Reformed Church at Porterville, and was arrested at Malmesbury on July 4 on a charge of high treason. He was removed to Porter-

ville, where a preparatory examination was held, and he had been committed for trial. He was now in custody, and offered personal bail of £2,000, and two sureties of £500 each.

Mr. Nightingale consented to Mr. Mosert's release, on behalf of the Crown, in terms of the petition.

The Court granted the application.

COLONIAL GOVERNMENT v. { 1902.
HOLT AND HOLT. { Aug. 1st.

Possession — Bills of Lading —
Security—Attachment.

Goods belonging to H. having been deposited with the Harbour Board of Port Elizabeth, the Secretary of the Harbour Board, acting under instructions from H., informed the Railway Department that he had been instructed to hand over the goods to them. The Railway Engineer, in reply, requested that the goods be stored for him, and the goods accordingly remained in the custody of the Harbour Board. The respondents, as execution creditors of H., attached the goods.

Held, that the Railway Department, which had received the bills of lading for the goods as security for advances thereon, and had given the bills of lading to H.'s agent at Port Elizabeth to enable him to land the goods, was entitled to an order for the discharge of the attachment.

This was an application for an order setting aside the attachment of certain steel rails, etc. The material which was been attached was the property of the Grand Junction Railways, and was lying at Port Elizabeth, having been shipped from New York by the Carnegie Steel Company. The applicants alleged that they advanced £6,000 odd to the Grand Junction Railways, no portion of which had been repaid, and they also alleged

that they had a valid lien on the material. Messrs. Holt and Holt, it appeared, attached the material as creditors of the Grand Junction Railways.

The affidavit of John Watson, secretary to the Harbour Board of Port Elizabeth, set forth that on November 7, 1901, the said Harbour Board received notice from Messrs. Palmer, Womersley and Co. not to part with the goods when landed on Trojan, as the master and owners had a lien over the same for general average. That the said goods were subsequently landed subject to such lien, and had remained so ever since, though the entries were made and forwarding instructions given by one James Smith as agent for the Grand Junction Railways.

That on or about May 26, 1902, the said goods were attached by the Deputy Sheriff who was at once notified of the Trojan's lien, as well as the Board's lien for storage, etc.

That the Board had had no communication from Arthur M. Tippet, or any other Government railway official in respect of these goods prior to May 10, 1902.

That the Board had never delivered the said goods to the said Arthur M. Tippet or to anybody else, and would not do so until the liens, as also the attachment by the Deputy Sheriff, had been removed.

That there had been no transfer of the said goods from the Grand Junction Railways to the Railway Department, but that the Board held a letter from the Grand Junction Railways to deliver the material to the Railway Department, who were to undertake to be responsible for and to pay accounts, and deponent forwarded a copy of such letter to the Railway Engineer, who, however, refused to pay charges until the Government should have got possession. The goods in question therefore remained at the date of deponent's affidavit (July 3, 1902) stored, subject to the liens aforesaid.

There was a supporting affidavit sworn to by Samuel J. Womersley, of the firm of Palmer, Womersley and Co., of Port Elizabeth.

The answering affidavit of Arthur M. Tippet, Chief Resident Engineer, of Port Elizabeth, stated that there were at the date of the said affidavit was sworn (June 16, 1902) certain goods (mentioned in detail) lying on the depositing

ground of the Port Elizabeth Harbour Board, which were under attachment in the hands of the Deputy Sheriff by virtue of certain writs of execution issued against the Grand Junction Railways.

That the said goods were shipped at New York, U.S., per S.S. Trojan, for delivery at Port Elizabeth, and were delivered there under the circumstances hereinafter set forth.

That all said said goods were shipped at New York by the Carnegie Steel Co. for and on behalf of Arnold F. Hills, who had the contract for construction on behalf of the Colonial Government of certain lines of railway in this colony, and were so shipped under one Bill of lading made to order and endorsed in blank by the Carnegie Steel Co.

That the said bill of lading was handed by and on behalf of the said A. F. Hills to the Agent-General for this colony in London, acting on behalf of the Colonial Government as security, and in order to give a lien upon the said goods for and in respect of money advances to the extent of £6,070 15s. 5d., made by and on behalf of the said Colonial Government to the said Hills in respect of the goods aforesaid. No portion of the said advances has been repaid.

That the said bill of lading was received by deponent, acting on behalf of the Colonial Government, from the Agent-General in due course.

That the S.S. Trojan arrived at Port Elizabeth on September 20, 1901, when deponent handed the said bill of lading to Jas. Smith, who represented the said Hills, for the purpose only of clearing the goods aforesaid in order that they might be landed and delivered to the Colonial Government under lien. That the said bill of lading should at once have been returned by Smith to deponent as soon as he had cleared the said goods. Deponent has never recognised the said Smith as the agent, or anyone but the said Hills.

That the said goods were landed in due course at Port Elizabeth, between December 24, 1901, and February 3, 1902, and placed on the depositing ground of the Harbour Board. On May 26, 1902, they were attached by the Deputy Sheriff of Port Elizabeth.

That on May 20, 1902, deponent had called upon Smith to return the bill of lading. This he did on May 24, and the bill was still in deponent's possession.

That prior to the delivery to deponent by the said Smith of the said bill of lading of the said goods, deponent had received a letter dated May 10, 1902, from the Port Elizabeth Harbour Board, advising him that the Grand Junction Railways had instructed them by letter (dated same day) to deliver to the Railway Department all material on their ground of which the goods aforesaid formed a part. Deponent, however, did not claim rail saws, ex Trojan, Bar Steel, ex Aros Castle, Coal, ex Theodore, and Abyssinia, or Cement ex Bellefeld.

That on May 27, 1902, deponent gave notice to the Deputy Sheriff of Port Elizabeth that all the goods save those last named were claimed by the Colonial Government, that he protested against the said Deputy Sheriff having attached them, and that he now claims that they be released from attachment.

The replying affidavit of James Smith stated that he was agent at Port Elizabeth for the Grand Junction Railways. He knew that A. F. Hills was a partner in the said firm, but had no knowledge as to who took out the bills of lading or in whose favour they were. He acted generally for the Grand Junction Railways and took his instructions from them, but had no power of attorney from A. F. Hills. He denied that the bill of lading per "Trojan" had been handed to him solely for the purpose of clearing the goods aforesaid, or that he had engaged to return the said bills to the said Tippet, who never demanded them till on or about May 20, 1902. The said goods remained on the depositing site because it was impossible to forward them owing to Military Regulations. On April 2, 1902, deponent signed an average bond in respect of the said goods; in the name of and for the account of the Grand Junction Railways. This bond was presented for signature before April 2, 1902, and delivery of the goods was stopped by Palmer, Womersley and Co., agents for S.S. "Trojan," as and from the 6th of November, 1901, under and by virtue of the lien for general average, and such lien is still in force by reason of the fact that the deposit payable in terms of the said bond has not been made, and delivery is refused by the Harbour Board, who continue to hold the goods for the Master of the "Trojan." While under such lien the goods were attached by the Deputy Sheriff.

Deponent denied that he ought to have handed over to A. M. Tippet the bills of lading as soon as he (deponent) had cleared the goods. He always cleared in the name of the Grand Junction Railways, and never received any instructions from A. M. Tippet to return the bills of lading.

Mr. Schreiner, K.C. (for the Colonial Government): The letter of May 22 is a complete acceptance of the account. Tippet offers to pay all charges. The Harbour Board contend that they were the holders of the goods. The Grand Junction Railways have certainly no right to these goods. By clause 51 of the contract the Government contracted with the Thames Iron Works and were not empowered to assign the said contract to any other person, save to Frank Hills. He is not the Grand Junction Railways, and now Government know nothing about the Grand Junction Railways. The Government, in point of fact, have bought these goods.

[Sir H. Juta: There is nothing on affidavit to that effect.]

It is incorporated in the Act. The Harbour Board held the goods for the Government, and not for the Grand Junction Railways. The latter, in fact, had no interest whatever in the goods. Hills, and not they, was the consignee. Even assuming that delivery was made to the Grand Junction Railways, there has been re-delivery to the Government. Smith held the documents for us, and not for the Grand Junction Railways. By their letter of May 10, the Grand Junction Railways frankly recognised their position, and ordered the goods to be handed over to the Government. Of course the Government takes the goods subject to the lien for general average.

Sir H. Juta, K.C. (for the respondents): There is a great difference between this application and that which was made on June 12 (12 Sheil, 366) for setting aside the attachment of certain sleepers. In that case the goods had again come into possession of the pledgee, and the Court held that the lien was good. The point was not as to whether the goods could be claimed by Government under the bill of lading, but whether the pledgee could claim them after they had returned into his possession, and the Court held that he could. It has been argued for the applicants that in this case the possession of the goods by the Harbour Board became the possession of

the Government by a kind of *constitutum possessorium*; but the correspondence shows that the Grand Junction Railways authorised the Harbour Board to hand over these goods to the Government only on condition of certain charges on them being paid; which the Government has no intention of paying. And I would like at once to deal with certain statements that have been made. In the first place it has been said that the Government advanced 90 per cent. of the value on these goods. It is true that the Act authorises such an advance, but it does not follow that this advance has been made. Then, again, this is not a contest between the Government and the Grand Junction Railways, but between Mr. Hills and certain merchants; and if the Grand Junction Railways are not concerned in this case how could they authorise Government to hold for them?

[Maasdorp, J.: They gave up whatever rights they had.]

Even assuming that the Grand Junction Railways had an interest in the matter, by whom were the goods handed over to Government? Tippet was evidently under a mistake when he swore his affidavit. He asked Smith where he (Smith) was going to send the goods, and he was told to Cookhouse, and this was not to be done for the Government, but for the Grand Junction Railways. The goods were not landed for Government. Such being the case, do the letters of May constitute a transfer of possession? If I held goods on behalf of A, B, and myself and were told to hand over to Z, I certainly should not do so until I had received payment. The Grand Junction Railways entered into an average bond, and they were responsible. The Harbour Board would not hand over the goods until this bond was paid. Neither the Government nor Hills appears in the matter at all. We never gave up possession to the Government. all we agreed to do was to hand over the goods on condition that all charges were paid. They never were paid, and hence there was no transfer of possession.

Mr. Schreiner was not heard in reply.

[De Villiers, C.J.: For the purpose of this case, the Court may assume that the Harbour Board held this property on behalf of the Grand Junction Railways. The respondents, at all events, cannot deny the right of the

Grand Junction Railways to this property. The respondents are the creditors of the Grand Junction Railways, and as such they have attached this property, so that they cannot deny the right. Then we find that on the 10th May, 1902, there is this letter, written by the secretary of the Harbour Board to Mr. Tippet, the engineer: "I have now to send you enclosed herewith a copy of communication received from the Grand Junction Railways, having reference to the delivery of material to the Railway Department. I shall be glad if you will kindly confirm this." The communication is as follows: "Railway material imported by the Grand Junction Railways on Harbour Board ground. kindly confirm this." The communication is as follows: "Railway material imported by the Grand Junction Railways on Harbour Board ground. I beg to advise you that I have this morning received the following telegram from the Grand Junction Railways, Cape Town: 'Begins.—Instruct Harbour Board to hand over all material to Railway Department, who undertake to be responsible for and pay accounts against us. Ends.' You may deliver all railway materials, but there is a consignment of rail saws, ex Trojan, and some bar steel, ex Aros Castle, which belongs to us. Coal, ex Theodor and Abyssinia, also cement, ex Bellegeld, are our own property." Now if Tippet had said, in answer to this, "I confirm this," there would have been no doubt whatever that the Harbour Board would have held this property on behalf of the Colonial Government, but he did not, in a few words, say, "I confirm what has been done"; but he writes this letter to the secretary: "I have the honour to state, in answer to your letter of the 10th instant concerning material for the abovementioned lines, which you have in your possession, that I notice that the agent for Mr. A. F. Hill's lines has instructed you to deliver the material to me, and I shall be glad if you will make arrangements to store this material for me." If it had stopped here there would have been no doubt that there had been acceptance of this property on behalf of the Government, but the letter continues: "I note that Captain Smith states that the Government undertakes to be responsible and pay for accounts against the Grand Junction Railways. This is not correct. The

department will pay the charges on such material as it gets possession of, but is not in a position to recognise other accounts." Counsel for the respondents contends that this addition makes the acceptance of the Harbour Board's offer conditional only, but that is not so. The sole object of this addition is to make it clear that the Government is only responsible for charges on such materials as come into their possession. The materials now in question did come into its possession, for the possession by the Harbour Board was possession by and on behalf of the Government. There is a further statement in the affidavit made by Mr. Tippet, which is confirmed by the letter of May 22, 1902, in which he refers to "our conversation of to-day." In this affidavit he states: "Prior to my letter, the said John Watson, at interviews I had with him, told me that he held all the goods on the depositing-ground, which included those ex Trojan, now referred to, at the Government's disposal, and would deliver them on payment by them of the Board's charges and the average charges on them, and asked me to write him the letter of the 22nd May, 1902." Now if this statement is correct, it is as clear a case as possible that the Harbour Board became agents for the Government to hold the goods on behalf of the Government. The possession of the Harbour Board after this correspondence was, in my opinion, possession for the Government, and if the Government had lost its lien, that lien revived through the Harbour Board, its agents, holding the goods on behalf of the Government. When, therefore, the attachment subsequently took place, at the suit of the present respondents, that attachment, in my opinion, became invalid, and must therefore be discharged, with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys: Reid and Nephew; Respondents' Attorneys: Van Zyl and Buissinné.]

MARSBERG V. MARSBERG.

This was an application for leave to sue *in forma pauperis*.

Mr. Goch, for the applicant, said they had been unable to effect personal service. He asked leave for public service and the return to be extended.

The Court ordered the return day to be extended until August 31, the notice to be published in a Queen's Town newspaper.

Postea, August 30th, the rule was made absolute. *Postea* October 14. The Court granted leave to sue by edictal citation.

ZONDAGH V. FICHAT AND } 1902.
OTHERS. } Aug. 1st.

Proof of debts—Insolvent estate
—Costs—27th Section of Insolvent Ordinance.

On an application to admit a proof of debt on an insolvent estate which had been rejected by the magistrate, it appeared that the assets of the estate were sufficient to pay all the debts which had been proved, including the applicant's claim. The Court held that the proof was a bona fide one, and as the respondents had persisted in their opposition to the application after they were aware of the sufficiency of the assets, they were ordered to pay the costs of opposition.

This was an application for the admission of a certain claim against the insolvent estate of one Helgard M. Zondagh.

The applicant, who is the mother of the insolvent, desired that her claim for £90—being rent on a farm in the Uniondale district occupied by insolvent—should rank as a lawful claim, the Resident Magistrate having refused to admit proof of debt.

Her affidavit stated that the estate of her son was placed under final compulsory sequestration on February 20, 1892, upon the petition of James A. Fichat, John T. Stone, and Raynier J. Reid. At the second meeting of creditors, held March 10th, 1902, deponent tendered a claim on the insolvent estate for £90 rent, and another for £88 10s. cash advanced. The former claim was objected to and disallowed. At the said second meeting Jacobus A. L. de Waal, solicitor,

of Uniondale, was elected sole trustee. At the third meeting of creditors held on May 2nd, 1902, deponent tendered a circumstantial and explanatory proof of the debt aforesaid. The respondents Stone and Fichat objected to the said proof of debt, and the Resident Magistrate of Uniondale, before whom the meeting was held in consequence of their opposition again disallowed deponent's claim.

The affidavit of John T. Stone admitted that he had opposed the said claim for £90 both at the second and third meeting. Deponent's reasons for objecting were: (1) That there was no evidence of any lease from the insolvent's mother to the insolvent; (2) that having issued two writs against the estate prior to insolvency having been declared, and the messenger of the Court having asked that the standing crops of the debtor should be pointed out to him, the said messenger was informed by the present applicant that there were none, despite the fact that the usual lands on the farm all appeared to be sown, and on enquiring for live stock, he was assured that the insolvent possessed no cattle, sheep, or ostriches.

The affidavit of James A. Fichat stated that to his certain knowledge the insolvent was possessed of ostriches, cattle, sheep, cart, waggon, etc., etc. That he had shortly before joining the Boer forces offered ostriches for sale for £100, and that he had fine crops of corn, oathay, etc., which were reaped in December, 1901, and January, 1902, and appropriated by applicant or her agents. Deponent was now informed that the life interest of the property had realised sufficient to pay all creditors 20s. in the pound, even including payment of the claim in question.

An answering affidavit of applicant's denied that her son was possessed of any property at the time the said writs were served, or that she or her agents had been privy to disposing of any property belonging to him. She deposed that she had no source of income save the rent paid to her by the lessees of the landed property registered in the name of her husband, and in which a life interest was reserved to her in their joint will.

The affidavit of the trustee, Mr. De Waal, stated that at the third meeting of creditors his report was unanimously accepted. He mentioned that insolvent

had sold some of his property for £19, after which he joined the Boer forces.

Mr. Schreiner, K.C., for applicant; Sir H. Juta, K.C., for the respondent Stone. Mr. Burton for the trustee, De Waal.

Mr. Burton was not called upon. After argument by Mr. Schreiner and Sir H. Juta on the question of the costs of opposing applicant's claim, the Court gave judgment as prayed.

De Villiers, C.J.: There are circumstances of suspicion in this case, no doubt, but looking at the affidavit made in the first instance, and more especially to the applicant's subsequent affidavits, in which she answered every one of the allegations which had been made on behalf of the respondents, I think the Court must come to the conclusion that the claim was a *bona fide* one, which ought to have been admitted by the Magistrate. But independently of that, I consider that when once it was known to the respondents that there was quite sufficient to pay the amount which plaintiff claims, they ought to have withdrawn all opposition, and given notice to the applicant that they ceased to object. Instead of that, they insist that the claim is not *bona fide*, and enter, I think unnecessarily, into the merits of the claim. Under these circumstances, I consider that the respondents Fichat and Stone ought, at all events, to pay the costs of opposition. As to the costs of the trustee, I think it would be unfair that the two other respondents should pay his costs; he has not been called upon, but at the same time I cannot blame him for appearing, and I think he is entitled to his costs out of the estate. An order will be made as prayed, Fichat and Stone to pay the applicant's costs; De Waal's costs to come out of the estate.

Maasdorp, J., concurred.

[Applicant's Attorneys: Walker and Jacobsohn; for Fichat, C. W. Herold; for Stone, Friedlander and Du Toit; for De Waal, Dempers and Van Ryneveld.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

Re BERMAN. { 1902.
Aug. 4th.

Mr. Buchanan applied for an order declaring David Berman to be of unsound mind, and for the appointment of a curator.

Dr. William W. J. Dodds, superintendent at the Valkenberg Asylum, said accused was placed under his charge on the 2nd June. He was now better than he formerly was, but he still had insane delusions, and was, in witness's opinion, incapable of looking after his own affairs. One of his chief ideas was that he, as well as a number of other people, knew a great deal about the Claremont murder, and that the police would take no notice of the information given them on the subject. He had offered the asylum authorities £250 if they would take action in the matter. Other insane ideas which possessed him were that other men had been concerned in murders. Shortly after being admitted, he told witness that his wife was going to murder him, and that on one occasion he had to run away with his little boy and take refuge in a brickfield. He had an idea that his wife was trying to make a bankrupt of him. He was 49 years of age.

[De Villiers, C.J.: Is there any probability of his recovering.]

Dr. Dodds: I think there is fair hope of his recovery. He is certainly better than he was.

What is the nature of his insanity?—An attack of mania, with these insane ideas that take possession of him.

Mr. Buchanan said that Berman was in court.

Berman was then examined.

[De Villiers, C.J.: It is said you are not quite right in your mind, and that it is better for you to have someone to look after your interests for the present. Do you object to that?]

Berman: I hope I have been quite right. I have never been wrong in my mind.

Can you look after your own property?—Yes; I can look after myself.

It is only to be done until you are perfectly well.—I hope I am quite well. I have plenty of witnesses to prove it.

Do you want to leave the place?—No, not to-day. I will leave next month.

Why not to-day?—I am frightened to come out to-day.

Why?—I have got plenty of witnesses to prove it.

Prove what?—What I know.

What is it you know?—I want to call my witnesses to prove it.

What are the witnesses to prove?—They will prove it.

What is it you are afraid of?—I want only to call my witness to prove it. If he is here, I am not frightened. If he is not here, I cannot tell you anything.

Berman then called a man named Wallace, who deposed that he last saw Berman a few months ago. He appeared to be quite right then. The witness did not know his present condition.

Berman: I have got 150 customers to prove I am not mad.

[De Villiers, C.J.: Do you still think your wife wants to ruin you?]

Berman made some statement about his wife having put him into "trunk" for stealing "my cow."

The Court declared the respondent to be of unsound mind, the Chief Justice expressing the opinion that the case was one in which there was every probability of his recovering his health. In that event he would of course be discharged. Mr. Partridge, conveyancer, would be appointed curator of the defendant's person and property on security being given—defendant having landed property valued at over £1,000.

JONES V. JONES.

This was an action for divorce.

The plaintiff was Mrs. Mary Ann Jones, of Mowbray, the defendant was Thomas Jones, a cattle dealer and butcher, and the parties were married at Walsall in 1874. There were nine children, issue of the marriage, six of whom were minors. The respondent came to Cape Town in 1900, and his wife followed later on. They lived at Rondebosch, and applicant found that the respondent had a house at Woodstock, in which lived a person named Annie Thomas. Applicant in her evidence stated that one afternoon she called at Woodstock and found the

defendant and Thomas under compromising circumstances. Very soon afterwards the defendant and the woman disappeared, and it was stated were now in Durban.

The Chief Justice said that the defendant had sent him a letter in the form of an affidavit, in which he said he had only £12 per month, and could not afford the £20 which was demanded in the summons.

Mr. Russell, who appeared for the plaintiff, said the sum of £20 had been inserted in error. It had been put in by the attorneys.

The Court granted a decree of divorce, the plaintiff to have the custody of the children, and the defendant to contribute £6 per month to their support until the youngest child reached the age of 16.

FORD V. ROSS.

Mr. Buchanan, for defendant, applied in terms of a consent paper, for a commission *de bene esse*, to take the evidence of defendant at Pietermaritzburg, and for the postponement of the trial until August 29.

Granted.

ELLIOTT V. MCKILLOP. { 1902. Ang. 4th.

Sale and purchase—Warranty—
Fraud—Voetstoots.

At a sale by auction of certain kilns of bricks the auctioneer stated that he sold them "as a lot" and not by number, and the seller being asked by the auctioneer how many he estimated them to be, said "about 80,000. The purchaser on receiving delivery found there were only about 50,000, and on being sued for the price claimed a pro rata reduction.

Held, that there was no warranty of quantity, and that, in the absence of bad faith on the part of the seller, he was entitled to claim the full price at which the kilns had been sold.

This was an action to recover the price of certain bricks sold and

delivered to the defendant. The declaration set forth that on the 31st January last Messrs. Stamper and Zoutendyk, acting on behalf of plaintiff, sold, by auction, to the plaintiff certain bricks, a certain heap of manure, and several small articles, which were duly delivered to the defendant. The bricks were sold for the sum of £140, the manure for £10, and the other articles for £1. Plaintiff claimed judgment for £151, interest and costs. Defendant, in his plea, admitted liability for the price of the manure and small articles. In regard to the claim for the purchase price of the bricks, he alleged that he had been induced to purchase the same upon the distinct representation of the auctioneers that the lot of bricks purchased consisted of 80,000 bricks, whereas it consisted of less than 65,000. He had tendered £113 15s., being the *pro rata* amount due on the reduced number of bricks, and the price of the manure and articles.

Mr. Gardiner (with him Mr. Russell) for the plaintiff; Mr. Burton for the defendant.

Peter Johannes Zoutendyk, auctioneer, said that when he sold the bricks he mentioned that something was said in the advertisement about there being 80,000 good bricks. He added that there had been so many difficulties as to exact quantities at recent sales, that unless Mr. Elliott said there were 80,000 bricks he would not guarantee the number. Mr. Elliott said he believed there were 80,000, and witness then announced that as Mr. Elliott was not certain he could not guarantee any quantity.

Cross-examined: Witness would be surprised to learn that the number was less than 50,000. Witness sent in an account for 80,000 bricks, not for "a lot." This was a mistake by the clerk. Witness asked Mr. Elliott whether he should sell the bricks by the thousand or as a lot, and he instructed witness to sell them as a lot. Witness then said he could not guarantee the number.

George Elliott gave similar evidence. Before the advertisement was drawn up, witness instructed Mr. Zoutendyk that the number of bricks was about 80,000. He said at the sale that there were about this number.

Cross-examined by Mr. Burton: Witness sold the bricks as a lot, and told the people there were about 80,000. What

he meant was that he would not bind himself within a thousand or two. Witness did not remember having a conversation with defendant after the sale, nor did he remember telling defendant then that he had paid for the making of 80,000 bricks. Witness did not tell defendant some time afterwards that he (witness) had taken 15,000 bricks away from the kiln before the sale.

Re-examined by Mr. Gardiner: If there were 4,000 or 5,000 short, witness would not hold himself liable.

James Rees said he attended the sale. Mr. Elliott said he would not guarantee the number, but he estimated there were about 80,000 bricks.

Frederick Barker said he bid for the bricks, but stopped at just over £100. A builder was present who bid considerably higher. The auctioneer said distinctly that he could not guarantee the number. The defendant bought the farm as well.

Mr. Gardiner closed his case.

Mr. Burton called

James Henry McKillop, the defendant, who said that he saw the advertisement of the sale, in which it was stated that there were 80,000 bricks. Witness bought the farm. As regards the sale of the bricks, the auctioneer put up for sale 80,000 bricks. He asked Mr. Elliott whether he should sell them by the thousand or as a lot, and Mr. Elliott told him to sell the lot as they stood. Witness bought the bricks. Witness drove away from the farm with plaintiff, who told him that he had paid for the making of 80,000 bricks. Witness afterwards went up to measure the bricks, being accompanied by two other gentlemen. This was three days afterwards. Witness did not measure the bricks. Witness afterwards met plaintiff at the Royal Hotel, Wynberg, and asked him how many bricks he had removed from the kiln, and he replied that he had removed 15,000. This was after witness received the account for 80,000 bricks from Messrs. Stamper and Zoutendyk. Witness's manager afterwards sold the bricks at £2 per thousand.

George Buckley, farmer, said he was present at the sale. The auctioneer put up the bricks at 80,000. Witness heard nothing about not guaranteeing the number.

Alexander Logie Asher, an accountant at Claremont, deposed that he went about February 1 with Mr. Wallace and Mr. McKillop to measure some bricks in kilns. They made the measurements and calculations. Witness's calculations showed that there were between 55,000 and 60,000 bricks there, taking in every brick, bad and good. He made it 55,700.

Cross-examined: Witness noticed the hole where some bricks had been taken out. These bricks might have fallen out owing to the water, or there may have been some thousands taken out.

George Frederick Holmes deposed that he managed the farm for the defendant. There were three brick kilns on the farm when witness went there on March 1. Since he went to the farm, witness had disposed of the bricks, having sold 35,000, used 10,000 on a building, and he reckoned that about 5,000 were waste.

Cross-examined: Witness's estimate was as near as he could make it.

This concluded the evidence.

Mr. Gardiner (for plaintiff): The case turns upon the difference between a warranty and a statement of opinion. Here both plaintiff and the auctioneer who acted for him simply expressed an opinion as to the number of bricks; neither the one nor the other gave any guarantee whatever. See *Van Wyk v. Sauer and Orsmond* (11, S.C.R., 142) and *Benjamin on Sales* (p. 608-609). Then, again, in this case the seller had no special knowledge as to the quality of the article of which he was disposing, and the buyer had every opportunity of fully inspecting it. After all, the discrepancy between about 80,000 and 65,000 is not so very great.

Mr. Burton (for defendant): In the English Courts it has been held that misrepresentation, quite apart from fraud, justifies the rescission of a contract. See *Moncrief* (p. 310, where he alludes to *Fry on Specific Performance*), who supports the opposite view. Since the passing of the English Judicature Acts the former Equity Rule has prevailed. *Redgrave v. Hurd* (20 Ch., D 1). In that case the defendant set up as a defence (1) misrepresentation; (2) a counter claim for rescission of the contract. He failed in his defence on the ground that he had not proved fraud. (See the judgment of Fry, J.). But his decision

was overruled by the Court of Appeal, which decided that it was no defence that the party prejudiced had had an opportunity of investigating the truth of defendant's statements. These judgments go to show that no allegation or proof of fraud is necessary in order to obtain the rescission of a contract, if the statement made by one of the contractors to the other was false in point of fact. Here 80,000 bricks were bought, sold and charged for.

[De Villiers, C.J.: But here you take the bricks and keep them; so you do not want your contract rescinded.]

No, we do not ask for that; but we object to pay for 80,000 bricks when we have not received them. No man can be allowed to benefit by a false statement, whether he believes it when he made it or not. The necessity for proving fraud in order to obtain rescission of a contract has not been crisply decided in our Courts, but see *Forbes v. Behr* (6 Shiel, 341). This is not a question of a guarantee, but whether a certain quantity of goods was brought or not; 80,000 bricks were sold, and only from 40,000 to 50,000 delivered.

Mr. Gardiner (in reply): The defendant does not plead fraud, nor does he base his defence on any plea known to our law. *Redgrave v. Hurd* was a claim for rescission, but this is no such claim. The only action which could possibly be applicable here would be the *Actio quanti minoris*, but if that action is to be brought there must be some exact price to go upon. Here it is admitted on behalf of the defendant that if he had got 70,000 bricks he would have had no case. As to rescission of a contract on the ground of misrepresentation, see *Kennedy v. Panama Royal Mail Co.* (Law Rep. 2 Q.B., 580) where *Digest* (18-4) is referred to. The contract cannot be set aside unless the misrepresentation goes to the whole root of the matter; but even then it cannot be set aside in part and adopted in part. *McIntosh's Roman Law* (p. 93). *Anson on Contracts* (151), *Moncreiff* (245). Here the defendant does not seek to rescind the contract: hence he can neither rescind it nor claim damages. There was no representation that there were 80,000 bricks, but that plaintiff believed there were 80,000. Defendant bought a definite pile of bricks, and he has got them. A contract must be either adopted or repudiated *in toto*.

The Court gave judgment for the plaintiff with costs.

De Villiers, C.J.: The advertisement inserted in the papers by the auctioneers stated that there were erected on the farm two newly-built cottages, and also that there were 80,000 good bricks on the spot. Now, if at the time of the sale the auctioneer had stated that he sold 80,000 bricks, and afterwards it was found that there were only 50,000, it is quite clear that defendant would not have been bound to pay for more than 50,000. It is important, therefore, to inquire what took place at the sale. I am quite satisfied that the auctioneer at the sale took care to guard himself against selling 80,000, else why this question put to the seller, "Do you sell as a lot or by number?" The question was put publicly, in the presence of the bidders, to Mr. Elliott, the plaintiff, and the latter said, "Sell them as a lot," but he added that he estimated that there were 80,000, giving it as his opinion only, and not in any way as a warranty, that that quantity was there. According to the defendant the words were used, "As they stood"—that the bricks were sold as they stood—but the defendant added that the plaintiff said he believed there were 80,000. Now, under these circumstances, it is clear that the defendant has got what he bought. He has bought a lot of bricks in kilns "as they stood." He has got that, and if he relies upon any representation made at the time, it must be either a representation by way of warranty, or a false and fraudulent representation. Now clearly there is no warranty, because, as I have remarked, it was merely an expression of opinion. If by the expression of that opinion the plaintiff intended to defraud, clearly he cannot take the benefit of it; but there was clearly no intention to defraud, because the plaintiff believed there were 80,000 bricks. Under these circumstances, I do not think there is any authority, either in our own law or in English law, which would entitle the defendant to the defence which he sets up. He takes the benefit of the sale, but claims the right to deduct from the price agreed upon the difference between the supposed price of 80,000 bricks and that of 50,000 bricks. It was urged on behalf of the defendant that he has this right, because if he had paid the full price he would have been entitled, by the

actio quanti minoris, to recover back the difference, but this is not a case in which either that action or the *actio redhibitoria* would have been available under the Roman law. Those actions were allowed where, after payment of the price and delivery of the thing sold, the purchaser discovered some defect which, if known to him before, would have prevented him from purchasing. They would not, however, have been allowed where a quantity of articles were sold in bulk, even although it was subsequently discovered that the number was less than that which the seller had represented them to be approximately, unless the seller acted in bad faith. By the customs of some provinces in the Netherlands a purchaser of land was allowed to claim a *pro rata* reduction in price if the extent of land transferred was found to be less by 50 roods than the extent mentioned by the seller, even if the sale had been of the land as it stood. The general rule, however, as stated by Van Leewen (Com. 4 18.7) and other commentators, was that if on the sale of land the extent was approximately stated, but with the addition of such words as "yet in bulk" or "without measure," the seller was only liable to make compensation in case he knowingly deceived the purchaser. This rule has never, so far as I am aware, been departed from in the Courts of this Colony. In the United States the question seems to have been carefully considered in the case of *Braxley v. United States*, cited by *Benjamin on Sales* (p. 701. 4th Edition), and certain rules were there laid down, of which it is only necessary to quote the first as applicable to the present case and fully agreeing with our own law. The rule is thus stated: "Where the goods are identified by reference to independent circumstances, e.g., all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or to be shipped in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific goods, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it." In the present case, the defendant bought all the bricks in certain kilns for a certain price, and the plaintiff stated

his belief as to the number merely by way of estimate and not of warranty. It is not suggested that he knew, or had reason to know, that his estimate was wrong, and therefore, in the absence of any warranty, the defendant cannot escape liability to pay the price which he bargained for. Judgment must therefore be given for the plaintiff, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinne; Defendant's Attorneys: Van der Byl and Van der Horst.]

NOMBOMBO V. STOFIE. { 1902.
Aug 4th.

Native customs — Marriage —
Dowry — Seizure of dowry
cattle.

A native being engaged to be married to a native girl delivered certain dowry cattle to the father of the girl, but afterwards broke the engagement without any fault on her part, and took possession of the cattle.

Held, on appeal, that the father was entitled to recover back the cattle or their value.

This was an appeal from a decision of the Assistant Resident Magistrate for the district of King Williams Town sitting at Middledrift, in the district of Victoria East, in a case in which the plaintiff (now appellant) sued the defendant for the return of a cow and a calf, or £20 damages. After hearing evidence, the Magistrate gave judgment for the defendant, and against this plaintiff now appealed.

From the record it appeared that the plaintiff alleged that he consented to the marriage of his daughter with the defendant on the customary dowry of six or seven cattle being given. The defendant paid four cows, but before paying more, decided to abandon the girl, and by stealth took a cow and a calf from the custody of the plaintiff, they being part of the marriage dowry. The defendant alleged that he had paid five cattle, and when he wanted to pay the last cow, the plaintiff declined to give

up the girl. The Magistrate gave judgment for the defendant; hence the appeal.

In his evidence in the Court below, the defendant alleged that the girl's illness was the reason of the marriage not taking place. He, however, admitted that he was now courting another girl.

The Magistrate's reasons for his judgment were as follows: After hearing the evidence tendered by the plaintiff and the defendant, the Court arrived at the conclusion that the story of the defendant (for reasons given at the time) must be accepted in preference to that of the plaintiff. Being satisfied on this point, it appears to me the contracting parties were merely negotiating a marriage, which, through no fault of the defendant, was not brought to a final issue, and that the property in the cow had not passed from the defendant to the plaintiff. It will be noted that the words in the summons are "two head of cattle, the property of the plaintiff." The above result was arrived at from a native point of view, as I understood from both practitioners that the opinion of the Court was solicited in connection with the native laws and customs. If the plaintiff wished the issue to be decided under the common law, he should have summoned the defendant to show cause why he should not be adjudged to restore to plaintiff one cow and one calf, removed by him from the lawful custody of the said plaintiff—not the property of plaintiff, as stated in the summons. Let us suppose, therefore, that plaintiff had issued a summons in the form just referred to, it would not alter the position, as the property in the cow and the calf would still be vested in the defendant.

For the appellant, Mr. De Waal; Mr. Gardiner for the respondent.

Mr. De Waal (for appellant) cited the cases of *Ncotama v. N'Cume* (10 Juta, 210) and *Ngquobela v. Sihle* (10 Juta, 350), to show that if a wife deserts her husband without just cause, he could recover dowry cattle paid to her father.

[Maasdorp, J.: The latter case was in the Transkei, where the Magistrate can grant a writ of *Spoliatic*. But can a Colonial Magistrate do that?]

Here the maxim applies *spoliatus ante omnia restituendus*, and I submit that the Magistrate can always order a man

to pay damages if he has wrongfully dispossessed another man of his property.

[Maasdorp, J.: Can the Magistrate order him to make restitution of the property?]

No, he can only give damages. See *Ngquobela v. Sihle* (10 Juta, 357).

[Is there any process of law by which the dowry cattle can be recovered? Has not that point been already decided?]

I submit that the question is still open, and that if a woman unjustly deserts her husband, he can recover the dowry cattle or damages. The consideration for which these cattle were paid was life-long cohabitation. It is true that the arrangements for the marriage have fallen through, but that is not our fault. Moreover, it is very questionable whether there was any completed contract at all. Where was the consideration? When the woman was of age the man might have married her without her father's consent. I submit that unless her father can prove that her state of health was such as to form a bar to her marriage, we are entitled to have our appeal allowed, with costs.

Mr. Gardiner (for the respondent): The case of *Ngquobela v. Sihle* is not in point. In that case the Court held that dowry given in consideration of a native marriage within the Colony was not recoverable on failure of consideration, or for what the law regards as an immoral consideration, scil. that persons married in accordance with native rites should thereafter cohabit. But in this case the marriage was not to be in accordance with native rites. It was agreed that it should be in church. As to the settlement with respect to the property, see *Peacock v. Ben Rango* (12, Sheil). The marriage fell through by no fault of the defendant. Plaintiff's daughter alleged ill-health, and an increase in the dowry was demanded. But even had the marriage not taken place, owing to the default of the defendant; plaintiff's remedy would have been to sue for breach of promise of marriage—clearly, he had no right to keep the cattle.

De Villiers, C.J.: It appears to me that in this action the Magistrate did not pay sufficient regard to the evidence given by the defendant himself as to the reasons why the marriage did not take place. The

defendant says: "I went to the plaintiff's place and found the girl unwell. I went there twice again and found her still unwell. That is the reason why the marriage did not take place." Well, it seems to me that that is not a sufficient reason. If there were any evidence that this illness of the girl was a chronic one—that it was an incurable illness—then of course the man was not bound to marry her, but as far as one can ascertain from the evidence, the girl became quite well, and was prepared to marry. The man himself apparently fell in love with another girl, and preferred her, and thereupon seized the cattle which he had given to the father as dowry. The Court has decided that where cattle are given as dowry the father holds them in trust, but only until the marriage takes place; but here the defendant, by his own conduct, prevented the father from getting the benefit of the contract made. I am of opinion that the defendant was not justified in seizing the cattle: the father being entitled to keep the cattle. Supposing the marriage had taken place and the cattle had vested in the father, if the defendant afterwards chose to desert the girl, then he could not have claimed that the property should be restored to him. It may well be that if the wife herself had deserted her husband, and had gone back to her father, the defendant might have an action to recover back the cattle; but as far as I can judge from the evidence, it was the defendant's own fault that the marriage did not take place, and he was not justified in seizing the cattle as he did. The appeal must be allowed, with costs to the plaintiff in this Court and in the Court below.

Maasdorp, J., concurred.

The Court ordered defendant to return the cattle or pay £7 10s. as damages, with costs in this Court and the Court below.

Appellant's attorneys: J. J. Michau.
Respondent's attorneys: Fairbridge, Arderne, and Lawton.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

MCLEOD V. WARD. { 1902.
Aug. 5th.

Mr. Benjamin appeared for defendant, and applied, in terms of a consent paper, for judgment.

Granted.

LISHMAN V. LISHMAN.

Mr. Close moved for a rule nisi, granted July 15, to be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF ANNA J. M. JACOBS.

Mr. Goch moved for the appointment as *curator bonis* of the joint estate of petitioner and her husband, an inmate of Valkenberg Asylum, of Mr. Henry Johannes Jacobs.

Granted.

FINLAYSON V. FINLAYSON.

Mr. Nightingale moved for an order for the payment of a sum of money to enable the petitioner (the wife) to institute an action for judicial separation against respondent.

An order was made on the respondent to pay £10, and £2 per month towards the maintenance of the petitioner and child, pending the action; and respondent was further ordered to restore the custody of the child of the marriage to petitioner.

LAW SOCIETY V. MICHAU { 1902.
D. J. { Aug. 5th.

Attorney of Supreme Court—
Misconduct.

An attorney of the Supreme Court, being the creditor of a person whose estate had been sequestrated as insolvent, wrote to the insolvent asking for payment of his debt, and threaten-

ing the insolvent that if the debt were not paid he would be prosecuted, and that he (the attorney) would spare no trouble to have the insolvent severely punished. The attorney's clerk was subsequently appointed trustee of the insolvent estate.

Held, that the writing of the letter was such misconduct as to justify the Court in suspending the attorney from practice for a period.

This was an application on the part of the Incorporated Law Society, to have the respondent suspended from practising as an attorney and notary of the Court by reason of professional misconduct in that, having secured the sequestration of the estates of Gert. C. Nel and Jan J. Bouwer, farmers and speculators, trading in the district of Cradock, he wrote to Nel a letter dated February 6, 1900, to the effect that if he (Nel) did not pay him (Michau) in full, he (Michau) would spare no money or trouble to have him (Nel) punished for false and dishonest declarations, etc., and further, to show cause why he (Michau) should not hand up and place in the custody of the Registrar of the Court his appointments as attorney and notary.

There was some conflict of evidence as to the precise terms in which the respondent's letter aforesaid was couched. An English translation of the letter which he admitted having written was as follows:

Cradock, February 6, 1901.

Mr. G. C. Nel.

Dear Sir,—As the judges of the E.D. Court at Graham's Town have declared your estate as insolvent, I wish to give you notice that the meetings, which are always held in connection with an insolvent estate, will be held shortly here at Cradock. I advise you once more to make payment in full as soon as possible of all my promissory notes and accounts against you and Bouwer, as I am not going to spare any trouble or money to have you punished as much as possible for all your fraudulent and false declarations and expressions.

I say again I am not going to spare any trouble or money to get you in gaol as soon as possible.

(Signed) D. J. MICHAU.

The affidavit of Daniel J. Michau, the respondent, stated that during 1900 Gert C. Nel and Jan J. Bouwer, borrowed various sums of money from deponent, giving deponent promissory notes therefore, which notes were renewed from time to time. In December, 1900, the liabilities to deponent amounted to over £600. Deponent received no security for the advances so made beyond the pledge of certain live-stock, which pledge was never completed by delivery. Deponent repeatedly demanded security, but the debtors always assured him that they were perfectly solvent and that they practically had no other creditors. On December 11, 1900, they voluntarily signed a declaration before deponent, in his capacity as a J.P., to the effect that they still had on their farm 1,250 goats, 45 cattle, 35 ostriches, 7 horses, and certain household furniture; that they had no other debts (save small ones) besides those owing to deponent; that the stock in question were their absolute property; that they pledged and bound them to deponent in the sum of £866 due to him, except £60 advanced to Mr. Botha; and that they, the said appearers, were solvent. Deponent, on the faith of this declaration, renewed the appearers' promissory note, but on the renewal being dishonoured, he issued summons, obtained judgment, and found that he had been deceived by the judgment debtors. Deponent subsequently obtained a provisional order of sequestration, which was made final on February 1, 1901. In the estate of Bouwer debts amounting to £1,558 were proved, whereof £892 was due to deponent. Beyond a dividend of £4 14s. 9d., in respect of a preferent claim for rent, no dividend was paid to any of the creditors. In the estate of Nel, debts were proved to the amount of £1,815 11s., whereof £866 was due to deponent. £4 were paid in respect of a preferent claim for rent, and no dividend was paid to the rest of the creditors. The insolvents were tried at the Circuit Court at Somerset East on September 2, 1901, on a charge of fraudulent insolvency, and were convicted and sentenced to nine months' imprisonment with hard labour. Deponent denied responsibility for the wording of his let-

ter of February 6, 1901, which was worded by his clerk, though written under his instructions. He acted on the spur of the moment, and under the influence of considerable exasperation at the dishonourable conduct of the debtors. Respondent never intended to induce them by means of his letter to pay his claim to the prejudice of those of other creditors. His real motive in writing the said letter was that he hoped the debtors might be induced thereby to pay out all the creditors, seeing that they had repeatedly assured deponent that they were unable to do so. In conclusion, deponent expressed his opinion that he had acted injudiciously in signing the aforesaid letter, and expressed his regret for his hasty action.

[De Villiers, C.J.: Whichever of these letters was written by Mr. Michau, there can be no doubt that it was grossly improper.]

Mr. Searle, K.C. (for the Law Society): The dual position of attorney and creditor held by Mr. Michau in this case can hardly be separated. If Mr. Michau had actually received payment of his account from the insolvent, he might, under Section 74 of the Insolvent Ordinance, have been sentenced to imprisonment for life. He first of all took steps to get himself elected trustee, and when in that position endeavoured to obtain a fraudulent preference. The respondent might have got money out of the estate which would never have appeared in the liquidation account.

Mr. Burton (for respondent): I do not wish to make any point as to the difference in the wording of the two letters.

I admit that they were both very improper letters, but the question is, "Were they unprofessional?" Was Mr. Michau's conduct under all the circumstances such as to necessitate his suspension from the side bar. It must be remembered that he is a young man, and that after having advanced considerable sums of money to these men, he found out that they had imposed upon him. They had told him that he was (practically speaking) their only creditor, and that they were solvent. Hence he could not have known that there were other creditors who would be affected by the payment of his debt. He honestly believed that they were concealing property, and their sworn declaration of December 11, 1900, afforded amply sufficient ground for such belief. They then

swore that they were possessed of a considerable quantity of live stock. Then came the sequestration, Mr. Michau's discovery that he had been imposed upon, and his indignant letter. It was not a proper letter, but was it written with intent to defraud the other creditors? That is the whole point of Section 74 of the Insolvent Ordinance. No doubt he wrote under strong feelings of exasperation, seeing that he had lost about £1,500. He did not wish to defraud the other creditors, but he did wish to get payment both of his own debt and of their debts. Then again, was it likely that the respondent, with his legal knowledge, could have contemplated being an accessory to a fraudulent insolvency, and thereby incurring the severe penalties which he must have known he would have to face. The whole point is, is the Court satisfied or not that his letter was written with the intention of obtaining any undue preference?

Mr. Searle (in reply): Michau must have known that there were other creditors. The insolvents expressly told him that there were, though they said the debts were small. Respondent practically said, "Unless you pay my bill, I will put you in gaol. This letter was written to ignorant farmers by a man holding the responsible position of an attorney of this Court, and a J.P. His affidavit is not ingenuous, and I submit that his conduct should be severely punished.

De Villiers, C.J.: In writing this letter, the respondent must have had one of two objects in view; either his object was to induce the insolvents to make a fraudulent payment to himself, or his object must have been to levy blackmail upon the relatives of these insolvents, and induce them to come forward and pay him in full, in order to relieve these insolvents from punishment for their alleged criminal acts. But, whichever view the Court takes of the case the offence seems to me to have been a serious one. The attempt to obtain fraudulent preference for himself would entail a very severe criminal punishment upon the insolvents, and if he intended to get the money out of the insolvents it is clear that it must have been done with a view to obtaining preference for himself; for he says nothing with regard to the other creditors. Although he knew that

the estate was sequestrated at the time, and that the provisional order had been made final, he says nothing in this letter as to the rights of the other creditors, but simply refers to himself and his own claims, which he required to be paid in full. He makes this threat of having them punished, and said he would spare no trouble or money to get these people into gaol for as long as possible. If he were exposing himself to a charge of fraudulent insolvency then clearly the offence would be a very serious one. I am inclined to think that he must have known that these people had nothing, and that he thought by making this threat that the friends of these insolvents might come forward and pay him in full; but even this form of levying blackmail upon the relatives is, I think, most improper. It may not be criminal, but it is grossly improper, especially when an act of this kind is committed by an attorney of the Court, who ought to know better, who is aware of the provisions of the insolvent ordinance, and who ought to be aware also of the gross impropriety of holding out threats of this kind, whether directed against the insolvents or with a view of influencing the relatives or friends of the insolvent. There are one or two circumstances, however, in the case which induce me not to deal too severely with the respondent. One of these points is that whatever was done was not done by the respondent in his capacity as an attorney. No doubt as an attorney he ought to know better, but it was simply as a creditor of these people that he used these threats towards them, and the other point in his favour is that he had been very badly dealt with by the insolvents. They had certainly not treated him well, and I have no doubt he is right in saying that it was a hasty action on his part, and that he did not give full consideration to what he was doing, for I feel sure that if he had given the matter the slightest thought he would have seen what a grossly improper act he was doing in sending this letter. Under all the circumstances of the case I think the suspension of respondent for a period of three months would meet the justice of the case. The Court, therefore, will order the respondent to be suspended from prac-

tising as an attorney and notary for a period of three months, and that in the meantime he will hand over to the Registrar of the Court his appointments as attorney and notary. As to the costs of this application, he will have to pay them.

[Applicant's attorneys, Van Zyl and Buissinne; respondent's, J. J. Michau.]

BALANTINE V. MCKENZIE. { 1902.
Aug. 5th.

Mr. Buchanan moved for judgment to be signed against plaintiff for not proceeding.

RIDINGER V. WELLSTED.

On the motion of Mr. Buchanan, a rule *nisi* granted July 11 to restrain respondent from cutting down certain trees and thereby deperciating the value of a farm mortgaged to applicant, was made absolute.

COWLEY V. COWLEY.

On the motion of Mr. Russell, leave was granted to sue by edictal citation.

GUARDIAN ASSURANCE AND TRUST CO. OF PORT ELIZABETH V. BUSH.

Mr. Close moved for leave to sue by edictal citation.

Granted.

ROBERTSON V. CORNERSKI AND BERMAN.

Mr. Rowson applied that this case should stand over until the 14th instant. Granted.

Ex parte BOTHA AND ANOTHER. { 1902.
Aug. 5th.

This was an application for an order authorising the Registrar of Deeds to register a certain antenuptial contract. The petition of John S. F. Botha and Maria Botha (born Maasdorp), showed that the said petitioners duly signed and executed a notarial antenuptial contract on July 8, 1902, and that the petitioners were married on the following day. The antenuptial contract was not tendered to the Registrar for registration till July 22, 1902, but was rejected by him in consequence of its not having been tendered for registration within seven days of the date of its execution, in terms of section

7 of Act 21 of 1875, and section 1 of Ord. 27 of 1846. The petition was accompanied by the usual verifying affidavit. There was also a supporting affidavit of the notary before whom the said contract had been executed, in which it was stated that the delay in presenting the contract for registration arose from an oversight of deponent.

On the motion of Mr. Buchanan the Court granted an order as prayed, saving the rights of creditors which might have accrued prior to registration.

[Applicant's attorneys: Innes and Hutton.]

Ex parte ROOKE AND ANOTHER.

This was a similar application to the preceding. The petition of William E. Rooke and Sarah A. Rooke showed that they had executed an antenuptial contract on June 20, 1902, before Alexander C. Guthrie, of Caledon, notary public, and that they were married the following day. On June 21, Mr. Guthrie forwarded the contract to Mr. M. F. H. Kleyn for registration; but owing to an oversight on the part of a clerk in Mr. Kleyn's office, it was not tendered for registration within the prescribed time. There were supporting affidavits from Mr. Guthrie and from Mr. Kleyn's clerk.

On the motion of Mr. Goch, the Court granted an order in the same terms as in the preceding case.

[Applicant's attorney: D. F. Marais.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

MARITZ V. WORCESTER { 1902.
BUTCHERY CO. (LTD.). { Aug. 5th.
" 6th.
" 7th.

This was an action brought by Daniel Jacobus Maritz against the Worcester Butchery Company (Limited) for the recovery of a certain sum, alleged to be due on account of salary, and, further, for £500 damages for alleged wrongful and unlawful dismissal.

The plaintiff's declaration was as follows:

1. The plaintiff, Daniel Jacobus Maritz, resides at Worcester, in the Cape Colony. The defendant company is a company registered with limited liability, and in-

incorporated under the provisions of Act 25 of 1892, having its registered office at Worcester aforesaid.

2. On or about the 9th day of November, 1900, the defendant company, through the Board of Directors thereof, appointed the plaintiff to act as provisional manager and secretary of the defendant company, until the date of the special meeting hereinafter set forth, and at a reasonable salary to be thereafter fixed.

3. Thereafter, on or about the 23rd day of November, 1900, the defendant company, by resolution of the shareholders thereof, at a special meeting duly convened and held at Worcester, appointed the plaintiff to act as provisional manager and secretary of the defendant company, to carry on the business thereof for the benefit of the shareholders thereof, until the expiration of a reasonable notice to be given by the plaintiff or the defendant company to the other of them to terminate the said appointment.

4. It was thereupon agreed between the plaintiff and the said company, through the Board of Directors thereof, that, in consideration of the plaintiff accepting and performing the duties of the said appointment, he should be entitled to a salary, not exceeding the sum of £20 per month, to be reckoned from the 9th day of November, 1900.

5. The plaintiff duly entered upon the duties of the said appointment, and has at all times material to this case duly performed the said duties, and has always been willing and ready to continue so to do, until the said appointment should be determined as aforesaid, but on or about the 4th day of February, 1902, the defendant company, through the Board of Directors thereof, wrongfully, unlawfully, and without due notice, dismissed the plaintiff from the said appointment, and refused to continue him therein until the said appointment should be determined, as aforesaid.

6. At the date of the said wrongful and unlawful dismissal there was lawfully due and owing to the plaintiff by the defendant company the sum of £320 sterling, as and for salary as aforesaid, less the sum of £63, received on account.

7. All times have elapsed, all things been done, and all conditions been fulfilled, to entitle the plaintiff to claim

payment of the said sum of £320, less the said sum of £63; but the defendant company wrongfully and unlawfully neglect or refuse to pay the said sum, or any portion thereof.

8. By reason of the premises, the plaintiff has been much injured in character and reputation, and has wholly lost the said salary and advantages which he would have derived from the said appointment, and has otherwise sustained damage to the extent of £500 sterling.

Wherefore the plaintiff claims: (a) Judgment for the said sum of £320, less the said sum of £63, together with interest *a tempore morae*; (b) £500 damages; (c) alternative relief; (d) costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1 of the declaration (save that the plaintiff no longer resides at Worcester), and says that the plaintiff is also a director and shareholder in the defendant company.

2. As to paragraphs 2, 3, and 4, the plaintiff was not, as therein alleged, appointed as provisional manager and secretary on the 9th day of November, 1900. Before the 23rd day of November, 1900, the plaintiff aided and took a prominent part in the affairs of the company then about to start business, but the appointment held by him as an official of the company took place on the 23rd day of November, 1900, and not before, in terms of the following resolution of shareholders, to wit: "That Mr. D. J. Maritz be and is hereby appointed provisional manager and secretary of the company, with instructions to carry on the present butchery business, and to do everything that may be necessary in connection with the same, to the benefit of shareholders, rendering a report to the next meeting."

3. No special terms as to salary or the period of employment were then arranged, but subsequently it was mutually understood that the plaintiff should receive a salary of £20 per month, which remuneration it was understood should also cover the services rendered in and about the company's business by the plaintiff's four children, two boys and two girls.

4. It was, amongst other duties, part of the duty of the plaintiff to see that the necessary books, accounts, and vouchers would be properly kept, correctly disclosing the business of the company, not

to incur heavy liabilities without the approval of the Board of Directors, to make payments wherever possible by cheque, and when making necessary cash payments to obtain and preserve the necessary vouchers.

5. The plaintiff remained in the service of the company as provisional manager and secretary from the 23rd day of November, 1900, until the 4th day of February, 1902, when his appointment was lawfully terminated by the Board of Directors, on the ground of unsatisfactory management in respect of the matters set forth in the last preceding paragraph, and in other important particulars.

6. The plaintiff failed and neglected to see that the necessary books, accounts, and vouchers were properly kept, correctly disclosing the business of the company; he incurred large liabilities without the approval of the Board; he made large payments in cash, and not by cheque, and did not obtain and preserve the necessary vouchers; he improperly charged the company in its books with sundry amounts hereinafter specified for his own house rent, for salary or wages paid by him to his children, and for furniture; and improperly neglected to debit himself with the price of sundry supplies of meat, fat, milk, bread, wood, and other articles drawn from the stock or property of the company, or bought by him with the company's till money.

7. The defendant annexes hereto an account of moneys received or drawn by the plaintiff out of the funds of the company, of the amounts improperly charged or omitted to be debited as aforesaid, of calls due by the plaintiff on shares held by him in the company, and of certain cash sales effected by him, but not properly entered in the books of the company, and not by him duly accounted for.

8. At foot of the said account, and after deducting £320 for remuneration or salary in respect of the plaintiff's services to the company, and £16 7s. 10d., stated by plaintiff to have been handed over by him out of his own funds when delivering the cash in hand on the termination of his engagement, there is due to the company the sum of £263 3s. 4d.

9. The plaintiff has credited himself in the books of the company with cash alleged to have been by him advanced,

amounting to £133 2s. 11d., which advance the defendant disputes.

10. The defendant admits refusing to pay the sums claimed in this suit or any part thereof, and denies specially that there is any sum due to the plaintiff or that he has sustained any damage, as alleged, for which the company is responsible.

11. Save as aforesaid, the defendant denies all allegations in paragraphs 2, 3, 4, 5, 6, and 7 of the declaration.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

For a claim in reconvention the defendant (now plaintiff) says as follows:

1. The defendant begs to refer this Honourable Court to the several paragraphs of the above plea and to the account annexed thereto.

2. All things have happened, all conditions have been performed, and all times have elapsed and passed necessary to entitle the defendant (now plaintiff) to payment by the plaintiff (now defendant) of the sum of £263 3s. 4d. shown to be due at foot of the said account, but the plaintiff (now defendant) has not paid the said sum or any part thereof.

Wherefore the defendant (now plaintiff) prays for judgment for the sum of £263 3s. 4d., or for such further or other relief as to this Hon. Court may seem meet, together with costs of suit.

The account referred to in the pleadings is as follows: To amounts received or drawn by the plaintiff out of the funds of the defendant company and placed by plaintiff to his debit in the company's books, £215 13s. 3d.; house rent, £60 5s.; salaries paid to children, £72 10s.; account for sundries, comprising fat, milk, bread, wood, etc., £58 10s.; due on shares, £75; meat account, £38 10s.; cash sales, etc., unaccounted for, £75 9s. 11d.; furniture, etc., £3 13s.; total, £599 11s. 2d. Against which must be placed: Salary to plaintiff, £320; private cash, said to have been handed over to Mr. Home on February 4, 1902, £16 7s. 10d.—£336 7s. 10s. Leaving a balance still due to defendant of £263 3s. 4d.

Mr. Upington (with him Mr. Bisset), for plaintiff; Mr. Schreiner, K.C. (with him Mr. C. W. de Villiers), for defendant.

Daniel Jacobus Maritz, the plaintiff, said he was formerly provisional manager and secretary of the Worcester

Butchery Company. The business was one which had been carried on by Van Hoessen and Schalkwyk, who had assigned it to the creditors, and witness was appointed one of the assignees. Then some of the leading creditors agreed to carry on the business, the sale being effected on October 15. A couple of days after the sale, Van Rooyen and witness opened the business, and as they had to start with stock, witness and Van Rooyen advanced money. Witness advanced £54. That was paid to Van Rooyen by Mrs. Maritz. On December 29 there appeared in the books to witness's credit two items, one of £2 14s. 5d., and the other of £77 8s. 6d. The one item was witness's dividend from the estate of Van Hoessen and Schalkwyk, and the other was his share of the liquidator's fees of the estate. He drew these amounts, and paid them over to the company. Witness and Van Rooyen carried on the business until November 23, when at the first real meeting of the shareholders witness was appointed provisional manager of the business, with instructions to do everything necessary to carry on the present butchery business. Witness understood that he had been appointed from November 4. He continued to carry on the business, and as soon as arrangements could be made with the Standard Bank an account was opened there. They arranged for an overdraft with the bank, and for that witness had to make himself personally responsible. When they took over the business it had fallen away until they were killing only three or four sheep a day, and before they finished they were killing thirty or forty sheep per day. Most of the sales were effected from the meat wagons which were sent out. It was necessary to have a large number of employees. In the account annexed to the plea there was an item of £75 9s 11d. cash sales unaccounted for. Witness explained the system on which the books were kept to show that although the rough and the clean cash books apparently did not correspond, in the end the company got the full value of all amounts recorded. There was a petty account book which was not produced. Witness when dismissed had handed over all the books to Mr. Holm and Mr. Van Rooyen, who gave him a receipt for them. Alto-

gether witness handed over 48 books, and now a discovery order only disclosed some 36. With regard to the item of £60 5s. for house rent, witness admitted now that he could not very well claim that. When the understanding was arrived at that witness should receive £20 salary, it was also witness's impression that he should come and live in the house attached to the shop. Instead of that other employees were put into the house, and witness hired another house. He entered the rent of that in the books as a charge against the company, intending to have the matter put right with his fellow directors. Now of course that they were at loggerheads there was no chance of an arrangement being made. As to the amounts charged as salaries to his four children, witness explained how the services of these children were absolutely necessary. They were kept at work from morning until night. The first couple of months witness charged nothing, but from December 31 he paid them £1 10s. each a month as employees, and very cheap employees they were. At the present time the two girls were employed as book-keepers, and earned £10 a month between them; the little boy earned £1 16s. a month, and the other boy could get employment at any time at £6 per month. As to the meat now charged witness at £38 10s., when the mutual agreement as to £20 salary was made it was also agreed he should be allowed the meat for his home, the same as the other employees, and as was the custom in butcheries in Worcester. Even if they had to pay for the meat the value would not be a third of the amount charged, as they only used the meat that was left over. He had drawn money to pay his bread and milk accounts, etc., but he had debited himself with that in the ledger, and it was accounted for in the £215 admitted. As to his dismissal in February last, there was just a bald resolution passed at the meeting, and no reasons given for his dismissal, but there were statements made by the directors. Mr. Van der Merwe said witness was living out of the company, and asked how much money he took every day out of the business which he did not account for.

Cross-examined: At the end of September, 1900, witness had something under £100 of his own, and the £54 wit-

ness paid into the company was part of that money. The money was actually paid before the date it was entered in the books, but that was because they had to buy cattle and carry on the business before the company was legally floated. As to the items of money advanced by plaintiff which had not appeared on the balance-sheets, witness explained that it was well known at all the directors' meetings that witness had never credited himself with his salary. Witness had never stated that the salary of £20 was to include the remuneration for the services of witness's children as well as his own. With regard to the advances made on December 29, 1900, witness pointed out that a sum equivalent to that had been paid into the bank on the same day. The agreement witness made with the three principal directors as to witness getting his meat free was made some time in February or March, about the same time the agreement was made in regard to the £20 per month salary. The word "fat" was not used, but it was understood whatever witness required out of the butcher's shop he should take. The directors with whom the agreement was made were the two Messrs. Van der Merwe and Mr. Rossouw. The agreement was made in a general conversation, and not at a regular directors' meeting. Witness never took 6 lb. of meat every day, and he did not take from 1 lb. to 1½ lb. of sausages every day. He only took the worst parts of the meat. He did not know about his bread and milk accounts being always paid out of the company's money. The girl might have on a few occasions taken a shilling or two to pay the accounts from the till, but she always, in accordance with strict orders given, got the money afterwards from Mrs. Maritz or witness, and replaced it.

Plaintiff denied that his system of bookkeeping, in not entering small amounts as they were paid, was a bad one. He had the interests of the business at heart, and did everything in his power to further those interests. He denied that Mr. Lindenberg asked for any particular vouchers or for receipts for payments. Witness ceased to be a director as soon as he was appointed manager. Witness would say that, reading his appointment strictly, he could assume heavy liabilities on be-

half of the company, but, as a matter of fact, he never did so. Witness, when his employment ceased, handed over a file of vouchers to Messrs. Holm and Van Rooyen. These would satisfactorily account for the disbursements entered in the cash-book. When Theron and Lindenberg came to witness they never asked to see vouchers. When the business was first started some payments were made without vouchers, but afterwards vouchers were given for every payment. Judging from the pile of vouchers produced, they were not all there. Witness repeated that his impression of the terms of his agreement was that he was to receive £20 salary, that he would be allowed meat the same as most of the other employees, that the children would have a small salary, and that he should live in the house attached to the shop. As he could not live in the house attached to the shop he charged to the company the rent of the house he hired, with the idea that the matter could be amicably settled later on.

Re-examined: The list put in of the books handed over was in Van Rooyen's handwriting, with the exception of the heading, which was in witness's handwriting. For certain small payments there were no vouchers, and in the course of travelling about the country it was not always practicable to obtain vouchers for small cash payments.

By the Court: A certain statement which was prepared was drawn up for the purpose of showing the position of the affairs of the company. At that time witness would appear as a debtor to the company, with the exception of what was due to him for salary.

L. Borchers, clerk in the office of the Registrar of Deeds, produced the records of the Worcester Butchery Company, and the documents filed in connection with the business of the company.

Sophie Maritz, daughter of the plaintiff, said that she was employed after the formation of the company as bookkeeper at a salary of £1 10s. a month, and was now employed by Mr. F. J. Pearce, of Claremont, at a salary of £5 a month. The evidence as to the conduct of the business which had been given by the last witness was correct.

Cross-examined: Witness never paid out any money on account of the business.

Johanna Maritz, also a daughter of the plaintiff, stated that she was assisting her father in the bookkeeping portion of the business at Worcester, and was now employed by Mr. F. J. Pearce, at Claremont, at the same salary as the last witness. She recollected a sum of £79 being paid to her father as commission in respect of the estate of Van Hoessen and Schalkwyk. The payment was made in gold and silver, and was subsequently paid into the bank.

Cross-examined: She was quite sure that her father's commission was brought in gold and silver. She never paid money out of the till, but on some occasions she had paid money out of the tin box for such items as milk and wood, for the house. No money was ever taken out of the till in the shop. She paid out, perhaps, a shilling or sixpence or so from the tin, and then, when she went home, got the amount from her mother or father and replaced it. If money taken from the tin was not replaced it would be noticed, because the money in the tin was from the wagons. In the evening the money in the tin was counted and checked with the wagon receipts, and it was always right.

Re-examined: The wood purchased was needed for boiling the fat for the purposes of the business. As to the money paid out for the refreshment-rooms, witness paid that out of money she had received from the refreshment-rooms. The latter were in the same building as the butchery, and as the soldiers who had been there having refreshments passed out they paid witness. It was from that money that witness occasionally paid for vegetables, etc., for the refreshment-room.

Mrs. Anna Johanna Maritz, wife of the plaintiff, said that she occasionally boiled fat for the company, and it was agreed that as remuneration for her doing so she should receive a little of the fat. Proceeding, witness deposed to having, on plaintiff's instructions, paid over £53 or £54 to Mr. Van Rooyen. That was before the business was regularly started, and witness understood that the money was for the purpose of paying for sheep purchased from Du Plessis. Wood had been brought to witness's house occasionally. That was for the melting of the fat for the company.

Mr. Schreiner said it appeared that a sum of £53 or £54 had been received by

Van Rooyen, and it would be admitted that plaintiff should be credited with that sum. It formed part of the £133.

John Maritz said he had been in the employ of the Worcester Butchery Co. as a wagon-driver. He got £3 a month at the start, and afterwards it was raised 10s. a month.

Colin Fraser Maritz said that he was employed to go round with the wagons. He received for that £1 per month. He had to go with the wagon to learn the customers, so that if any of the drivers left, witness could show the customers to the new drivers.

Mr. Upington closed the case for the plaintiff.

For the defence, Mr. Schreiner called James Muirhead, an accountant, carrying on business in Cape Town in partnership with Mr. Maynard Nash. Acting on instructions, witness had made an audit of the books of the company. The utmost care had been taken of all books, documents, and vouchers which came into his possession in connection with the audit, and they had all been returned. Witness did not go into the rough books in his audit, but dealt only with the clean books, starting as a basis of his audit with the cash-book and day-book. The books were evidently kept by someone acquainted with bookkeeping, but there were a good many errors in the posting. He instanced some of the mistakes.

By the Court: These did not make any difference in the result.

Further examined, witness said that no auditor, under the conditions of these books, could give the company a clean certificate. At the time of closing the books there were between 500 and 600 sundry debtors, some of them, considering the time the company had been in existence, considerably in arrear. A number of the very small accounts had apparently only been posted at periods. It was impossible to check the cash sales. It was a most difficult thing in any business to satisfactorily check cash sales. He thought something in the way of a stock-book should have been kept, but he could hardly expect the full books kept that would have been necessary to check cash sales in a business of this kind. Witness's report was a fair statement of the company's affairs, as shown by the books. From start to finish, nothing had ever been written

off for depreciation. With regard to plaintiff's own account, the ledger showed a balance against him of £82 10s. 7d. That was allowing the £53 and the £77 odd, but, of course, not taking account the salary, which was not shown in the books, and it did not include anything due on shares, and the children's salaries were entered as cash disbursements. With regard to the £38 10s. for meat supplied to plaintiff, that was not shown in the books, but on instructions given by defendant's attorneys, witness took the monthly average plaintiff had paid for meat previous to February, 1901, and then entered eleven months at that average. Plaintiff's explanation as to the manner in which petty payments during the month were deducted from a certain day's cash was probably correct, from what witness now noticed in the books. The petty payments, however, instead of being all entered from another book into the cash-book at the end of the month, ought to have been entered when received.

Before the hearing of further evidence was gone on with, Mr. Upington, in reply to a question put by the Court in regard to the shortening of evidence, said that he would not now press the claim for damages.

Frederick Lindenberg said he was secretary of the Worcester Divisional Council and Municipality, and although not an accountant or an auditor, he understood bookkeeping, and had to keep books to the satisfaction of the Auditor-General. Witness made an examination of the books of the company in April, 1901, and witness then asked plaintiff to send the vouchers. Witness repeatedly asked plaintiff to furnish vouchers. He wrote a letter (one which plaintiff said he never received), pointing out that the vouchers were required. Witness was astonished afterwards to find that that letter had not reached the directors. Plaintiff never urged witness to get the audit finished; in fact plaintiff seemed to avoid witness.

Cross-examined: Witness had previously audited the books of a registered company, viz., the Colonial Brandy Company. He had then to go to the office to audit the books.

Johannes van Rooyen deposed that he received from Mrs. Maritz the £53 referred to. Witness had received

books from plaintiff after the latter's dismissal, and everything so received had been handed on to the accountant, Mr. Muirhead. Witness made up, on information received, the account now charged against plaintiff for milk, bread, fat, wood, etc. Witness never heard at any time of Maritz being entitled to free meat. Witness was at a meeting, where Maritz said that he was not a Hottentot to work for salary, his intention being to work up the business. Later on, at the same meeting, Maritz said that his salary, including that of his children, would not exceed £20 per month.

Cross-examined: The prospectus put in was one on which the Worcester Butchery Company afterwards went through. The prospectus was in witness's handwriting, but witness did not know who a certain D. J. Viljoen was, whose name appeared as a provisional director. Witness was not secretary. Witness was not a shareholder.

Mr. Upington pointed out that on the prospectus, in Mr. Van Rooyen's own handwriting, Mr. Van Rooyen appeared as secretary *pro tem*, and the name of J. H. van Rooyen also appeared as a shareholder.

Witness said the shareholder, J. H. van Rooyen, must be his wife, who held shares in the company.

Re-examined: There was no other prospectus of the present company than the one produced.

Mr. Upington closed his case.

Mr. Schreiner called

J. J. Buyskes, one of the directors of the defendant company, who gave evidence in confirmation of the allegations contained in the plea. He said that in January he first heard of salaries being paid to the plaintiff's children. There was no agreement concerning the work of the children, excepting that made at the previous meeting. On the 4th February witness moved the resolution to the effect that plaintiff should leave. Witness never heard about the plaintiff lending the money he received as commission from the estate of Van Hooesen and Van Schalkwyk to the company.

Cross-examined by Mr. Upington: When the salary of £20 was agreed upon, plaintiff said it was £20 with his children. The children were not named. Mr. Maritz was secretary of the company, and he was

there when the prospectus (produced) was drawn up. No one else was ever secretary of the company.

Mr. Upington pointed out that Mr. Van Royen's name appeared on the prospectus as secretary *pro tem*.

Witness said that Mr. Van Royen and Mr. Maritz were there together.

Willem van der Merwe, retired farmer, said he was a creditor of Van Hooesen and Van Schalkwyk. Witness was a shareholder in the Butchery Co. Witness remembered Mr. Maritz being appointed. Mr. Hamman brought up the question of plaintiff's salary at a later meeting, and plaintiff said that his salary would not be more than £20, together with his children. Witness had no knowledge until recently—when Messrs. Holme and Van Rooyen took up the matter—that the children were being paid separate salaries.

[Maasdorp, J.: The salaries were entered up in the books from month to month, and the books were open to you.]

Witness said he did not examine the books. Witness heard it said at a meeting of directors in February, 1901, that Maritz had lent the company £80, which he received as commission from the estate of Van Hooesen and Van Schalkwyk.

Petrus Johannes van der Merwe, retired farmer, at present acting-chairman of the defendant company, said it was not until after Messrs. Holme and Van Rooyen made their investigations that witness knew of the entries in the books concerning the children's salaries. Witness was not aware of any understanding that Maritz should get his meat for nothing. Witness had never agreed to this. On the day before the resolution terminating the engagement was passed witness went to the shop, and Maritz threw down the key, shut the door, and walked out. Witness never gave Maritz authority to buy sheep from Loochner and Verster at the Strand. Witness had no shares. He signed the memoranda of agreement. His sister took shares with the dividend from Van Hooesen and Van Schalkwyk, and one document witness signed "qq" for his sister.

An employee of the defendant company named Erasmus was called. He said he had sent meat to Mr. Maritz's house. A messenger used to come to the shop and select a joint, which wit-

ness delivered. Witness supplied meat to Mr. Maritz's house on instructions from that gentleman. It was not witness's experience that scraps were taken. The best joints were sometimes selected by plaintiff's children. Witness and Mr. Maritz had not quarrelled. They parted the best of friends. There was no ill-feeling between them. Bread was brought to the shop by a baker named Maritz, and part was taken to Mr. Maritz's house.

Cross-examined by Mr. Upington: Meat was taken for Mr. Maritz in a most open way. No more than a loaf of bread a day was taken to Mr. Maritz's house.

E. G. Harsenberg said he had supplied plaintiff's family with milk from the 30th October, 1901, to the 16th February, 1902. He received payment in the office of the Butchery Company habitually. The first payment was made by Miss Maritz, the money being taken from the till.

Mr. Schreiner then closed his case.

Mr. Maritz, the plaintiff (re-called), gave evidence as to certain items in the account books of the company.

Counsel then addressed the jury on the facts of the case.

Maasdorp, J.: Upon the credit side of the account submitted there were sums admittedly due amounting to £320, £16, and £53. Then there was a further amount of £80, alleged by plaintiff to have been advanced by him to the company. This was denied by the defendant company, and the jury will have to analyse the evidence, and say whether, as a fact, this had been advanced by plaintiff. In regard to the amounts debited to the plaintiff by the defendants, the jury, as men of business, will perhaps be able to determine as to the accounts with which the Court had been furnished. In connection with the question as to whether the £20 paid as salary to plaintiff was for plaintiff's services alone or was for the services of himself and his children as well, it appears from the evidence given that the children were quite able to earn salaries, and that they are now earning much more than they were claimed by plaintiff to have earned from the defendant company. The question is whether the plaintiff agreed that he and his children should work for the salary of £20 or whether the children were em-

ployed on terms outside the salary which it was agreed should be paid to Mr. Maritz. It will be the duty of the jury to decide what items brought on the debit side they will allow against plaintiff, and which they will strike out, and upon that they will arrive at a balance. I think it would be advisable for the jury to say specially in giving their verdict which items they allow and which they disallow, because the question might arise as to the construction of the law in regard to the matter of the shares.

The jury retired, and after an absence of half an hour, found a verdict for plaintiff for £111 12s.

Judgment was accordingly entered for this amount, with costs.

[Plaintiff's attorneys, Faure and Zietsman; defendants attorneys, Walker and Jacobsohn.]

SUPREME COURT

FIRST DIVISION.

[Before the Right Hon. Sir J. H. DE VILLIERS, C.J.]

ESTATE KHAN V. KHAN } 1902.
AND ANOTHER. } Aug. 6th.

Insolvent Ordinance, section 83—

Alienation of assets—Bona fides.

An insolvent having sold his business and goodwill at the time when his liabilities exceeded his assets,

Held, in an action against the purchasers, under the 83rd section of the Insolvent Ordinance, that the burden of proving good faith and valuable consideration lay upon them.

This was an action brought by the trustee of the insolvent estate of Hassan Kahn, of Claremont, for the cancellation of certain two sales. In the first case the defendant was Amjit Khan, a general dealer, of Claremont, who it is

alleged bought the insolvent's goodwill and stock-in-trade for £237 16s. 1½d., for which Hassan Khan accepted promissory notes, payable in eleven months' time. It was alleged that at the date of the sale the liabilities exceeded the assets, that the sale was not *bona fide*, and for just and valuable consideration, and was accordingly null and void. It was also alleged that the intention of Hassan was to defraud his creditors. The plea admitted the sale, but alleged that it was a *bona-fide* and open transaction, and that the sum paid was full and fair value. In the second case the defendant was Abdurahman Khan, and the formal allegations were the same. The shop was in Buchanan-road, Claremont, and the price given was £162 10s. 3d., payable in bills at eight months. The plea was practically the same.

Mr. Buchanan for plaintiff. Mr. Bisset for defendants.

Thomas Herbert Hazell said he was one of the trustees in the insolvent estate of Hassan Khan, and one of the plaintiffs. Witness had investigated the affairs of the estate. The books were not sufficient, and witness could form no record from them. Debts to the amount of £745 had been proved, and there were probably other debts, as some people did not prove until they were satisfied there would be a dividend. Witness found £5 in the bank belonging to insolvent, who informed him that debts were owing to him to the amount of £300; but in regard to this witness could not get any details from the insolvent as to where the people whom he alleged owed him money were. Proceedings had been taken against insolvent for fraudulent insolvency.

Cross-examined by Mr. Bisset: It was not customary for an Indian shopkeeper to keep elaborate books. The books which this insolvent kept were of the character kept by most Indian shopkeepers.

[De Villiers, C. J.: What is the allegation—that the purchase price is not sufficient?]

Mr. Buchanan: That he knew himself to be insolvent, and sold on long credit.

[De Villiers, C. J.: But you have the bills; cannot the purchasers pay?]

Witness: The bills have never been tendered to me. My experience of these things is that one Indian will sell to another by a series of bills, of which two

or three will be paid, and as to the balance, the debtor either disappears with it or goes insolvent. I consider these sales are generally fictitious. I have come across several.

[De Villiers, C. J.: And you object to this because you consider the bills are fictitious.]

Witness: I do not say they are fictitious, but I say the sale was made to two men who have no position at all.

[De Villiers, C. J.: The defendants, you mean?]

Witness: Yes.

Mr. Bisset said they had the promissory notes, and they would be produced.

[De Villiers, C. J.: But were they tendered to the trustee?]

Witness: No.

[De Villiers, C. J.: Because they belong to you, surely?]

Mr. Buchanan: We do not want to acknowledge the sale in any way.

[De Villiers, C. J.: What is your case—that it was not a sale at all?]

Mr. Buchanan: We say that it was made by a collusive arrangement between the parties, and that the purchase price was by long dated bills, which were calculated to delay and defeat the creditors, and interfere with the ordinary course of the insolvency working out. Then we have evidence of the removal of goods.

[De Villiers, C. J.: Suppose for one minute that the defendants can pay the bills; you can discount them?]

Mr. Buchanan: Yes, but they are unapproved bills, and from persons in the position of the defendants are practically valueless. The trustees prefer to have a bird in the hand rather than two in the bush.

[De Villiers, C. J.: Then you say the sales were not *bona fide*.]

Mr. Buchanan: Yes, and not for just and valuable consideration.

James M. Bennett, co-trustee with the last witness and a creditor in the estate, The two defendants had lived of late with the insolvent. They had told witness they were cousins. Witness understood before the insolvency that Abdurahman Khan was a partner of the insolvent. Abdurahman paid witness his accounts when he used to call. Witness saw the shops on the 13th March. Both were well stocked. The stock they had in 1, Buchanan-road, shop, witness valued at £250, and he calculated

that there was over £300 worth of stock in the Main-road shop. Witness visited the places again on the 15th March, when the stock had decreased a good deal. Witness had been offered £50 for the goodwill of the Buchanan-road shop. Witness valued the goodwill of the other store at £20 or £25. The trustees had had a good deal of difficulty in getting information. Insolvent had not assisted the trustees in the least.

Cross-examined by Mr. Bisset: Witness absolutely denied saying to insolvent on the 15th March that if they would give him £25 he would protect their interests.

Mohammed Ishmael, an Indian, living in Pontac-street, said the defendants and insolvent were cousins, and used to live together at Claremont. The three Khans were partners. Before the insolvency, witness assisted them to take stock in one of the shops. They told witness afterwards that there was about £500 worth of stock in the two shops. At about nine o'clock one evening witness saw goods being removed in a handcart from the Buchanan-road store. Witness heard the sum of £500 mentioned when the sale was agreed upon.

Mr. Buchanan closed his case.

Mr. Bisset called

Abdurahman Khan, who said he bought the goodwill and stock of the Buchanan-road shop for £162 10s. Previous to that, witness was managing a shop at Wynberg for insolvent. Prior to the sale, stock was taken. Everything was taken and priced. The same thing was done at the Main-road shop, and the value there was placed at £237. Promissory notes were drawn up and signed. Ishmael's statement as to stock being taken out of the shop was untrue. The giving of promissory notes and the payment of them at different periods out of the takings at the shop was the usual way in which shops were bought among the Indian community.

Amjit Khan gave similar evidence. He had no knowledge of the circumstances of the insolvent when he purchased the shop. It was customary for payment to be made by promissory notes when shops were sold to Indians. The witness alleged that Mr. Bennett had threatened to have them imprisoned if they did not give him £25.

Samsodien, another Indian, gave evidence as to taking stock. The goods were all marked, and the result was that

the stock in one shop was found to be worth £162, and in the other £237. Witness considered that this was a fair value for the stock.

Hassan Khan was called, and stated that he sold the Buchanan-road shop to Amjit Khan, and the other shop to Abdurahman Khan for the amounts stated. Witness would get no profit out of the sale of the shops. He was not in partnership with the respondents.

[De Villiers, C.J. (to Mr. Buchanan): What is the charge of fraudulent insolvency against this man?]

Mr. Buchanan: I think the charges are of fraudulently alienating these goods, and of making false statements under examination.

Witness said he did not remove goods from his shop, as Ishmael had stated. He took promissory notes from respondents because they had not the cash. He did not tell the respondents of his circumstances when he sold the shops.

Louis Frederick Zietman, attorney, said his firm acted as attorneys for insolvent. He informed witness that there was a probability of a compromise. Before this insolvent had had interviews with Mr. Faure. Witness advised the insolvent either to get the cash, or a guarantee, or to sell the property. He afterwards came to witness's office with the promissory notes, and thereupon witness sent out a circular to the creditors respecting a compromise. The insolvent was usually advised by Mr. Faure, of witness's firm.

Abdol Kadir said that respondents and insolvent came to him on the 13th March, and asked him to draw out memoranda of sale and promissory notes. Witness did so. In the majority of cases payment of the purchase price of Indian shops was made by promissory notes. Merchants in the city had negotiated notes of this kind.

After hearing argument by Mr. Bisset, on behalf of the defendants,

The Court gave judgment in each case for the plaintiffs, with costs.

De Villiers, C.J.: It is common cause in this case that on the 13th March the insolvent sold the goodwill and stock-in-trade of his business in the Main-road, Claremont, to the defendant Amjit Khan, and the goodwill and

stock-in-trade of the shops in Buchanan-street, Claremont, to Abdurahman Khan. The first question to be decided is whether, at the time of such sale the insolvent's liabilities, fairly calculated, exceeded his assets, fairly valued. Upon this point the Court is satisfied with the evidence of the two trustees, and there is no doubt whatever that the liabilities at that time did exceed the assets of the insolvent. But if any doubt existed upon that point that doubt is removed by the letter written by the attorneys of the insolvent on the 14th March, that was the very day after the sale, and a circular letter addressed to the creditors of the insolvent in the following terms: "Hassan Khan, of Buchanan-road, Claremont, has consulted us with reference to his affairs. It appears that he owes £785 8s. 2d., and the only asset he has consists of certain promissory notes, being the proceeds of the sale of his business, amounting in all to the sum of £380, falling due from the 13th April, 1902, to the 13th of February, 1903. He is anxious to avoid the expense of a surrender, and has instructed us to write to his creditors asking them whether they would be willing to accept an assignment of his estate. Kindly advise us whether you are agreeable to this; the promissory notes are in our possession." Now from this it is perfectly clear that the insolvent, on the 13th March, when he entered into this transaction, knew that he was insolvent as well as any man could know. The question that obviously suggests itself is, with what object did he then sell his business? If he was an honest man, it was his duty to surrender this property to his creditors, instead of entering into this arrangement with these two men, who had practically been underlings of his for some years. In this very letter there is nothing whatever said of certain other assets which the insolvent now says he had, on the contrary he distinctly states that the only assets which he had were these promissory notes which had been given the day before to him by the two defendants. Let us see what these promissory notes are. When once it is proved that the assets are less than the liabilities, the onus is thrown upon the defendant to show that the transaction was *bona fide*, and upon just and valuable

consideration. Well, now, first as to the *bona fides*, because even if there was *bona fides*, it is said that it is usual for Indians to take promissory notes in the way in which the defendant states. If it is usual, the sooner we put a stop to it the better. It is the most ingenious way of defrauding creditors that could possibly be imagined. Here are these men, comparative strangers, coming to this country, and with very little to keep them here, and one of them sells to another his business for which he gets promissory notes at long dates. There is nothing to prevent the purchaser from selling these goods and clearing from the country long before the promissory notes fall due, and the creditors, the trusting creditors, have to look out for themselves. Some of the Indians have been called in regard to the custom, but I think it would have been more satisfactory if the merchants, who are supposed to agree with this custom, had been called, and I should like to have known the circumstances under which merchants have taken such long dated promissory notes as security for debts or for advances made. Certainly, if there have been other such cases that is no reason, when a case comes before the Court, why the Court should not deal with it in the manner in which it deserves to be dealt with. It seems to me that there is an utter absence of *bona fides*. These men had been employed by the insolvent, and if there had been these losses upon the business which the insolvent says, they would have known about it, and that in itself would have debarred them from purchasing the property as readily as they were supposed to have done. It seems to me that the two defendants knew as much of the insolvent's business as the insolvent himself. They had been his confidential people, and had been employed for a long time; in fact, they were living with him at the time, and knew his business as well as he did himself. I do not, therefore, go into the question of whether the stock was of the value which it is alleged to have been. They were very particular in giving these promissory notes to come down even to a halfpenny. The sale is for £237 16s. 1½d., and for that amount the promissory notes are given. Even supposing that this was a fair price, I do not think it was fair payment. The payment was made in this way, without a

penny of cash and with long dates attached, which would enable these defendants to clear out of this country, and to disappear long before any of these notes would fall due. I need not, discuss the question whether any of the goods were removed by the defendants after the sale, beyond saying that the weight of the evidence is in favour of their having done so. I am of opinion that it was not a *bona fide* sale, and that the defendants cannot take advantage of it. The creditors must have the benefit of the assets. The Court will, therefore, give judgment for the plaintiffs in each case, as prayed, with costs.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorneys: Faure and Zietsman.]

Ex parte BOTHA AND } 1912.
OTHERS. } Aug. 6th.

Martial Law—Seizure and sale of property by the Military.

Where the military authorities had seized, declared confiscate, and proposed to sell certain moveable property of certain British subjects, such seizure having been effected after peace had been proclaimed between His Majesty's Government and the South African Republics: the Court granted a rule nisi calling upon the officer commanding the troops in the district where the said seizure had been made, to show cause on August 21st why he should not be interdicted from proceeding with the contemplated sale.

By leave of the Court, the following petition of Gert Botha, of Kapot, and of twenty-nine other residents within the District of Calvinia, was presented from the Bar, as a matter of urgency:

The petition was as follows:

1. Your petitioners are British subjects, residing in the District of Calvinia.
2. In or about the months of June and July last, and after the declaration of peace between His Majesty's Government and the South African Republics, property belonging to your petitioners

and consisting of horses, mules, donkeys, sheep, goats, carts, waggons and harness have been seized by native scouts and other troops acting under the orders of Major Mackenzie, Officer Commanding troops at Calvinia, and declared confiscate.

3. A sale of property seized as aforesaid was held at Calvinia on July 15th last, and another began yesterday, and property belonging to your petitioners is being sold.

4. Your petitioners have protested against the sale and confiscation of their property as aforesaid to the Military Authorities, but cannot induce them to postpone the said sale.

5. Your petitioners are not permitted to attend the said sale or to bid thereat, and are not allowed access to the paddocks for the purpose of identifying their property.

6. Unless the said sale is prohibited until your petitioners have been able to claim their property they will suffer grievous loss.

Wherefore, your petitioners pray that your lordships may be pleased to grant an interdict:

(a) Restraining Major Mackenzie, officer commanding troops at Calvinia, and the Military Authorities from selling, or causing to be sold, any horses, mules, donkeys, sheep, goats, carts, waggons, harness or other property belonging to your petitioners.

(b) If any such property has been sold already, restraining the purchaser or purchasers thereof from removing or making away with same.

(c) Restraining Major Mackenzie and the Military Authorities from parting or making away with any monies that may have been paid or may be paid to him or them for or on account of such sale.

(d) Restraining Major Mackenzie and the Military Authorities from interfering with or molesting your petitioners in obtaining access to their property, or that your lordships will be pleased to grant to your petitioners such further or other relief as to your lordships may seem meet pending actions to be brought by them for the restoration of their property.

Cape Town, August 6th, 1902.

On the motion of Mr. Burton, the Court granted a rule nisi, to operate as a temporary interdict, calling upon Major McKenzie or other Officer Com-

manding the Troops at Calvinia, to show cause on the 21st August why an interdict should not be granted, as prayed, the rule to be served by telegram upon Major McKenzie, and also upon the Officer Commanding-in-Chief.

[Applicants' Attorneys: Van der Byl and Van der Horst.]

FOURIE V. SMIT. { 1902.
Aug. 6th.

Appeal—Credibility—Evidence.

The decision of a magistrate upon a question of credibility reversed, the Court being of opinion that the discrepancies upon which the magistrate relied were unimportant, that there was no motive for perjury, that there was no justification for the magistrate's holding that a certain document had been falsified, and that the absence of any denial by the defendant of the statements made by the plaintiff's witnesses ought to have induced the magistrate to attach greater weight to those statements.

This was an appeal from a decision of the Resident Magistrate of Bredasdorp.

In the Court below, the appellant summoned Smit for damages in the sum of £10, for the illegal impounding of twelve donkeys, the property of Mrs. Fourie. The defendant pleaded general issue, and the Magistrate gave judgment for absolute from the instance, with costs. Against that decision the present appeal was brought. The Magistrate, in his reasons, stated that owing to the form in which this action was brought, it was necessary for the plaintiff to prove that the donkeys were her property at the time they were impounded. The plaintiff alleged that she had bought the donkeys from a certain Sylves de Kock, but the Magistrate was of opinion that De Kock was still the owner of the donkeys. There may have been some bogus transaction to meet the exigencies of this or some other case, but that there was a true sale appeared

preposterously unlikely. From the record of evidence, it appeared that De Kock was plaintiff's son-in-law, and worked on her ground. He was said to have been the original owner of the donkeys, and to have sold them to Mrs. Fourie. Plaintiff, De Kock, and other witnesses gave evidence to this effect. There were discrepancies in the evidence as to the mode of payment by plaintiff for the donkeys. Defendant called no evidence.

Mr. Close for appellant; Mr. Gardiner for respondent.

After argument, the Court allowed the appeal.

De Villiers, C.J.: It appears to me that in this case the Magistrate has attached undue weight to the discrepancies between the evidence of the plaintiff and De Kock. Discrepancies such as exist in this case do not necessarily prove that the two witnesses were both swearing falsely. They tend to show that there was no pre-arrangement between the two as to the evidence which was to be given at the trial. It is quite true that the plaintiff is not entitled to succeed in this action unless her ownership is proved, but all the evidence is one way. All the witnesses agree that the donkeys had been sold to the plaintiff by De Kock, and moreover, a document was produced which, unless the plaintiff's version is correct, would be false and fraudulent. Now the Magistrate says that he does not believe the evidence, that there is perjury on all sides. Well, that is a very strong statement to make, more especially when one considers what possible object they could have had in committing perjury. Supposing De Kock was the owner, and had brought the action, and had said that these donkeys were upon the premises with the permission of the owner, and that the defendant had unlawfully taken them away. In such case I suppose De Kock would have succeeded in the action. I cannot, therefore, see the object of committing perjury. Why call several witnesses, and why prepare a false document when, if De Koch was the owner, he could have brought an action, and would have been entitled to damages if the donkeys were there with the consent of the owner? I confess I cannot see the motive for perjury, and therefore, as the Court should rather give

effect to evidence like this than throw it overboard altogether and accuse them all of perjury, and of falsifying this document, I think, that however much weight should be attached to the decision of the Magistrate who had heard the case, the evidence here is all one way, and there is not sufficient motive for perjury on the part of plaintiff's witnesses. Further, the amount of damages claimed is very small, and it is incredible that they should all perjure themselves for the sake of this petty sum. The appeal must be allowed with costs, and judgment entered for the plaintiff for £3, with costs, in the Court below.

[Appellant's Attorney: F. W. Greenwood; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

PROVISIONAL CASES.

COLONIAL GOVERNMENT V. { 1902.
ASSIGNEE OF THE ESTATE { Aug. 7th.
OF BENNETT.

Mr. McGregor moved for provisional sentence on a judgment of the Court of the Resident Magistrate of East London. This judgment, given on April 8, 1902, was for £3 4s. 3d., quitrent due, and for this a writ of execution was issued, and a return of *nulla bona* made, consequently there were £2 1s. 10d. taxed costs, and other charges incurred in the matter. It was also asked that the landed property in respect of which such quitrent was due should be declared executable, so that it could be attached to satisfy the judgment, with the costs and the costs of this application.

In reply to the Court, counsel said that the assignee in the estate confessed judgment in the court below.

The Chief Justice said it was a pity that all this property should be sold for

the purpose of paying £3, but, of course, the Government was entitled to its order.

Order granted as prayed.

ILLIQUID ROLL.

STANWAY AND CO. V. BEAUMONT.

Mr. Buchanan moved for judgment, under Rule 329d, for the sum of £120 11s. 8d., less £21 17s., paid on account, for goods sold and delivered.

Judgment granted as prayed.

GOURLAY AND CO. V. DA SILVA.

Mr. Gardiner moved, under Rule 319, for judgment, in default of plea, for £196 15s. 1d., with interest *a tempore morae*, and costs of suit.

Judgment granted as prayed.

REHABILITATIONS. { 1902. Aug. 7th.

Mr. J. E. R. de Villiers moved for the rehabilitation of the estate of Willem Frederick Steynsberg, which was voluntarily surrendered on October 10, 1896.

Order granted as prayed.

Mr. Langenhoven moved for the rehabilitation of the estate of Johannes Steyn, which was sequestrated on September 3, 1892.

Order granted as prayed.

GENERAL MOTIONS.

Ex parte DU TOIT.

Mr. Goch appeared for the petitioner, who had been a member of the Boer forces, and had surrendered on the proclamation of peace. He had been called upon to respond to a charge of high treason, and he now asked the Court to admit him to bail of £2,000 personal security and two sureties of £500 each.

Mr. Nightingale appeared for the Attorney-General, to consent to bail being granted.

Order granted as prayed.

Ex parte LIBERHAGEN AND ANOTHER.

These were similar applications to the above, but the bail offered in each was £1,000 personal security and two sureties of £250 each.

Mr. Goch appeared for the petitioners, and Mr. Nightingale appeared for the Attorney-General, to consent.

Orders were granted as prayed.

MAGGS V. TATI CONCES- { 1902. SIONS. Aug. 7th.

Appeal—Delay in prosecuting appeal—Security for costs.

In allowing an appellant to prosecute his appeal from the High Court of Rhodesia, notwithstanding his default in proceeding with the appeal in the proper time, the Supreme Court may make it a condition that he shall give security for costs

This was an application upon notice given, calling upon the respondents to show cause why an extension of time should not be granted for the setting down for hearing of an appeal from the High Court of Southern Rhodesia.

Mr. Searle, K.C., appeared for the appellant, and read an affidavit showing that the matter had originally come before the Resident Magistrate of Bulawayo, in the form of an action in which the present applicant was the defendant and the respondents the plaintiffs. After hearing evidence, the Magistrate gave judgment in favour of the defendant, with costs. Against this decision the plaintiffs appealed to the High Court of Southern Rhodesia, which reversed the decision of the Magistrate. Notice was given of an appeal to the Supreme Court, and thereafter the present applicant came to Cape Town for the benefit of his health, and on April 4 wrote to his attorneys to the effect that business demanded his paying an immediate visit to England. The attorneys wrote to the address in England, to obtain from him the warrant to have the appeal set down, but it had been impossible to get his reply in time to set the appeal down for hearing within the time prescribed.

Mr. Close appeared for the respondents, and read affidavits which showed that the position they took up was that before they could consent to an extension of the time for prosecuting the appeal, the appellant must give security

for the costs in the Courts below, and also for the costs of the appeal to the Supreme Court.

Mr. Searle, K.C. (for applicant): The applicant's affidavit is clear and in accordance with facts. Respondent's is not, and particularly as to the costs. This appeal might have been prosecuted in the May term, but the time for appeal elapsed on June 13. The appellant had to go to England in a hurry, and went away without signing the necessary power of attorney. I submit that under these circumstances the Court will grant the extension we now apply for.

Mr. Close (for respondent): The applicant relies very much on certain inchoate arrangements made between parties' attorneys. As to postponement, see *Alexander v. Owen* (1 S.C. 87). The question is really one of costs in the Court below. The costs have to be paid, and all we ask is that if security is not given the applicant should be condemned to pay them. The applicant has not shown any good reason for an extension of time.

Mr. Searle (in reply): See paragraph 5 of the affidavit of applicant. I would submit that this is a case for the Court to exercise its jurisdiction by granting relief.

De Villiers, C.J.: The only condition upon which leave can be granted is that the appellant should give security for the costs in this Court and the Courts below, to the satisfaction of the Registrar. If the costs have already been paid in the Courts below, or if security has been given in the Courts below, of course, the Registrar will not require security to be given over again. But if no security has been given in those Courts, nor payments made, then they should be included in the amount for which security should be given, to the satisfaction of the Registrar. As to the costs of this application, they must be costs in the cause.

[Attorneys for Appellant: Findlay and Tait. Attorneys for Respondent: Walker and Jacobson.]

HUNT V STACK

Mr. Buchanan moved that this matter be postponed until August 21.

Postponement granted.

ADAMS V. ADAMS.

Mr. Goch moved for leave to the petitioner to sue her husband *in forma pauperis* for divorce, on the ground of his adultery, committed at Clanwilliam.

The petitioner appeared before the Court, and said that she lived with her parents. She had two children, the eldest three years old. Her parents were poor themselves, and could not help her to bring her action in the ordinary form. Her husband lived somewhere in town.

[De Villiers, C.J. (addressing Mr. Goch) said: If people don't try to earn money themselves the Court cannot assist them. The Court has set its face against these pauper divorces.]

Mr. Goch said that the applicant had the testimony of two householders to the effect that she had no money.

De Villiers, C.J.: But if she has not got £10, why does she not earn it. With the scarcity of servants, I think she could very soon get £10. This case is just on the border line, but you may take your order.

An order was then granted as prayed.

STANFORD V. WILLIAMS AND OTHERS.

This was an application to have made absolute the rule *nisi* granted, May 7, 1902, restraining the respondents from circulating copies of certain photographs, and compelling them to deliver up certain negatives.

Mr. Close, for the applicant, said that a certain part of the order had already been complied with.

The rule was made absolute as prayed.

ROSENSTEIN V ROSENSTEIN.

Mr. Benjamin moved for leave to the petitioner to sue his wife by edictal citation for divorce. Respondent was now in Brazil. Leave was also asked to serve intendit and notice of trial with the citation.

Order granted as prayed, personal service to be effected, returnable on November 30, and leave given to serve intendit and notice of trial along with the citation.

SAPIERS AND OTHERS V. LIP- (1902.
SCHITZ AND ANOTHER. (Aug. 7th.

Village Management Board —
Election of member—Act 29
of 1881.

*L., who was not a registered
voter within the area of the
Village Management Board of
D., and not qualified to be such
as he did not reside within such
area, was elected as a member
of the Board*

*W., being a member of the
Board, was appointed foreman
of works at a salary, and was
afterwards re-elected as mem-
ber of the Board while holding
such appointment.*

*Held, that both such elections
must be set aside.*

This was a motion upon notice to have the election of respondents as members of the Village Management Board of Disseldorf, in the district of Oudtshoorn, set aside. In regard to Lipschitz, it was alleged that he was not a registered voter for the Board, nor was he qualified to be such, nor does he reside within the limits of the area of the Village Management Board, and, further, that he had, in partnership with another man, entered into a certain lease with the Board. As to Van der Westhuysen, the second respondent, it was alleged that he was in the employ of the Board as foreman of certain works, both at present and when he was elected.

There was no appearance for the respondents.

The affidavit of Mondel Sapiers, Jacob Saiomon, and Johan A. Ferreira, all of Dysselsdorp, in the Division of Oudtshoorn, stated:—

1. That deponents are all landed proprietors, householders and registered voters resident within the limits of the Village of Dysseldorp, in the Division of Oudtshoorn, which village is incorporated under the Village Management Act of 1881.

2. That an election for members to constitute the Board of Management for the coming twelve months took place at Dysseldorp, on July 5, 1902; that upon

a poll being taken the two above-mentioned respondents, and one Philip le Roux, were elected by a majority of votes.

3. That deponents protest and object to the election of the aforesaid two respondents, and show to this Honourable Court their grounds for such objection:

Firstly, in respect of the respondent Maurice S. Lipschitz, deponents say:

(a) That although he is the owner of certain properties situated within the limits of the constituted village and has so owned for years past, he is not registered as a voter of the Ward within which the Village Board of Management of Dysselsdorp has been constituted.

(b) That he is not registered within the limits of the said village, as proclaimed by Government.

(c) That the said Maurice S. Lipschitz, who farms in partnership at Dysselsdorp, with one Adolf Tooch, shortly before his election entered into several contracts of leases with the Board of Management, of which he was then already a member, he having occupied a seat on the Board for the previous year.

(d) That the leases referred to in Resolution No. 9 of the minutes of the Board of April 16, 1902, are for the period of twelve months, commencing May 1, 1902.

Secondly, in respect of the respondent Isaac van der Westhuysen, deponents say that he is also an old member of the Board; he has likewise entered into an agreement with the Board, by his services as foreman over the water-courses; for the services so rendered he draws pay at the rate of 3s. per diem; and this pay he has been drawing for some considerable time past.

And deponents further say that the respondent M. S. Lipschitz has advanced a considerable sum of money to the Board; and that this circumstance tends to clothe the said Lipschitz with improper influence over his two colleagues, both of whom are illiterate coloured men. It is, moreover, contrary to the spirit of the law.

Mr. Searle, K.C. (for applicants): These men are contractors to the Board, and are therefore disqualified under Section 18 of Act 29 of 1881 from being members of it. Lipschitz is moreover disqualified under Sections 4 and 7, as being a non-resident within the defined limits of the village. He is neither a registered voter nor is he entitled to be registered.

Respondents were in default.

De Villiers, C.J.: It is clear that the election must be set aside, as Lipschitz is neither a registered voter, nor qualified to be such, nor does he reside within the limits of the area under the jurisdiction of the Management Board. As to Van der Westhuyzen, it is clear that he could not be elected, because he is the foreman of works, and employed by this Board. Originally he ought not to have been appointed, and having been appointed, he ought not to have been re-elected. The order will be granted as prayed.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset.]

COLONIAL GOVERNMENT V. COATON.

Mr. Searle, K.C., moved on behalf of J. H. Coaton for removal of bar, and leave to plead in an action which the Colonial Government is bringing against him for the recovery of a sum of £16,449 3s., being the difference between the railway carriage for imported goods and for Colonial produce over the Cape Government Railways, which goods had been consigned over the railways during the years 1898, 1899, 1900, and 1901. Affidavits were annexed to the application showing the communications that had passed between the applicants and the Government. The applicant pointed out that it would be necessary for an accountant to go into all his books, and it would take a fortnight or three weeks to do that.

Mr. McGregor appeared for the respondents (the Government).

Lengthy affidavits were read, which showed that both parties were anxious that the case should come on for trial this term, the only difference being that the respondents wanted it set down for an earlier date than the applicant felt could be done, as it was necessary for an accountant to go over the books of the firm to see what was actually due to the Government, the applicant now recognising that the special rates for goods sent over the railway line applied only to goods that were exclusively South African produce.

After hearing counsel, the Court ordered the removal of bar, the plea to be filed forthwith, and the case to be set down for hearing on September 3.

IN THE MATTER OF THE MINORS LTWINHOBEL.

Mr. Buchanan moved for leave to the father and natural guardian of the minors to sell in their interest certain property which had had donated to and held in trust for his minor children. The Master's report was favourable, but he recommended that, as was usual in such cases, the proceeds of the sale be paid into the Guardians' Fund to be paid out to the minors on their attaining their majority.

Order granted in terms of the Master's report.

MCKEATH V. ESTATE OF HABLUTZEL.

Mr. Benjamin moved, on behalf of J. H. N. Roos, secretary to the Board of Executors, and as such administrator in the estate of the late H. P. Hablutzel, for the postponement of the above trial. From the pleadings it appeared that the plaintiff claims a certain sum for the maintenance of certain children, of whom she alleges the deceased was the father. It was alleged by the respondent that the evidence of certain witnesses, whose names were given, was necessary for the defence, but these persons were at present on a visit to England, and it was impossible to get their evidence in time for the trial to come on during the August term.

Mr. Burton said that he was not instructed to oppose the postponement, but to point out that the pleadings disclosed the fact that the plaintiff was a widow, in poor circumstances. She was asking for maintenance from what was undoubtedly a wealthy estate. The respondent was perfectly well aware that these witnesses—in fact, their names appeared on the pleadings in a most substantial and important part of the case—would be required, and that their evidence would be taken on commission. Counsel was instructed to ask the Court to bind the defendants to come to trial at an early date next term. The applicant was anxious to have this matter disposed of as soon as possible. Counsel objected, however, to his client being required to pay the costs of this application. He submitted that, seeing it was respondents' own application to postpone the hearing of this case, that they should pay the costs of this application.

Mr. Benjamin replied that the respondents were perfectly prepared to go to trial as early as possible. They were making inquiries new as to the whereabouts of these persons. They left the Colony, as far as could be ascertained, in April, and were now in England. Possibly they might be back for the November term; but if not, their evidence would have to be taken on commission.

The Chief Justice: You surely do not ask for costs, do you?

Mr. Benjamin said that he thought the costs should be the costs in the cause.

The Court granted a postponement of the trial until the first Monday in the November term, costs to be costs in the cause.

ROBERTSON V. SARNERSKI AND BERMAN.

Mr. Russell moved that the rule *nisi* be made absolute, restraining the respondents from trespassing upon the property of the applicants in Kloof-street, Cape Town. The respondents are the owners of certain land adjoining that of the applicant, upon which they are erecting certain buildings, and it was alleged that they had demolished a fence belonging to the applicants, which separated the properties; further, that they had placed ladders upon applicant's property, and had placed a scaffolding overhanging applicant's property.

Mr. Close appeared for the respondent Sarnerski, who stated that he demolished the fence under the impression that it was his property, and would now have it replaced. Since objection had been taken, the ladders had been removed, but as to the scaffolding, it was stated that that was put up by the plasterers, who were independent contractors, and that, therefore, the respondent could not be held responsible for their actions.

After hearing Mr. Close, the Court made the rule absolute.

De Villiers, C.J.: If the respondents employ workmen to make certain alterations and improvements, and amongst those workmen are plasterers whom he employs to do certain work, the mere fact that he has given them a contract does not affect his liability. If he wished them not to put up scaffolding on his neighbour's land, he should have told them so, and prevented them

doing so. I think he is responsible, and the rule must be made absolute, with costs.

REX V. JAMES.

1902.
Aug. 7th.

Native—Liquor Licence—Barman
—Secs. 29-30 of Proclam. 255
of 1900.

This was an appeal by Chas. James, of the Masonic Hotel, Kokstad, against a conviction against him by the A.R.M. of Kokstad for selling drink to natives in contravention of Proclamation 255 of 1900.

The accused, one Charles James, of the European Hotel, Kokstad, had been charged in the Court of the Resident Magistrate of Kokstad with contravening Sections 29 and 30 of the Proclamation 255 of 1900 (1) by wrongfully and unlawfully selling, giving, supplying or delivering to a Griqua native, named William Janse, a certain quantity of intoxicating liquor, to wit, two bottles of brandy, the said Griqua native not having produced or being provided with a permit signed by a Magistrate or other competent official authorising him to obtain such intoxicating liquor. (2) That on or about May 26, 1903, and at or near the Masonic Hotel, Kokstad, of which he is the licensed proprietor, the accused did wrongfully and unlawfully, through his barman, one John van Aardt, sell, give, supply or deliver to three Griqua natives, named respectively William Janse, Marcus Laverlot, and Oliver, a certain quantity of intoxicating liquor, to wit, three tots of brandy, the said three Griqua natives not having produced or been provided with a permit signed by a Magistrate or other competent official authority authorising them to obtain such intoxicating liquor. (3) That on or about May 26, 1902, and at or near the Masonic Hotel, Kokstad, the accused did wrongfully and unlawfully through his barmen, John van Aardt and John, sell give, supply or deliver to four Griqua natives a certain quantity of intoxicating liquor, the said Griqua natives not having produced or been provided with a permit, etc.

After hearing evidence, the Magistrate convicted the accused on all three counts and sentenced him to pay a fine of £50, or in default to be imprisoned for

three months with hard labour, and in addition to forfeit his licence to deal in intoxicating liquors.

From this sentence the accused now appealed, on the ground that the evidence adduced before the Magistrate's Court was contradictory, and insufficient to warrant a conviction, and generally that the said conviction was contrary to law.

Sir H. Juta (for the appellant): This is a very important matter for the appellant, because if this conviction is sustained he will forfeit his licence and lose his living. Let us then look at the evidence in the Court below. On one side we have that of three natives, all of whom contradict each other on every particular; on the other side the evidence is perfectly consistent. The case for the appellant was either supported by absolute perjury or it was of irresistible force. The Magistrate evidently believed the Griqua witnesses and not the white men. The story of Jantje was most improbable, as the hotel-keeper would never have forfeited his living in this reckless way by making a man drunk on his premises in open day.

Mr. H. Jones (for the Crown) was not called upon.

De Villiers, C.J.: Certainly there are contradictions in the evidence for the prosecution, but I don't think these contradictions are sufficient to justify the Court in reversing the decision of the Magistrate upon a pure question of credibility. I think these contradictions are explained by the fact that the witnesses had been supplied with drink to such an extent that they were entirely muddled at the end of the day as to what really took place. There was a mixture of drinks—F.C.'s and gins, and whiskies at different times—and it is no wonder that these people were somewhat muddled as to what took place; but on one point they are all agreed, that liquor was obtained on the premises of the defendant, and obtained at all events from the responsible barman, who had charge of the premises. The defendant does not repudiate the acts of the barman, but the defence is that nothing of the kind took place; neither the defendant himself, nor his barman, nor the boy "John," according to their evidence, ever supplied any liquor, and it is suggested that the whole story is con-

cocted. It is not suggested that these people had any motive, but on the other hand there is every motive for the defendant and his people to deny these charges, which would have such a serious effect upon the future prospects of the defendant. After the conviction took place evidence was given of two previous convictions, and sitting as a Court of Appeal, I don't think that I should lose sight of the fact that these previous convictions were on record. The appeal must be dismissed, and the conviction confirmed.

[Appellant's Attorneys: Findlay and Tait.]

REX V. STERN.

Mr. Wilkinson appeared for the appellant in this appeal from a decision of the Assistant Resident Magistrate of the Cape.

Mr. Howel Jones appeared for the Crown.

In reply to the Chief Justice, Mr. Wilkinson said that the case raised the question as to whether certain regulations, prohibiting the sale of liquor to aboriginal natives, promulgated under the Public Health Amendment Act, were *ultra vires*.

The Chief Justice said that as important questions would be raised by the appeal he would prefer it to be heard by a full Court.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

B. BUIESKI AND SON V. HAM- (1902.
MERSCHLAG AND CO. (Aug. 8th.
Sale and Purchase—Delivery.

B. had purchased from H. & Co. certain potatoes, to be delivered at Worcester. The evidence was weak as to the soundness of the potatoes when they were despatched to Worcester, and there was no evidence as to their condition when

the Railway Department were prepared to deliver them. After lying some days at the station B. took delivery and, finding them unsound, refused them. H. & Co. now sued B. for the value of the said potatoes. The Court gave judgment for the defendant with costs.

This was an action for the recovery of the purchase price of certain fifty bags of potatoes, brought by B. Buirski and Son, of Cape Town and Montagu, against Hammerschlag and Co., of Worcester.

The plaintiffs were Garnet Buirski and Isaac Buirski, carrying on business as G. Buirski and Son. The defendants were Mauritz Hammerschlag and Max Schonland, carrying on business in partnership as Hammerschlag and Co.

The plaintiff's declaration was as follows:

The plaintiffs carry on business at Cape Town as wholesale merchants and general dealers.

2. The defendants carry on business as brandy, wine and produce merchants at Worcester, in this colony.

3. The defendants are lawfully indebted to the plaintiffs in the sum of £27 10s., being the purchase price of certain potatoes sold and delivered by the plaintiffs to the defendants in or about March, 1902.

4. All times have elapsed, all things have been done and all conditions have been fulfilled to entitle the plaintiffs to demand payment of the said sum, but the defendants wrongfully and unlawfully neglect or refuse to pay the said sum or any portion thereof to the plaintiffs, although frequently requested so to do by the plaintiffs.

Wherefore plaintiffs claim:

(a) Judgment for the said sum of £27 10s., with interest *a tempore morae*.

(b) Alternative relief.

(c) Costs of suit.

Defendants' plea admitted paragraphs 1 and 2 of the declaration. They said that in or about March, 1902, they purchased from defendants 50 bags of sound potatoes at 11s. per bag, to be delivered at Worcester. They said that certain potatoes which were not sound were subsequently tendered to them, and that

they refused, as they were lawfully entitled to do, to accept the same. Save as above, they denied the allegations in paragraphs 3 and 4 of the declaration.

The Replication was general.

[Mr. Upington (with him Mr. Nightingale) for plaintiffs; Mr. Benjamin for defendants.]

Mr. Upington called

Isaac Buirski, a partner in the plaintiff firm of B. Buirski and Son, said that on March 7 he received a letter from the defendants offering them certain potatoes. In reply, witness wrote on March 12 making a counter offer of 200 bags of good, sound potatoes, which were realising 12s. 6d. in Cape Town, this offer being subject to immediate acceptance by wire. The defendants then wired to plaintiffs saying, "If sound, take fifty potatoes," meaning by that that they would take fifty bags. Witness was at Montagu, and he arranged there about the potatoes, purchasing 300 bags from Messrs. Joubert. Fifty of these bags were sent to defendants at Worcester, and the other 250 bags were sent to Mr. Buirski in Cape Town. Witness personally saw that they were, on the whole, sound, healthy-looking potatoes. The potatoes were despatched from Ashton to defendants on March 15, and an invoice sent, which read, "Fifty bags at 11s. delivered; £27 10s." On March 20 defendants wired from Worcester as follows: "Potatoes not sound; cannot accept; instruct railway disposal." Witness wired to defendants on the same day, pointing out that the potatoes had left Ashton on the Saturday in good condition, and that, as defendants had kept the potatoes six days in the station in the rain, they must accept delivery. The same day a letter was received from the defendants saying that they had examined the potatoes at the station, and found them in such a state that they could not risk forwarding them to a customer, who was expecting them, and that had put them out greatly. It was also stated that the delivery note had been handed to them (defendants) by the railway only on the 19th March. Further correspondence passed, and then plaintiffs wrote to the effect that it was defendants' delivery that was to blame, and not the railway, but defendants could pick out what was good, and plaintiffs would make them any reasonable allow-

ance, although they were not forced to do so, as the potatoes left their stores in good condition. Defendants, however, replied, refusing to accept delivery. Witness had had experience in potatoes.

Cross-examined: Witness saw the loose potatoes in a heap at Joubert's store before he purchased them, and he was satisfied with the quality, but he did not see the sacks actually sent off.

William Hamilton Anderson, the store manager at Messrs. Joubert's, Montagu, deposed to plaintiffs purchasing 300 bags of potatoes from his firm. The potatoes were placed in bags, under witness's supervision. Johnson was one of the boys employed on these particular potatoes. The picking was done carefully. They received special instructions with regard to the fifty bags for defendants, and particular care was taken in picking these. They were good, sound potatoes. They were sent off early on the Saturday morning to Ashton Station, in time to catch the afternoon train for Worcester. These were summer potatoes, and could be kept a fortnight or three weeks in bags, but after that date some of them would go bad. The remaining 250 bags were sent to B. Buirski and Son, Cape Town. All the bags were picked from the same potatoes.

Cross-examined: If the potatoes were bad on the Wednesday, they must have been bad when they were put into the bags. The work of the boy Johnson was to take the bags from the heap, and weigh them. It is possible that potatoes might be decayed inside, so that their condition could not be told without cutting them.

Re-examined: That did not often happen with potatoes.

Jack Wales Bond, the stationmaster at Ashton, recollected receiving on March 15 last a consignment of fifty bags of potatoes from Buirski and Co., and consigned to Hammerschlag, of Worcester. The potatoes were sent on to Worcester by the evening train, which would arrive at Worcester some time on Saturday night. Witness received no notification from Hammerschlag as to acceptance of the potatoes being refused.

Johnson, the store boy at Messrs. Joubert and Co.'s, said that he weighed the potatoes in question. As far as witness saw, there were no bad potatoes, nor any showing signs of growth.

Cross-examined: Witness only weighed, and did not pick these particular potatoes.

Barnard Buirski, a partner in the firm of B. Buirski and Co., said that in March he received first fifty, and then the remainder of the 250 bags from Joubert. As summer potatoes they were fair.

Cross-examined: If summer potatoes were really bad when bagged they would not keep longer than four or five days. Witness did not see the fifty bags sent to defendants.

Walter Edward Picton, the stationmaster at Worcester, said he did not know personally anything about the arrival at Worcester of this consignment of potatoes. They arrived on the night of March 15. He first saw the potatoes on April 3, when they were sold for account of whom it might concern, and realised 6s. per bag. He saw the potatoes. There were some signs of growth, and some of them were bad. At that time the potatoes had been outside the shed, but were covered by a sail. Witness did not notify defendants of the arrival of these potatoes. It was not customary to do so in the case of firms, with whom they had daily transactions. Defendants were such a firm, and were at the station almost every day.

Cross-examined: The potatoes were sold to a dealer, named Harris.

Johan Hendrik Pentz, a market agent, residing at Cape Town, said he had been twenty-four years in the business, and was well acquainted with all sorts of produce. A sound summer potato would keep in bags for ten to fourteen days. If sound, summer potatoes were put into bags on March 15, they would still be saleable at the end of the month, but, of course, they would not be good. Potatoes which realised 6s. a bag after being fourteen days in the bags must have been good when bagged.

Cross-examined: If on March 15 potatoes were bagged, and he examined them on April 3, and found nearly the whole bag decayed, he would say that the potatoes were not sound when put into bags.

Re-examined: Witness was speaking of bags of potatoes kept in a proper store. If kept in a dry place outside it might not make much difference, but still potatoes were better kept in a store. Once potatoes began to go they decayed very rapidly.

Mr. Upington closed his case.

Mr. Benjamin called

Max Schroeman, who said he was one of the defendants in the action, and carried on business with partners under the style of Hammerschlag and Co. Witness went on the Monday or Tuesday to the station to inquire for the potatoes. He was told that they were not unloaded.. Witness was anxious to get the potatoes off, as they had to go under permit to Bloemfontein that week. On the Wednesday the clerk handed witness the consignment note. Witness went personally to the station next morning, and took boys with him to sew up the bags, and remove them. Witness examined the potatoes. There were about 25 per cent. rotten in one bag, and from 15 to 20 per cent. in another. There were rotten potatoes in two other bags which witness examined. Witness telegraphed to plaintiff in the following terms: Potatoes not sound; cannot accept. Instruct railway as to their disposal. This was on the 20th. A railway-checker was at the station, and witness called his attention to the potatoes. He had specially stipulated for sound potatoes. Witness bought potatoes from a farmer, and had to pay a shilling more. Witness's attorneys had written to plaintiffs suggesting that the action should be tried in the Magistrate's Court, but they did not reply.

Cross-examined by Mr. Upington: Witness handed the consignment note back. He did not attend the sale of these potatoes. He would not be surprised to hear that they realized 6s. a bag. He examined four bags, which he selected from different parts of the consignment. He was in a hurry for the potatoes. He did not ask the stationmaster to take the potatoes out at once, as they were perishable. The clerk to whom witness went about the potatoes was now dead.

William Harris, produce dealer, Worcester, said he purchased the fifty bags of potatoes. When he examined the potatoes he found them rotten. He got some sound potatoes from the bags. In four or five bags the potatoes were all rotten. The centre bags were all rotten. Witness found worms and moth, and other insects in the bags. Had he known the condition of the potatoes he would not have bought them.

He considered 6s. a bag too much. The whole contents of some of the bags were sound.

Cross-examined: Out of the whole consignment of 50 bags he got 35 bags of sound potatoes. These he sold for 13s. The potatoes had to be sorted out.

Re-examined: The 35 bags comprised the potatoes which were saleable.

Charles Abrahams, checker at Worcester Station, said that Mr. Schoeman called his attention to the bags. Mr. Schoeman opened a bag for him to look at. Witness saw the potatoes at the top of this bag. They were bad. Other bags had been emptied on the platform. There were bad ones among these.

A coloured driver employed by defendants gave similar evidence.

After hearing Mr. Upington in argument the Court gave judgment for defendants with costs.

Maasdorp J.: The plaintiffs claim from the defendants the sum of £27 as the purchase price of certain potatoes and the defendant pleads that the potatoes tendered to him under the contract were not sound according to the terms of the contract of sale. It appears to me that in this case there is very little conflict of evidence, and I may say this for the plaintiffs: that they have made no attempt to prove their case by any exaggeration. The only question which has to be decided is whether the potatoes which plaintiffs were prepared to deliver to the defendants at Worcester were sound. Now the plaintiffs have given no evidence themselves as to the condition of the potatoes when the railway were prepared to deliver them at Worcester. For that we must depend wholly upon the evidence of the witnesses for the defence. Mr. Isaac Buirski, who saw the potatoes at Montagu in Mr. Joubert's store, says that in his opinion the potatoes, which amounted to something like 300 bags, lying in the store of Mr. Joubert, were on the whole sound. He expresses a general opinion as to the condition of the potatoes which he saw there. He gives no evidence as to which of these potatoes were actually put into the fifty bags which were sent to the defendants. He left the place before this was done, and the matter was left entirely in the hands of Mr. Anderson. So far as the evidence of Mr. Isaac Buirski is concerned, sound

or unsound potatoes may have been put into these 50 bags and sent to defendants. Mr. Barnard Buirski says he considered that the 250 bags of potatoes which he received, and which formed part of the lot sent from the store of Mr. Joubert, were fair. He goes no further. Well, that is the evidence that the potatoes were sound. The question is not whether the potatoes were fair when they were tendered for delivery to the defendants, but whether they were sound, but even Mr. Barnard Buirski could express no opinion as to the fifty bags of potatoes that were sent to Worcester. As to the condition of these potatoes when they left Montagu, we have therefore to depend largely upon the evidence of Mr. Anderson. He says that there were a large number of potatoes lying in the store, and he was superintending the packing into bags. He left the packing to the boys, and he told them to sort the potatoes; and it would appear that almost the whole of the lot lying in the store was put into the bags. Anderson says that the store was practically cleared, and it would be hardly probable that the whole of that lot could have been sound. Anderson says that in his opinion the potatoes were sound. I am inclined to think, on the whole of the evidence that he was wrong. He superintended this packing, and he looked at the potatoes, and he says he told the boys to throw away any potatoes which showed signs of decay. But further than that he cannot go. Even if in his opinion the potatoes externally appeared to be sound, they must be internally sound. This is all the evidence as to the condition of the potatoes when they left Montagu, and I consider that this evidence is weak. The question is rather this: Whether, when the Railway Company, who acted as agents for the plaintiffs, were prepared to deliver the potatoes they were sound. They were not prepared to deliver on the Wednesday, and we have very strong evidence as to the condition of the potatoes, and it is impossible to come to the conclusion that the potatoes in the condition which those lying on the platform are said to have been can be said to be sound. There were some sound ones amongst them, but the proportion of bad ones was so large that I must come to the conclusion that on the whole the consignment must be considered as not

having answered the description of "sound." We have had the evidence of certain experts, who say that delay would cause potatoes to rot, but there does not seem to have been any delay on the part of the defendants. I come to the conclusion that the potatoes were not sound, that the plaintiffs did not comply with the terms of their contract, and that the defendants are not liable for the payment of the price of the potatoes which were tendered to them at Worcester. Judgment will be for the defendants, with costs.

[Plaintiffs' Attorneys: Van Zyl and Buissinne; Defendants' Attorneys: Walker and Jacobsohn.]

VINK V. VINK.

This was an action for judicial separation brought by Mrs. Vink against her husband. In her declaration plaintiff alleged that she and defendant were married out of community of property on the 19th April, 1897, there being two children of the marriage. In and since the year 1898 defendant had been very intemperate in his habits, and on 1st May, 1901, and on other occasions, he had assaulted her. On or about the 23rd May, 1902, he ordered her out of the house. Plaintiff further alleged that she had lent defendant £210, which he had not repaid. She claimed a decree of separation, custody of the children, maintenance for herself and children, and judgment for £210. In his plea defendant denied various allegations. He denied having turned plaintiff out of his house, stating that she left the house on the inducement of her sister, Mrs. Smuts, who was at enmity with him. He denied the alleged debt, and claimed, in reconvention, for an order on plaintiff to return to him.

Mr. J. E. de Villiers for plaintiff; Mr. Buchanan for defendant.

Elsie Maria Vink, the plaintiff, was called, and gave evidence in support of the allegations contained in the declaration. She said that one child was dead and there were two living, aged respectively four years and ten months. Defendant drank a lot, and had often been the worse for liquor. He began drinking about four years ago. He had treated her very badly. On the 21st May, last

year, he struck her on the cheek, and injured her eye. He also kicked her, and she lost consciousness. The servant saw him do this. On the 5th April of the present year he also assaulted her, and on other occasions he had ill-used her. On the 31st May last defendant drove her out of the house. Their child had died a few days previously. Witness took her two children away with her, and went to her sister's house. Witness was now living at Malmesbury. Her sister was assisting to support her and the children. Witness had lent her husband £210. She first lent him £100, giving him a cheque. She had paid a debt for £68 which he owed to Mr. Morrees. Her husband had asked her to return, but she had refused, because she was afraid. She said that if he would swear before an attorney that he would not touch drink again she would return to live with him. She asked for £5 a month for maintenance.

In answer to Mr. Buchanan, the witness said that she had not asked her husband to take her back again.

Mr. Buchanan: Did you not instruct your attorney to write, asking him to take you back?

Witness: No.

Mr. Buchanan read a letter written by plaintiff's attorney, in which the attorney said he was instructed by plaintiff to call upon defendant to restore to her conjugal rights and to make a home for her and the children, and to act towards her in future in a sober and husband-like manner.

Mr. Buchanan: Will you say he speaks falsely if he says that, barring one or two disputes usual to married life, you lived happily together?

Witness: I concealed the ill-treatment until it became intolerable.

Mrs. M. J. Smuts, sister of the plaintiff, said that she lived at Malmesbury, and had known the defendant for some years. While he was on the farm, she had seen him badly intoxicated on several occasions. Defendant became addicted to drink shortly after the birth of his first child. Witness had seen him several times drunk at Malmesbury. When intoxicated, he cursed and swore. She remembered defendant striking plaintiff one day in May of last year. Witness went to defendant, and asked him why he beat her sister. Defendant said he only gave her a slap. Plaintiff's

face was in a fearful condition, and witness asked if that was the effect of a slap.

Cross-examined: Plaintiff had never supplied witness with groceries to the annoyance of the defendant. Witness had told people—their own family—about defendant beating plaintiff.

Nicholas Smuts, husband of the last witness, said he had known defendant for about six years. Witness went to see him at Koeberg, in consequence of a letter sent by plaintiff to witness's wife, complaining of the life defendant was leading her. Witness went over to see defendant, and the latter promised to do better. Witness saw him again in Malmesbury, when defendant was once more misbehaving himself, and he again, on witness speaking to him, promised to reform. One day last May witness went to their house, and found plaintiff with a discoloured eye. Witness had seen defendant, not exactly drunk, but in a state he ought not to have been in. Witness had paid an account for defendant with money he received from the plaintiff. Defendant and plaintiff used to live happily together, but recently they had not done so.

Eliza Klaase said she was in the service of Mr. and Mrs. Vink at Koeberg. At that time her master drank a great deal, and treated his wife badly, beating and kicking her. Then they came to Malmesbury. There Mr. Vink often got drunk. One day in May last year defendant kicked plaintiff, pulled out her hair, and struck her in the eye, discolouring it. Then, on the day the child died, defendant behaved very badly to plaintiff, and the following week drove her away from the house. Witness had never seen plaintiff doing anything to annoy defendant.

Cross-examined: Witness was still with Mrs. Vink, and now lived with the Smuts family. She had heard them talking over this case, and they had spoken to her about it. Defendant beat his wife in presence of witness. Witness was telling what she saw. Defendant was drunk twice every week.

Mrs. Catherine Smuts said she was no relation of the parties to this suit, but she had seen defendant at Malmesbury. In April of last year she had seen him that drunk that he could not move. That was the evening of the day they moved into their house.

Chrittina Stoffberg deposed that on January 29 last she saw defendant very drunk. She had seen him drunk on several occasions previous to that.

Cross-examined: Witness had stayed a month with plaintiff and defendant, and was friends with both.

Mr. De Villiers closed his case.

Mr. Buchanan called

Willem Franciscus Vink, the defendant in the case, who said that at present he resided at Koeberg. After his marriage to plaintiff, they resided four years in the Koeberg district. He did not ill-treat his wife during that period. In April, 1901, they went to live in Malmesbury. It was not true that on May 23 of that year he beat and kicked plaintiff. They had a word or two about a receipt, and witness gave his wife a push. She fell up against the door and hurt her eye, and witness said he was sorry for what he had done. The servant girl Klaase was not in the room at the time. He did not, on May 30, use bad language towards plaintiff. Mrs. Smuts came and began to abuse witness in the presence of his wife. Witness never turned his wife away. Maria Smuts came and took his wife away. Plaintiff had never lent witness £210 in 1897 to pay some debts. She had never paid for a wagon witness bought.

Cross-examined: Witness knew nothing about his wife paying for a wagon for him. He knew nothing about Mr. Smuts having paid £69 for him. Witness had only once been drunk, and that was on account of the races.

By the Court: His wife had never given him a cheque for £100.

The plaintiff recalled, said she gave defendant a cheque for £100. That cheque was part of an inheritance paid to witness through the Board of Executors. She gave defendant the cheque to pay some of his debts.

The defendant re-examined, said his wife did not pay for the seed for the first year's sowing. Witness always paid for his own household expenses.

By the Court: His wife never, so far as witness knew, had £100 of her own. If she had spent money in the house witness must have known of it. Witness had now no means. He earned 4s. a day at present on fencing, but that would be done in a week or two, and then he would only get £2 a month.

He had sold all his stock, etc., but the proceeds had gone to pay his debts. He had been worth about £500 at one time. All witness now had was an old open cart.

Hermann Stoffberg said he lived on a farm at Koeberg, and knew plaintiff and defendant, who had been his neighbours for four years. Witness and the parties to the suit used to visit each other every other day. In witness's opinion plaintiff and defendant lived happily together. Witness often drove into town with defendant, and never saw the latter worse of liquor.

Cross-examined: Witness knew nothing about what happened after the plaintiff and defendant went to Malmesbury.

Jan Miinaar, a cousin of plaintiff's, deposed that he had stayed with plaintiff and defendant for a few days while they were on the farm. Defendant behaved well to his wife, and witness never saw him drunk. After they came to Malmesbury witness had been at their house several times, and they had come often to his house. Defendant appeared to treat plaintiff well, and witness had never seen him the worse for liquor. Plaintiff had never complained to witness about defendant's conduct.

William Berg deposed that plaintiff and defendant lived a little way from him at Malmesbury. They lived in a house belonging to witness. Witness had never seen defendant drunk, although he had seen him in a hotel.

After hearing counsel in argument on the facts,

Maasdorp, J.: The plaintiff sues the defendant in this case for a decree of judicial separation upon the ground that in consequence of his cruel treatment of her it is intolerable for her to live with him, and that it is even unsafe. Now, the evidence that has been given by the witnesses for the plaintiff certainly, I think, goes to prove that at times defendant has given way to habits of intoxication, and that occasionally at such times he has also given way to violence, and that he has used his violence against his wife. I am quite satisfied that the account the plaintiff gives of that assault upon her, when her face was discoloured, and which showed that some extreme violence had been used upon her, was

perfectly correct. That is certainly one clear proof of his having committed some assault upon her at a time when he was under the influence of liquor. If this were the only occasion it would have been best to leave the parties to make it up, and try to live as happily as possible together hereafter; but it appears from the evidence that on several other occasions when he has come home intoxicated defendant has become displeased with his wife, and that he sometimes showed his displeasure by assaulting her. That, she says, makes it unsafe for her to live with him while he is addicted to these habits. His conduct seems to have culminated in his ordering her to leave the house, and as she was leaving, he applied to her most opprobrious epithets or offensive terms, and it was also said by some witnesses that he was in the habit of using bad language towards his wife on previous occasions. I think when violence is used towards a wife by a husband, and when the husband is in the habit of using very abusive terms towards her, the wife is entitled to the protection of the Court, and the only way in which she can be protected is by the Court granting a decree of separation; but I wish to add this, that the parties in this case are very young, and that, although the wife is entitled now, from what she has proved, to an order of separation, it does not seem to me to be a case in which one would anticipate that it is absolutely impossible for the husband to give up what is certainly a very bad habit, and for them to live happily together again. I merely mention this because I do wish to express the opinion that, although plaintiff is entitled to this decree, it is certainly not a very bad case, and I think the wife has not been so badly treated that there is not some hope of a reconciliation hereafter, and if their friends would perhaps aid them in that respect, instead of drawing them further apart, some good might result. However, plaintiff is entitled to an order of separation, and she is also entitled to the custody of the children, because, as the evidence now stands, if the father is addicted to these habits for the present, it is better that he should not have the custody of the children. But now the difficulty arises that it will be necessary for the plaintiff to maintain the children. She wants maintenance for the children

and herself, and the evidence proves to me conclusively that the defendant is not in a position now to make any allowance for maintenance. Under these circumstances, if the children could be provided for by some mutual arrangement, by which plaintiff would be satisfied—if defendant could offer them a home which would be acceptable—she might accept such an offer, but at present she is entitled to the custody of the children, and as no order can be made upon defendant to provide the means, when he has none himself, she will, of course, for the present, be expected to support these children. When I refuse the order for maintenance, of course, it is coupled with permission to the plaintiff to move again at any time hereafter, if she can prove the defendant's circumstances to have changed, for such maintenance both for herself and children. As to the claim made by the wife for £210, I think the evidence placed before the Court is very unsatisfactory on that point. It is quite possible that he owes her the money, but I am not satisfied that it has been proved, and upon that point I will be obliged to give absolution from the instance. A decree of separation will be granted, the plaintiff to have custody of the children, but the defendant will, of course, have reasonable access to them. Leave will also be reserved to the defendant at any time hereafter to move the Court, if it can be shown that the mother should no longer have the custody of the children. Further, the plaintiff will have leave at any time hereafter to move the Court for maintenance for herself and children. There will be absolution from the instance on the claim for £210. Defendant to pay the costs.

[Plaintiff's Attorney: D. Tennant;
Defendant's Attorneys: Berrangé and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

KARIEM V. JANSON. { 1902.
{ Aug. 11th.

Rule 319—Evidence—Interdict.

This was a motion under Rule 319 for judgment in default of plea in an action in which the plaintiff claimed an order declaring him the owner of certain land and entitled to the free and undisturbed use of a certain lane or passage and for an order compelling the defendant forthwith to remove all buildings or obstructions erected by him upon the said lane or passage, and restraining defendant from interfering with the plaintiff's free and undisturbed use of the said lane or passage.

Mr. Upington (for applicant): I submit that under Rule 319 it is not necessary to call evidence.

[De Villiers, C.J.: You had better lead your evidence.]

Mr. Upington called

Mahommed Kariem, the plaintiff, who said that he owned a certain lot of land on the Zonnebloem estate, and defendant owned another lot of land, also on the Zonnebloem estate, adjoining witness's. There was a lane on witness's land, but defendant had the right to use that lane. In January last defendant obstructed a portion of this lane by erecting buildings over it.

By the Court: The building over the lane was a double-storied one.

Correspondence was read in which the defendant acknowledged having unwittingly built on the plaintiff's land, and offering plaintiff the use of a certain well in exchange for plaintiff allowing him the use of the land. Later on defendant's attorneys wrote offering to pay the plaintiff's costs between party and party, and to pay the sum of £5 as and for the purchase price of the said land, defendant further offering to pay the costs of transfer. In the course of further correspondence plaintiff offered to accept £20 for the land and costs to date, but the negotiations fell through.

[De Villiers, C.J.: Mr. Upington, I suppose when you were prepared to accept £20 you meant that the buildings should remain?]

Yes, that would have been as purchase price of the ground.

[De Villiers, C.J.: Would it not be better to amend your declaration so as to claim the value of ground as an alternative to removing the buildings?]

After consultation, counsel announced that his client was willing to accept an order in that form.

In reply to the Court, plaintiff said that he considered the value of the land in question to be £20.

[De Villiers, C.J.: Are you prepared to give defendant transfer of the land on which the building stands?]

Mr. Upington: Yes, my lord, provided that he pays the costs of transfer and of this action.

[De, Villiers, C.J.: As the defendant does not assert any right, there is no need for pressing the interdict portion of the claim.]

The Court then granted an order compelling defendant on or before September 15 next to remove all buildings or other obstructions in the lane mentioned in the declaration unless he shall pay to plaintiff on or before that date the sum of £20 as the purchase price of the land on which the buildings stand, the plaintiff to be ready to transfer the said land to defendant in consideration of such payment, the defendant to pay the expenses of transfer and the costs of this action.

[Applicant's Attorneys. J. H. Reid & Nephew.]

CHRISTIE V. ETHERIDGE. { 1902.
{ Aug. 11th.

Sale and purchase—Warranty—

Actio redhibitoria—*Actio quanti minoris*—Delay—Prescription.

The defendant, on a sale by him of a cart to the plaintiff, warranted it to be in a good and sound condition. After three months, during which plaintiff had seldom used the cart, he discovered that the wheels were not in a good and sound condition, upon which the

defendant undertook to put in new wheels. The defendant having failed to carry out this undertaking.

Held, that the plaintiff was entitled to a refund of the price, he tendering to redeliver the cart.

The actio redhibitoria should be brought within six months after the sale, unless good and sufficient cause be shewn for a further delay.

This was an action to recover the sum of £45, the price paid for a certain Ralli cart, and £25 as damages. The declaration alleged that plaintiff resided at Sea Point, and that defendant carried on business as a coachbuilder. In the month of October the plaintiff bought from the defendant a Ralli cart for the sum of £45, and the defendant warranted it to be in good, sound condition, and guaranteed it for 12 months. On delivery plaintiff discovered that the wheels were not good and sound, and thereupon it was agreed between the parties that the defendant should put on a pair of new wheels. The cart was delivered to the defendant for that purpose, and when plaintiff got it back he found that the cart had not been fitted with new wheels, and that the defects still existed. He therefore refused to accept the cart. He claimed the return of the purchase price and damages. The defendant, in his plea, denied he sold the cart to the plaintiff, and said that in October he sold a cart to one McLeod for £39, and delivered the same to him without any guarantee, and that thereafter, in January, plaintiff brought the cart to him and complained that the wheels were in need of repair. Defendant agreed to repair the same, and having done so sent the cart back. The value of the repairing work was £1, which defendant claimed in re-convention.

Sir H. Juta, K.C. (with him Mr. Gardiner) for plaintiff; Mr. Searle, K.C. (with him Mr. Russell) for defendant).

Mr. Searle said that there was no claim for damages in the declaration served upon the defendant. Damages were alleged, but no specific damages were claimed.

Sir Henry Juta said that damages were claimed in the summons.

De Villiers, C.J.: If the defendant suffered owing to there being no claim for damages in the copy of the declaration served upon him, the Court will confine the case so as to exclude damages, but I do not think defendant could suffer.

Stephen M. Christie, the plaintiff, said he was a broker and commission agent, and lived at Sea Point. He knew defendant, who was a coach-builder. In October last year witness wanted a cart, and went to see a Ralli cart at a painter's place in Sir Lowry-road. McLeod told witness about this cart. After witness had seen the cart he went to Mr. Etheridge's place of business, and spoke to him about this cart. Witness saw defendant on another occasion, and bought the cart from him for £45, defendant giving witness a twelve months' guarantee. Witness then went back to his office, and there, in the presence of Mr. Wilson, a builder and contractor, he saw Mr. McLeod. Witness then made out a cheque for £45, and gave it to McLeod. As far as witness could remember, the cheque was made out simply in favour of John McLeod or order. He gave the cheque to McLeod for the purpose of paying Etheridge. McLeod said to witness: "Mr. Christie, you might allow me to give the cheque to Etheridge. I might get a pound for myself." Witness presumed that McLeod wanted that as a sort of commission for his trouble in introducing witness to Etheridge. After that witness fetched the cart from the painter's, and after a time he found that the wheels were cracking round the rim. He then took the cart to Etheridge, who seemed very much surprised when told about the defects in the cart, saying that he had used in the cart the very best material that money could buy. He promised, however, to make a new pair of wheels for the cart. Witness would not pay for this new pair of wheels. He reminded Etheridge of his guarantee, and the latter did not repudiate it. Witness sent down the cart the following day, and then when it was returned he examined it carefully, and found that they were the same old wheels. The cracks had just been filled with putty and painted over, so as to hide the defects. Wit-

new wheels or the cancellation of the sale and the return of his £45. He received no reply, and on February 17 he again wrote in similar terms, pointing out that legal proceedings would be taken at once unless the new wheels were supplied. He received a reply from defendant to the effect that he could not be held responsible, seeing that he (witness) had bought the cart from a dealer, and not from him. He also said that he could not well afford to give a new pair of wheels when the price he got was only a second-hand price, and that he had repaired the wheels as best as he could. He enclosed an account for £1 for repairs. Witness replied that he had told McLeod in the presence of witnesses that he had purchased the cart from him (defendant).

By the Court: Witness bought the cart as a new one. As a matter of fact, at the time he bought it it had never been painted.

Examination continued: Witness went with one Mr. Curran to defendant's place one day shortly after he had bought the cart. It might have been a couple of weeks afterwards. He then introduced defendant to Mr. Curran as the man from whom he had bought the cart, remarking that as Mr. Curran was a cab proprietor he might put some work in defendant's way. Defendant then said nothing about the cart not having been purchased from him. That was before witness knew that anything was wrong with the cart. About the time witness gave instructions for the issue of summons in this case he went with Mr. Wilson to defendant's to see a buggy belonging to Dr. Hewat. At first witness took no notice of defendant, but afterwards defendant came up and shook hands with him, and then witness asked if he had received his summons yet. He then asked defendant how it was that he had promised to put a new pair of wheels into the cart and then repudiated that. Defendant said that he had seen McLeod, and had found out that he was not straight in the matter. He said: "McLeod came down to me, and said that you (plaintiff) did not want to buy my cart, as you had bought one from him. McLeod then said that he would buy my cart, and I sold it to him." Witness had never given McLeod instructions to say any such thing. Witness told defendant

what had taken place between him and McLeod, and told him that Wilson was present at the interview. In the meantime witness had stored the cart at Mr. Curran's livery stables. He had bought another cart, as he used a cart very frequently in the course of his business. He might have used the Ralli cart, but knowing that there was this action pending he did not do so. He had not yet paid for the storage, but he expected he would be charged about £2 per month. He had tendered the return of the cart.

Cross-examined: Mr. McLeod had first told witness about the cart, and had taken him to see it. He did not say he had the cart for sale, but he said that he could get it. He told witness where to go to buy it. McLeod never told witness that he had bought the cart for £39. There was no guarantee in writing. Witness had the cart for about three months before he noticed that there was anything wrong, but he had used the cart very little. Mr. Wakelin was present on the first occasion when witness spoke to defendant about the cart, but not on the occasion when he bought it.

E. Wilson corroborated plaintiff as to the conversation between McLeod and Christie in the latter's office on the occasion the cheque was given, and also as to the conversation with Etheridge when witness and Christie went to see Dr. Hewat's buggy. Defendant did not then deny the promise to put in new wheels.

William Curran, a cab proprietor, said that the Ralli cart in question was stored at his stables. He was not going to make any charge at present. On one occasion he went with plaintiff to defendant's place, and defendant was introduced to him by plaintiff as the man who built the cart for him—the man from whom he bought the cart. Nothing was then said about the cart having been sold to McLeod.

Cross-examined: Witness understood from what was said that defendant had built the cart for plaintiff. The latter had then had the cart about a month.

Sir Henry Juta closed his case.

For the defence Mr. Searle called

John McLeod, who said he had livery stables in Sir Lowry-road, and knew the plaintiff. With regard to the cart now in dispute he took plaintiff to see it in a painter's shop. Plaintiff said he wanted to buy a Ralli cart, and witness said he

had two for sale in the painter's shop. They went there and saw the carts. One of them was painted and the other was not painted. Plaintiff did not like the one that was painted, and witness told him that the owner of the carts was defendant. One morning later on witness met plaintiff, and the latter said he had bought the Ralli, the unpainted one. Witness said, "You are doing me out of my commission; you might have let me buy it for you, seeing that I introduced you to the shop, and told you everything about it." Plaintiff then told witness he could go up and see Mr. Etheridge. In the afternoon witness travelled with plaintiff in the train, and told him that he had bought the cart. Four days later, in his office, plaintiff gave witness the cheque for £45. That cheque was made payable to witness. Witness paid defendant £39 for the cart. Plaintiff never told witness to give defendant the cheque. Witness never received any receipt from plaintiff. He had received one from defendant (produced).

Sir Henry Juta objected to this cheque being put in through the witness McLeod.

Mr. Searle said that his learned friend knew well enough they could not put it in through Etheridge, who would not be called, as they did not know where he was. The case was being defended by someone interested in his business. Defendant had left the country.

[De Villiers, C.J.: The receipt may be put in.]

Witness took the cheque and cashed it and paid Etheridge the £39. Witness supervised the "doing-up" of the vehicle, which was done in accordance with Christie's instructions. Everything was done as Mr. Christie wished.

Cross-examined by Sir Henry Juta: The cart was brand new. Christie said he bought the cart for £45. Witness did not tell him he had not bought it. Witness did not ask a price from Christie.

By the Court: Witness did not tell Etheridge that Christie had bought the cart from him.

[De Villiers, C.J.: From whom do you say Christie bought the cart?]

Well, I should say he bought it from me.

Did you tell Etheridge that Christie had bought the cart from you?—No.

Why not?—Why should I tell him?

Why should you not?—The man never asked, and I don't tell my business to everybody.

James Wakelin said he was in Etheridge's place when Christie came in about a cart. This was about October. Mr. Etheridge showed him a cart, which he said was £40. Etheridge made some calculations on his cuff, and witness noticed that he put down £45 as the price of the cart. Witness did not tell Christie of this error; he told Etheridge when Christie had left. Christie did not then purchase the cart. He said he would call back about it.

Mr. Searle closed his case.

Sir H. Juta, K.C. (for plaintiff): This is a very simple matter. None of the evidence given by plaintiff is contradicted, and it is not easy to see why Christie should have gone to Etheridge if McLeod was the principal in this matter. McLeod admits that he sold to Christie, but says that he never mentioned the price. Christie tells a friend that he had bought the cart for £45. The sale was then a concluded sale from Christie to Etheridge for £45. The evidence shows that the cart was a brand new one, and now Etheridge tries to get out of his bargain by saying it was a second-hand cart.

Mr. Searle, K.C. (for defendant): Unfortunately the defendant is not here, but the documents put in entirely support his case. McLean seems to have received these carts from Christie for sale. Christie admits that he had nothing to do with Etheridge till he had seen McLeod. Surely, if McLeod had bought these carts from Etheridge, he would have had something to show for it—receipt, cheque or something. If the cheque was not to McLeod, why did Christie give it in favour of Etheridge? If Etheridge could get £45 for his cart, why did he not do so? Christie put down £45 in error. Then as to the question of guarantee, Christie keeps the cart for months and then finds out that there is something wrong with one of the wheels. He cannot set up a case like this. His position is not that there has been a breach of warranty, or that the article was unsuitable for the purpose for which it was sold, but that the cart had not remained in a sound condition for a year. A guarantee of a cart for twelve months does not mean that the builder will take back the article, but

will execute necessary repairs thereon. The *Actio Redhibitoria* does not apply here; the *Actio Quanti Minoris* may, but they are not suing under this. The *Actio Redhibitoria* would not apply unless the cart could not be used as a cart.

[De Villiers, C.J.: Did not defendant bind himself to make two new wheels?]

Then he ought to be sued to compel him to do so. Plaintiff should sue, if at all, under the *Actio Quanti Minoris*. He has no claim under the *Actio Redhibitoria*. He was too late in taking his objection in his letter of February. He accepted the offer of a new pair of wheels, and he cannot now go back on that agreement. Nobody knows to what rough usage the cart had been subjected, and in any case there is no satisfactory evidence of warranty.

Sir H. Juta was not heard in reply.

De Villiers, C.J.: The evidence satisfies the Court that the plaintiff bought the cart from the defendant for £45; that at the time of the sale the defendant warranted the cart to be in sound condition, and guaranteed it to remain in such condition for twelve months; that afterwards, when the plaintiff discovered it was not in sound condition, that the wheels were in a bad state, the defendant undertook to put in new wheels; that the defendant failed to put in these new wheels, and that, consequently, plaintiff is entitled to succeed in the action to have the sale cancelled and to recover the money which he paid. The defence set up is that the defendant sold the cart, not to the plaintiff, but to McLeod. Well, it is quite possible that McLeod may have misled the defendant as to what had taken place; in fact, it is more than possible, it seems to me probable, that McLeod did mislead the defendant, but the fact of his having misled the defendant cannot alter the relations between the plaintiff and the defendant. If the defendant sold the cart to the plaintiff, he is liable to the plaintiff, and the plaintiff has nothing to do with McLeod. It is quite clear from McLeod's evidence that the plaintiff was under the belief that he bought the cart from the defendant. Otherwise he would not have given the cheque for £45 to McLeod. A great deal has been made of the fact that he gave the cheque to McLeod, but that does not seem to me to be extraor-

dinary at all. The plaintiff thought that McLeod was the agent for the defendant, and he understood that McLeod would get something out of the £45, and there was no reason why he should not give the cheque to McLeod, who had been acting as a sort of agent for the defendant. Then there is a denial of the plaintiff's allegation as to a warranty being given, but in regard to this the evidence is all one way. The plaintiff says there was a warranty, and there is no evidence on behalf of the defendant to prove the contrary. The wheels were a very material part of the vehicle, and if the wheels were in such a condition that the plaintiff would not have bought the cart if he had known of the latent defect in the wheels, then I think that he is entitled afterwards to set aside the sale when the defect was discovered. I am satisfied that if he had known the wheels were in that condition he would not have bought the cart. When this latent defect was subsequently discovered, the plaintiff induced the defendant to promise to put in new wheels. The defendant never fulfilled that promise, the defect remained, and the plaintiff then became entitled to recover the amount which he had paid for the cart. On behalf of the defendant, it has been urged that the plaintiff's proper remedy is to recover the difference between the price of the cart as warranted and the true value of the cart with its defects. It is clear, however, from the authorities that the plaintiff has his election to proceed by way either of the redhibitory action or of the action *quanti minoris*. There was a warranty of soundness and subsequent discovery of a latent defect which, if it had been known to the purchaser, would have prevented him from completing the purchase. Grotius (Introd. 3, 15, Sec. 7) and Voet (21, 1, 3) agree that under such circumstances either action is maintainable. This view was upheld by the Court of Holland and Court of Appeal (Van der Keessl. Thes. 642), and no case in this Court has been cited which would justify the contention that our own practice is inconsistent with that of Holland. Another point made was the delay in bringing the action, but the proceedings were commenced within six months after the sale. This is the period mentioned in the books as that within which the action should be brought, but the

period is not mentioned as a final period of prescription, but rather as the time within which it is reasonable that the action should be brought. Some discretion was allowed to the Court to extend the time on good and sufficient cause shewn. In the present case the defendant undertook, after the plaintiff had discovered the defect, to cure it by making new wheels, and while the defendant was supposed to be engaged on his work the plaintiff was justified in not proceeding with the action. Even, therefore, if more than six months had elapsed from the date of the sale to the date of the summons, the delay could not, under the circumstances of the case have been fatal. Judgment must, therefore, be given in terms of prayer A of the declaration, and defendant must pay the costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney: A. W. Steer;
Defendant's Attorneys: Fairbridge,
Arderne and Lawton.]

CLEMEN V. FELTMAN. { 1902.
{ Aug. 11th.

Sale and purchase — Agency —
Evidence.

This was an action for the recovery of the sum of £134 19s., the price of certain 118 sheep and 24 goats, which plaintiff alleged he sold to the defendant at Oudepost, in the district of Wellington, on the 21st May last. In his declaration, the plaintiff said that he sold the sheep and goats to defendant, and delivered them to one Phil. Hotz, who received them on behalf of the defendant. In his plea, the defendant denied that he bought the sheep and goats, or made any agreement with plaintiff. Hotz had no authority to receive the sheep on his behalf.

Mr. Bisset for plaintiff; Mr. Benjamin for defendant.

Henry Clemen, the plaintiff, deposed that early in May last he brought a number of sheep and goats from Saldanha Bay. Witness was aware that defendant was anxious to negotiate with him for the purchase of sheep, and he obtained a permit for defendant to visit his farm. He took the permit to defendant, who, on the 20th May, came to the farm occupied by one Hotz. There was some discussion

about the price, and it was agreed that the sheep should be sold for 19s. a head. There was a disagreement as to the price of the goats, and it was eventually agreed that the price for these should be 19s. The question of delivery was discussed, and it was agreed that the sheep and goats should be delivered at Hugo's River. Defendant said that one of them, meaning himself or Hotz, would come for the sheep. Witness took the sheep to Hugo's River. He waited there for some time, and then sent a boy to defendant's place to tell him to come and fetch the sheep. Hotz came afterwards, and said that defendant was too busy. Witness delivered the sheep to him, and he took them to the Paarl. Witness went to defendant's on the following Tuesday to get the money. Defendant was not there. Witness saw the clerk, who told him to wait. Afterwards defendant came in, and asked witness to take a promissory note from Hotz. Witness refused, saying it was defendant who had bought. Witness refused, because he did not know Hotz. He went to the bank, and could not get a satisfactory arrangement as to the terms of acceptance of a promissory note from Hotz by the bank. Witness subsequently saw defendant, and again demanded payment from him.

Susannah Johanna Clement, the mother of the plaintiff, said that in March last Feltman came to her farm and asked about her son's sheep. Up to that time her son had sent his sheep to Malmesbury. Subsequently, in the month of April, Feltman again saw her, and asked witness to promise if her son came to get him a permit for himself and driver to see the sheep. Later on Mr. Feltman obtained a permit and he came out with Mr. Hotz and bought the sheep. Then witness's son went away to get more sheep, and on May 13 she again saw Feltman at the Paarl, and he asked for a similar permit for himself and driver. On May 18 she and her son went into the Paarl and gave Feltman the permits. The following day Feltman and Hotz came out and went with her son to see the sheep. Feltman then came into the house and spoke about a parcel he was bringing out for her. She had dealt with Feltman for years. While they were on the stoep her son and Hotz

came up, and her son said there was a difference of 13s. between them. The matter was arranged, and Feltman said the sheep should be brought to a certain place on the following day, but witness pointed out that as a permission to remove the sheep had to be obtained that was impossible. There was some discussion about payment, and Feltman said that on Monday they could come and get the money from him. He did not say who would come for the sheep. Hotz took no part in that conversation. Witness's son afterwards took the sheep to Hugo's River, and the following day they went into Paarl and saw Feltman, and witness insisted on the purchase amount of the sheep being paid. There was some trouble about the money, and Feltman would not pay, and said that Hotz was the one who bought the sheep.

Dolph, a coloured lad, deposed to assisting plaintiff to drive the sheep to Hugo's River. When they got there witness was sent to Mr. Feltman to tell him to come at once and receive his sheep. Witness went to Paarl, and meeting Hotz in the street, told him to tell Feltman to come at once and fetch his sheep. Witness did not know where Feltman lived, and he had seen Hotz with Feltman when the sheep were bought. Witness then went back to Mr. Clemen, and subsequently Hotz came and fetched the sheep.

Daniel J. Swartz deposed to meeting Feltman, and the latter saying that he had bought Clemen's sheep.

Cross-examined: Feltman and Hotz were together, and he simply asked both of them if they had bought the sheep, and they said "Yes."

Petrus Baartman said he was the uncle of the plaintiff, and acted as agent for plaintiff to inform Paarl butchers when he had sheep for sale. The defendant asked witness to let him know when sheep came to the farm of the plaintiff. Witness informed defendant when Clemen had this lot of sheep.

Mr. Bisset was proceeding to question the witness in regard to statements made by Hotz in a certain conversation, when

Mr. Benjamin objected.

Mr. Bisset said that the evidence he wished to lead went to show that there was a joint transaction with Hotz and defendant in regard to the sheep.

The Court ruled that the evidence was inadmissible.

Leopold Clemen, father of the plaintiff, deposed to having seen defendant come to the farm on the day of the alleged sale. Witness then asked him if he had bought the sheep, and he replied, "Not yet; they are too lean." Defendant had previously been to the house accompanied by Hotz to buy sheep, and witness had then drawn out a note showing the sale by his son to Feltman.

Mr. Bisset closed his case.

Mr. Benjamin called

Phillip Hotz, who said he had a butchery business at the Paarl in May last. In June he went to England, whence he returned on Thursday last. In April last witness went with defendant to Clemen's farm to purchase some sheep. He purchased sheep from Clemen. Feltman did not then buy any sheep; he bought two goats. Witness subsequently paid Clemen a cheque for £100, and the remainder in cash. In May witness went to the plaintiff's farm, again accompanied by defendant, and saw a number of sheep. He bought the sheep in question from Clemen. The latter sent for him next day, and witness told him that the sheep were bad. He asked plaintiff to take them back, saying he had slaughtered a few, for which he would pay. There was subsequently a discussion as to witness giving a promissory note, and they went to the bank together. Clemen said his parents would sign the note, their signatures being required by the bank manager. Three days later witness saw Clemen again, and told him the sheep were bad, and he offered to pay him £100 for them. Nothing was said about Feltman. Witness remembered the boy coming for him. The boy did not mention Feltman.

Cross-examined by Mr. Bisset: Feltman came to witness and told him that he had a permit to go and buy the sheep from Clemen. It was not the case that Feltman wanted witness to go with him and advise him as to the value of the sheep. Plaintiff and defendant settled about the price of the sheep, witness meanwhile sitting in the cart. Witness had no money to pay for the sheep. Witness went away, leaving defendants behind him. His financial circumstances were not such that he could pay for the sheep.

William Feltman, the defendant, said he was a general dealer carrying on business at the Paarl. On one occasion in

April he took Hotz down to the farm to purchase the sheep, Hotz paying him £5 for going down. Hotz then purchased sheep. On a subsequent occasion Mrs. Clemen came to witness and asked him to take Hotz down to buy some sheep. Witness went down to the farm again with Hotz, who bought the sheep in question in this case. Witness might have seen the sheep; he did not buy them. Next day Clemen came to witness's shop about payment. Witness sent for Hotz, who came to the shop, and Hotz and Clemen went off to the bank. On their return Clemen asked witness if he would endorse Hotz's promissory note, and witness refused. Mrs. Clemen afterwards asked witness to sign the promissory note, and witness declined, saying he had nothing to do with the transaction.

Cross-examined by Mr. Bisset: Mrs. Clemen asked witness to bring Holtz to the farm, and witness did so as a favour to Mrs. Clemen, who was a good customer of witness's.

By the Court: Witness had a permit to go to plaintiff's place. This was made out in his own name. Witness's business in going to the neighbourhood was to collect money which was owing to him. Mrs. Clemen got the permit.

Mrs. Feltman deposed to Clemen coming to the shop one day, and Hotz being sent for. Hotz then said he was sorry that he could not pay for the sheep that day, as he had not the money. Clemen and Hotz then went to the bank together, and coming back, wanted Feltman to sign the promissory note, but he said he would sign a note for no man.

Cross-examined: They wanted witness's husband to sign the note because the bank would not take the note with Hotz's name.

Sidney James Archibald, the manager of the branch of the Bank of Africa at the Paarl, said that in May Hotz came to the bank with Clemen. The latter spoke about the bank discounting a note in his favour. He said it was in connection with a sheep transaction. He never mentioned the name of Feltman. Witness refused to discount the bill without further security than Hotz's name.

This concluded the evidence.

Mr Bisset was not called upon.

After having heard Mr. Benjamin, the Court gave judgment for the plaintiff for the amount claimed, with costs.

De Villiers, C.J.: There is a direct conflict of evidence in this case as to what took place at the time of the sale. According to the evidence of the plaintiff and his witnesses, the sale of the sheep and goats was to Feltman. The defence is, not a denial that the sheep and goats were delivered to Hotz, but a denial that Hotz was the agent of the defendant. It is not directly stated in the plea that Hotz was the purchaser, but we must take it that that is what the defence really amounts to. With regard to the oral evidence, I must say that, in my opinion, the weight of evidence is entirely in favour of the plaintiff. The way in which his witnesses gave their evidence satisfies me as to their credibility, more especially the way in which the old lady gave her evidence. Every detail she gave had the appearance of being truthful. There are two points, however, in the evidence for the plaintiff which are very much relied upon by the defendant. The first is that the purchase price of the first sale was paid by Hotz, and not by the defendant, but this is easily explained by the fact that Hotz in this matter was acting as the agent of the defendant, and that he had gone with the defendant for the purpose of purchasing these sheep. He seems to have been called or spoken of as the driver, but whatever his position was, he was looked upon by the plaintiff as acting in the capacity of agent for the defendant. The object of the plaintiff was to get his money. It did not matter to him who paid the money, so long as he got it. The whole purchase price of the first sale was paid to him practically in cash. Part of it was, no doubt, paid by cheque by Hotz, but that cheque seems to have been honoured at once, and it was equivalent to cash. The plaintiff was apparently not a very good man of business, and seems to have done things in a very loose manner, and this is shown by what took place on the second occasion. The point there relied upon is that plaintiff was prepared to accept a promissory note of Hotz's. That is true, but he was only prepared to accept it in case the bank manager should pronounce him good for the amount. It was not good business on the plaintiff's part to be prepared to accept that promissory note. He ought to have told Feltman, "You are the purchaser, and I insist upon getting cash from you, or

upon getting a note from you." But plaintiff seems to have been ready to accommodate the defendant. His object was to get his money, and if he could get a note from Hotz, it made no difference to him, provided he was secured. He went to the bank in order to ascertain whether Hotz was a man who could pay, and therefore I do not see how the fact of Feltman's name not being mentioned in the presence of the manager at the bank affects this case at all, because plaintiff's object in going to the bank was to ascertain, not whether Feltman could pay, but whether Hotz could pay. Besides, it was quite possible that plaintiff might have spoke of Feltman without it having struck the bank manager, who was solely consulted on the question as to whether Hotz's name was good. In cases of discrepancies of this kind, the Court must always be guided to a very great extent by the contemporaneous documents. Now certainly the documents which have been put in in this case—the two undoubtedly genuine documents—entirely support the view given by the plaintiff. On the first occasion, when the defendant came to purchase sheep, he applied himself for a permit, and on the form of application for that permit there appears, "Full name, W. Feltman and driver," and "reason for going in full, business," and he thereupon obtained a permit from the Magistrate of Wellington, who endorsed upon it, "I have no objection to Mr. W. Feltman and driver coming from Paarl to Wellington, if the Deputy-Administrator of the Paarl consents, for the purposes of business." Then the subsequent application for a permit really shows what the plaintiff himself understood. This application for a permit was made out quite independently of the other application, and here again it is in exactly the same form. It was written out by plaintiff himself. He must have understood that it was the defendant, who had previously purchased, and that he was coming down again as a purchaser, for he stated, "Full name, W. Feltman and driver." Here again we have the permit of the Magistrate endorsed, "I have no objection to Mr. W. Feltman and driver coming from Paarl to Wellington, if the Deputy-Administrator of Paarl consents." So that, even if there had been a doubt in this case, these documents, I think, ought to have settled it, but seeing that

there was, in my opinion, not sufficient doubt to cast discredit upon the plaintiff's evidence, I am of opinion that, even without these documents, the judgment of the Court must be for the plaintiff, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Faure and Zietsman; Defendant's Attorneys: R. F. Marais.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

CARTER V. HOWSE BROS. { 1902.
AND THE ROYAL BANK { Aug. 12th
OF QUEENSLAND.

Mr. Searle, K.C., moved for judgment in terms of a consent paper, signed by Messrs. Howse Bros., for the sum of £388 4s. 6d.

Mr. Schreiner, K.C., appeared to oppose on behalf of the Royal Bank of Queensland, who had come into the case as intervening defendants.

The Court gave judgment for the plaintiff as against the first-named defendants, in terms of the consent paper, this judgment not to affect the proceeds of the butter (which formed the subject of the action) attached to found jurisdiction, and now in the hands of the Registrar of the Court, nor to prejudice the defence of the intervening defendants; costs to be costs in the cause.

KOPOLOWITZ AND BERMAN V. FROST.

This was an action to debate and settle an account.

The defendant, a law agent, practising at Simon's Town, now appeared in person, and asked for a postponement, owing to untoward circumstances, a telegram despatched to him on Thursday not having reached him until Monday, and he understood meanwhile that the matter had been settled.

The Court granted the postponement, and fixed August 29 for the hearing of the case.

KHAN V. AREND.

1902.
} Aug. 12th.

Sale and purchase—Conditions of sale—*Onus probandi*—Admission.

The onus of proving that the conditions of purchase have been fulfilled rests upon the purchaser, but such onus is discharged by the admission of the vendor, made in presence of credible witnesses, even though he may afterwards deny that he has made such admission, and the evidence may suggest a doubt as to whether it was not false in point of fact and made for a fraudulent purpose.

This was an action brought by Jerocham Elias Kahn against Hadje Omar Arend for an order compelling defendant to pass transfer of certain property. There was a counter-claim for £100, part of deposit on the purchase price, etc.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Cape Town; the defendant resides at Claremont, in the Cape Division.

2. On the 14th day of January, 1902, the defendant sold to the plaintiff a certain house and premises, situate in Cape Town, according to a written agreement of sale, copy of which is annexed hereto, for £150.

3. The defendant has received the said £150 sterling, part of the said purchase price, and the plaintiff has tendered, as he hereby again does, to perform all the other obligations on his part, and all things have happened, and all times have elapsed, and all conditions have been fulfilled to entitle the plaintiff to claim transfer, but the defendant refuses to carry out his part of the said contract and to pass transfer of the said house and premises.

The plaintiff claimed: (a) That the defendant be ordered to pass transfer of the said property, in terms of the said agreement of sale, the plaintiff tendering performance of all obligations on his part; (b) alternative relief; (c) costs of suit.

The defendant's plea and claim in reconvention were as follows:

1. Paragraphs 1 and 2 are admitted.

2. Defendant denies all the allegations in the 3rd paragraph, and craves leave to refer to the terms of the agreement of sale annexed to the declaration. The plaintiff has only paid the sum of £50 on account of the said sum of £150, and the balance, to wit, £100 is still due and owing by the plaintiff to the defendant.

3. The defendant has always been ready and willing, has tendered before issue of summons, and hereby again tenders to carry out his part of the said agreement, and to pass transfer of the said house and premises upon payment by the plaintiff of his (the plaintiff's) obligations under the said agreement, but the plaintiff has refused and still refuses to pay the said sum of £100, or to take transfer in terms of the said agreement, although duly called upon by the defendant to do so.

Wherefore, subject to the above tender, the defendant prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant (now plaintiff) says:

1. He craves leave to refer to the terms of the above plea which he prays may be considered as if inserted herein.

2. All times have elapsed, all things have been done, and all conditions have been fulfilled to entitle the defendant (now plaintiff) to claim that the plaintiff (now defendant) be ordered to take transfer of the said house and premises in terms of the said agreement, and to entitle the defendant (now plaintiff) to payment of the said sum of £100.

Wherefore the defendant (now plaintiff) claims: (a) An order compelling the plaintiff (now defendant) to take transfer of the said house and premises and to pay to the defendant (now plaintiff) the sum of £100 in terms of the said agreement, the defendant (now plaintiff) tendering performance of all obligations on his part; (b) Failing compliance with the terms of prayer, (a) An order cancelling the said agreement; (c) alternative relief; (d) Costs of suit.

The clauses of the conditions of sale bearing upon the present case were: "1. Transfer must be taken on or before the 1st day of April, 1902. 2. The pur-

chase price to be the sum of £2,500, £150 to be paid at once."

Sir H. Juta, K.C. (with him Mr. Goch), for plaintiff; Mr. Upington for defendant.

H. J. Dempers, an attorney of the Court, and a partner in the firm of Dempers and Van Ryneveld, said that on February 14 the parties to the suit came to his office and gave him instructions to draw up certain conditions of sale. Witness took the instructions from the parties for that purpose. Witness had in his office at the time an articled clerk named Du Toit. Witness went into that clerk's room with the parties and gave him instructions to type the draft. Witness, in the presence of Du Toit, made inquiries with regard to the £150 to be deposited. The parties came to witness's office on February 14, just about ten minutes to one o'clock, when Mr. Van Ryneveld and all the clerks, with the exception of Du Toit, were away at lunch. The parties told witness that the one had sold and the other had bought a property, and they wanted witness to draw up certain conditions of sale. Witness asked what the conditions were, and they told him. Witness asked how payment was to be made, and they said that £150 were to be deposited at once, and that a bond of £400 was to be given by the plaintiff to defendant without interest, defendant, as a Malay, not being allowed to take interest. While Mr. Du Toit was writing, witness asked about the deposit of £150, and both plaintiff and defendant replied that £100 had already been paid, and that £50 was to be then paid by plaintiff giving defendant a cheque. The plaintiff asked witness whether it was necessary to get a receipt, and witness said that it was not. All that was paid in witness's office was the £50. The defendant stated that he had received the £100 that morning. The plaintiff and the defendant both admitted the payment of the £100, so that witness thought there was no necessity for a receipt. The plaintiff was a Jew and the defendant a Malay. They both spoke English and Dutch, and as witness knew both languages he could not possibly have misunderstood what they said. Witness subsequently saw the parties on different occasions. Then on April 1 he received the letter from Messrs. Arderne and Wolff, defendant's

agents, asking payment of the £100 of the deposit so that transfer could be passed. After the receipt of the letter of April 1 the defendant came to witness's office, and witness, before opening conversation with him, called his partner, Mr. Van Ryneveld. He then said to defendant: "Do you deny having said that you received £100 from Hahn?" Defendant replied that he did not deny having said that he had received £100, but Khan had asked him to do so. With regard to the bond, Kahn and Omar came to witness again and Kahn said: "Mr. Omar wants me to give him a bond bearing interest." Omar said he wanted to cede the bond over to somebody else. Witness said that the bond must just be given according to the conditions of sale. Omar got huffed and went away.

Cross-examined: Witness got no receipt on behalf of his client for the payment of this money. As he had the verbal assurance of defendant, he did not think it necessary to take a receipt from him. Defendant often came to witness's office subsequent to the signing of the conditions of sale. Mr. Du Toit was present on the first day, when defendant said that Kahn had given him £100. Witness was astonished when he received the letter of April 1 asking for the £100.

By the Court: The first time defendant and plaintiff came to witness about this matter was on February 14, when they asked him to draw up the conditions of sale.

Re-examined: Witness often saw defendant after the conditions of sale had been drawn up, but the first he heard about the £100 not having been paid was when he received the letter of April 1.

Francois Daniel du Toit said he knew the parties to the case. Witness now resided at Humansdorp, but in February last he was an articled clerk. He remembered the parties to this suit coming to the office, and after a little witness was instructed to make a clear copy of the conditions of sale. One of the conditions was that £150 had to be paid at once. Witness started typing the deed. When he came to the clause about the £150 deposit, Mr. Dempers came into the room and asked defendant whether that deposit had been made already. Defendant said "Yes, Kahn paid me £100 this morning, and the other £50 is to be paid now." Kahn filled in the cheque and handed it over to defendant. Khan then

asked Mr. Dempers whether it was necessary to take a receipt from Omar, but Mr. Dempers said it was not necessary as Omar had admitted in witness's presence that he had received the deposit.

Cross-examined: The clause regarding the deposit was discussed, and then witness typed it from dictation. Witness did not know why the cheque was post-dated February 28. Nothing was said about that in his presence.

Mr. Dempers, recalled by the Court, said he did not know why the cheque was post-dated, but he supposed it was an arrangement between the parties. The cheque never passed through witness, but was given direct to Omar by Kahn.

Anthony van Ryneveld said he was Mr. Dempers's partner, but had had nothing to do with the matter now in dispute until the month of April. One day, after they had received the first letter disputing the payment of this £100, witness was in Mr. Dempers's office when defendant was there, and he remarked to the latter: "What is all this; how is it that you deny receiving this £100; surely you don't mean to say that you never said you received this £100?" Defendant's reply was, "No, I won't deny I told Mr. Dempers so, but it was at Kahn's suggestion."

Cross-examined: Witness had told Mr. Watermeyer that Omar had made that admission in his presence.

Jerveham Elias Kahn, the plaintiff, stated that on February 14 last he went with defendant to Mr. Dempers's office. Previous to doing so, and on the same morning, witness had seen defendant at his house on the Claremont Flats, and had asked him for a chance to buy the property now in question, reminding defendant that he had previously promised to sell him a house which he had afterwards sold to another party for £100 more. They then came to Cape Town together, and after going to Koch and De Waal's, visited the premises in Pepper-street together. Then they went to defendant's office at his stables in Bloem-street, and there came to the agreement for the purchase of the house. It was arranged that witness should make a deposit of £100, and he paid defendant in the office in notes. It was after they left the house that they agreed that witness should make a further deposit of £50, in consideration of witness receiving the

rents of the property—£25 per month—for the months of March and April. Witness told Omar that he had not then the money to pay the additional £50, but that he would ask his brother for it. When witness paid Omar the £100 at his office, he asked him for a receipt, and Omar said that directly they got to Mr. Dempers's office he would give him one. Witness was rather doubtful, and Omar, in the presence of one Polonis, said that he had received £100 from witness, and that they were going to Mr. Dempers to settle the conditions of sale. Polonis heard this. It was after this that they began to talk about the £50. Witness went to his brother's house in Dorp-street, and got a cheque from him. This was dated the 28th February. Witness told Omar that he had got the cheque from his brother, and that he would post-date it, because he was not certain that the balance at the bank amounted to £50. Witness remarked to Omar that the cheque was as good as a promissory note. This occurred in Mr. Dempers's office. When witness went to the office, they told Mr. Dempers what they required. Witness did not tell Omar to say that he had paid him £100. According to the conditions of sale, witness had to give a bond for £400, with no interest. A couple of days after the conditions of sale had been drawn up, Omar asked witness to give him a bond, with interest. They went to Mr. Dempers's office. In the meantime witness had signed the necessary papers.

Cross-examined by Mr. Upington: Witness got the cheque the same day; he did not have it in his possession the previous day. Witness had £50 of his own, and the other £50 he borrowed from Mr. Blumenau a few days before. The money was in notes. He could not say what kind of notes they were. Witness told his attorneys that he had paid the money in the presence of a witness, and his attorneys wrote to the defendant to that effect. Witness thought Polonis was as good as a witness. Witness asked to have something put into the agreement showing that he had paid the £150. Witness did not want Omar to take £50 cash and a promissory note for the balance, and to give a receipt for £150, in order that it might be shown to Mr. Dempers in connection with the advances on mortgage.

By the Court: Witness first spoke about buying 3, Pepper-street on the 14th February. He borrowed the £50 before this; he borrowed the money so as to be ready if he bought the place.

Nathan Polonis deposed to seeing Kahn and Arend coming out of an office one morning. Witness was going to see Kahn. Kahn said that he had given a deposit of £100 on account of the purchase to Arend. The latter said that the house was now Kahn's. Kahn suggested that they should go to the office to write out a receipt, and they then went away. Defendant exhibited a roll of notes, and said he had been paid by plaintiff.

Cross-examined by Mr. Upington: Witness had been working with plaintiff's brother. Witness did not see any money.

Re-examined by Sir Henry Juta. Witness had done some contracting work for plaintiff's brother, but had never been in his employ.

By the Court: Witness asked Kahn if he had made a deposit. He did this because he wanted to advise him to make a deposit.

Essel Bluemenau, of Caledon, stated that in February he lent plaintiff £50.

By the Court: Witness lent the money for nothing. Witness did not take a receipt. Kahn had helped him previously, and witness lent him the money in return. Kahn had not yet paid him the money back.

Sir H. Juta closed his case.

Mr. Upington called

Hadje Omar Arend, the defendant, who said that on the 14th February he sold 13, Pepper-street, to the plaintiff. The first negotiations between witness and plaintiff were with regard to a house in Loop-street, but nothing was done in regard to this. Kahn first spoke to witness about the Pepper-street property on the stoep of Mr. De Waal's store, and they there agreed upon the sale of the house. Plaintiff said he would pay £50 deposit. Witness insisted upon £150 being paid in cash. Witness did not meet Polonis, and did not show him a roll of bank notes. Witness went to Dempers's office, and received a cheque for £50. It was postdated, because plaintiff said his brother was expecting money. The other £100 was not paid, because plaintiff said he wished to arrange about the mortgages to Mr.

Dempers. Witness never admitted that he had received the £100. He had never received the £100.

Cross-examined: Witness did not tell Mr. Van Ryneveld that he had told Mr. Dempers he had received the £100, and that plaintiff had told him to say so. Plaintiff asked witness in Mr. Dempers's office for a receipt for £150. Mr. Dempers was not then present. Witness said, "How can I give you a receipt for £150? Even your cheque is post-dated." Witness did not give a receipt for the £50, because the cheque was, in his opinion, a sufficient receipt. Moreover it was postdated, and there might not have been money to meet it. Kahn asked for a receipt for £150 after the conditions of sale were signed. Before the conditions were signed, Kahn asked for a receipt for the £50, and Mr. Dempers said it was not necessary. It was, first of all, agreed that £50 should be paid as a deposit; but later, at Mr. Dempers's office, it was agreed that the amount should be £150. Witness first agreed about £50 on the understanding that he (witness) was to take the rent (£50) for the two months previous to transfer being passed. On reaching Mr. Dempers's office, Kahn said he wanted to take the rents, and then witness said he must pay £150. Kahn told witness that he had postdated the cheque because his brother had told him he was not sure that he had a balance at the bank.

Re-examined: Plaintiff had this cheque in his possession when he came to witness out in the country about the Loop-street property.

Mr. Upington closed his case.

Sir H. Juta, K.C.: Independent testimony was that defendant admitted the receipt of the money, and no explanation has been given, or suggestion made, as to why he should have made this admission if it were not true. It is common cause that plaintiff asked for a receipt for £150, though the parties are not agreed upon as to the time that this demand was made. No explanation has been offered as to why the plaintiff should have asked for a receipt unless he had paid the money. The plaintiff says that £50 was originally agreed upon as a deposit, it being agreed that plaintiff should draw the rents of the property before transfer was taken: these rents would amount to £50. Defendant insisted upon the deposit being increased,

so as to prevent plaintiff from paying the £50 out of defendant's money; and yet it is admitted by defendant that he never asked for the balance of £100 until transfer was about to be given.

Mr. Upington (for defendant): The only witness to the payment of the money in question is the plaintiff himself, and he is contradicted by the defendant. Mr. Dempers may easily have been mistaken as to what took place in his office. Where the oral evidence is so contradictory the Court will be guided by written documents. Mr. Dempers might easily have got them. The proof adduced by plaintiff is so unsatisfactory that I submit the Court will not accept it in lieu of a receipt.

Sir H. Juta was not heard in reply.

Buchanan, J.: On the 14th February last plaintiff and defendant entered into a written contract of sale of a house and land on certain conditions, which are set forth in writing. This writing was drawn up by the attorneys for the plaintiff in their office, in the presence of the parties. The conditions of the contract are not in dispute, but the question we have to decide is, whether one of these conditions, or a part of one of them, concerning the payment of the purchase price, has been complied with or not. The second clause in the contract reads: "The purchase price to be the sum of £2,500 sterling, which sum shall be paid in the following way," and the first of these ways is, "£150 sterling to be deposited at once." This was a condition which plaintiff had to execute, and plaintiff now comes into court and says that he has executed this condition, and has paid the £150 which it was arranged should be deposited. Defendant says he has not paid this amount, but he acknowledges receiving a cheque for £50 on account of the sum of £150. There is no doubt that the onus is on the plaintiff to establish that he has complied with this condition, and has paid the £150. The first thing that strikes one in this case is, that considering the contract was settled by the attorneys, as far as the written documents put before the Court go, is that there is absolutely no proof that more than £50 was paid of this sum of £150. The plaintiff states that on the day of making the contract, and before he went to the attorney's office, he handed over the sum of £100 in notes to the defend-

ant. The defendant denies that any such handing over took place, and plaintiff admits that no one was present but himself and the defendant. The plaintiff took no receipt or acknowledgment for his money. I must say that if the case rested here, on the documents, I should have had no hesitation in giving judgment against the plaintiff. But there is further evidence in this matter, which has to be dealt with. The parties went the same day to the office of Dempers and Van Reyneveld, and there informed Mr. Dempers of the contract, and got him to draw it up. This second condition as to the £150 being deposited at once was stated to the attorney, but the plaintiff says he informed the attorney before the contract was executed that he had already paid the £100; that he produced a cheque signed by his brother for £50, which he filled in with the defendant's name, and handed it over to the defendant, in the attorney's premises, and then said to the attorney, "Do I need to take some receipt for it?" and that the attorney told him, "No, the payment will appear in the document." The attorney himself gives a different version. He says that after the signing plaintiff asked whether he should not have a receipt, and he (the attorney) said, "It is not necessary, because the defendant has acknowledged in our presence that he has received the £100, and the £50 is now handed over." The defendant gave a third version, and says he was asked for a receipt, but did not give one, saying that the cheque, which was postdated, and which was made to order, would itself be a receipt. It must strike anybody as being very extraordinary that when persons go to an attorney's office for the purpose of having an agreement between them placed beyond all dispute, there should be this extraordinarily loose way of treating the contract. Transfer was to be passed before the 1st April, but there was some delay, owing to it being necessary to get the consent of the mortgagees, and hence the matter hung up for a short time; but on the 1st April, after some interviews, the defendant's agents wrote to the plaintiff, saying he was prepared to give transfer, and calling attention to the fact that this £100 of the £150 had not yet been paid. In reply, the assertion was made that the £150 had been paid, and it was re-

marked that the defendant had omitted to instruct his agent that the amount had been paid. A reply was sent at once, expressing some surprise at this assertion, and asking for some particulars. On the 5th April the plaintiff's attorneys wrote stating that their client most emphatically stated that the sum of £100 had been paid, and "fortunately, as our client states, in the presence of a witness." This was altogether unfounded. The plaintiff says that he had no witness at all to the payment, but that the defendant showed the notes he received from him (plaintiff) to some person in the street after the payment. The letter goes on: "Subsequently defendant admitted to our Mr. Dempers the payment of the £100." This is rather a misleading statement, because, according to the evidence to-day, the admission was made, not at the time the contract was entered into. There is further correspondence, but no explanation is vouchsafed to the defendant's attorneys in answer to their enquiries for information as to the time and place of payment. The defendant denies that he admitted to the plaintiff's attorneys that this £100 had been paid, but I think it is impossible to put aside the evidence of the plaintiff, the two attorneys themselves, and their clerk, all of whom are positive as to the fact that the plaintiff did make the admission. On the first occasion Mr. Dempers and Mr. Du Toit were present when the defendant admitted this. Afterwards Mr. Dempers called the defendant into his office and asked him whether he did not say that this £100 had been paid, and in the presence of his partner, Mr. Van Ryneveld, the defendant admitted that he had said the £100 had been paid; but he further said he had been requested by the plaintiff to say so, apparently, so far as one can gather from the cross-examination, to prevent any difficulty in the way of raising the loan for the balance of the purchase price, which business the attorneys had in hand. The defendant positively denies that he made any such admission, and in the correspondence he also denies it. Now here we have it sworn to on the one side that an admission was made that this £100 had been paid, and on the other side we have a denial that there was any such admission. Plaintiff is pitted against defendant, and if it

had rested here, as I said before, I should have held that plaintiff had failed to prove the payment; but I think we must take it as proved that the defendant himself did acknowledge to the plaintiff's attorneys on two distinct occasions that he did say the £100 had been paid. If such an acknowledgment was made, and if it was made with the ulterior object of perpetuating what one must always consider a fraud on the persons about to lend the money, defendant must take the consequences, and he should be held responsible for his admission. This corroboration must be put against the defendant's denial, and I think we must hold, under the circumstances, that the plaintiff has discharged the onus which lay upon him of proving that the £100 was paid. It is extraordinary that, as the £150 was paid before the contract was signed, that contract should be drawn up in the terms in which it was drawn up, or that there was no acknowledgment made at the time on the document itself that the £150 referred to therein as to be deposited had been paid as one cannot commend the attorneys' conduct in this matter. It is carelessness on their part, for if they had done their duty carefully no question would ever have arisen, and this case would not have come into Court. Here we have the oath of the plaintiff against the oath of the defendant, and we have further the evidence of the plaintiff's witnesses, who could not have been mistaken unless they came into Court for the purpose of perjuring themselves, for which perjury there is absolutely no motive. We must take this corroboration, and judgment must be given for the plaintiff as prayed in the declaration, with costs.

Maasdorp, J., concurred.

Plaintiff's Attorneys: Dempers and Van Ryneveld; Defendant's Attorneys: Fairbridge, Arderne and Lawton.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice) and the Hon. Sir JOHN BUCHANAN.]

SIGALOWITZ V. SIGALOWITZ. { 1902.
Aug. 13th.

This was an application for restitution of conjugal rights.

Mr. Wilkinson appeared for the petitioner; the respondent was in default.

Israel Sigalowitz stated that he married defendant at Omatra, Nebraska, in the United States, on September 14. They lived together until July, 1901, when she left him, they having in the meantime arrived in this country. He had asked her to return to him, but she had refused. There were no children of the marriage.

By the Court: Defendant was now in Natal, but to plaintiff's knowledge she had no friends or relatives in that colony.

The Court granted an order for restitution of conjugal rights, defendant to return to plaintiff on or before September 30 next, failing which defendant was to show cause why a decree of divorce should not be granted, personal service to be effected.

Postea (October 14th), the rule was made absolute and a decree of divorce granted as prayed.

APPEAL CASES.

MPOSELO V. BANKS. { 1902.
Aug. 13th.

Bailee—Lessee of movables—
Negligence—Burden of proof.

The defendant having hired three oxen from the plaintiff for the purpose of taking produce to market, used them for two days and then sent them adrift. The plaintiff found one in the "veld" bleeding at the nose, with the head and eyes swollen, and he did what he could for the animal, which soon after died. No evidence was given as to the cause of death. The defence was that

the animal died from "sponsziekte," but the Court below found that this was not the case. It was proved that the defendant was in liquor during the time the ox was in his possession.

Held, reversing the Magistrate's decision, that, under the circumstances, the burthen of showing that the ox died from natural causes lay upon the defendant, and that in the absence of any explanation as to the cause of the animal's condition the plaintiff was entitled to damages.

This was an appeal from a decision of the Resident Magistrate of King William's Town.

From the record of the proceedings in the court below it appeared that Banks was sued by appellant for the return of a certain ox or its value, £20. In March Banks hired from Plaintiff three oxen, agreeing to pay for them at the rate of 6d. per diem each. Plaintiff lent defendant a fourth ox, for which no charge was made. On April 1 three of the oxen were returned, but the fourth was not sent back. The next morning the missing ox was discovered on the veld; it had apparently been beaten, and shortly afterwards it died. For the defence, it was maintained that the ox was not ill-treated, and that its death was due to sponsziekte. The judgment was absolute from the instance, no order being made as to costs.

The following were the Magistrate's reasons for his judgment: In this case Mposelo sues Robert Banks for restoration of a certain ox or its value, alleged to be £20. The ox in question was hired by Mposelo to Robert Banks, with two others (with a third given for training), for a trip to King William's Town, carrying wood. The rest of the span required was made up by Rupert Banks. The wagon returned from King William's Town on Tuesday evening, 1st April (having left Bank's farm on the previous day), and all the oxen in the span were turned loose. It may be remarked Mposelo lives on Banks' farm,

some 200 yards from the homestead. Mposelo alleges that three of the oxen returned to his kraal that night, and that day he found the fourth near Mr. Banks's kraal, bleeding from mouth and nose, head swollen, and eyes blood-red. It is clear he made early representation to Mr. Banks of the condition of the animal, and, moreover, charged Mr. Banks with ill-usage; he also went to the Field-cornet. The ox died either on Wednesday or Thursday night. Mposelo now brings an action for restoration of this ox or its value. The form of action has been questioned, but after consideration of authorities, I am not prepared to say it will not meet the case. Rupert Banks's defence is that the animal died of *sponsziekte*, but that defence will not hold for a moment. The case is a somewhat difficult one. Mposelo contends the death of the ox resulted from injuries sustained whilst hired to Rupert Banks, and as the ox was never formally returned to him, Rupert Banks must make good the loss. Mr. Murray and Mr. Bertram have assisted me with a number of authorities, the most pertinent of which appear to be *Burge* and *Voet*. I have found passages in *Pothier*, *Voet*, and *Pothier* differ from *Burge*. If *Burge* be right, Banks, to succeed, must prove the ox was not lost by his default. If *Pothier* be right, Mposelo must prove the loss would not equally have happened if the animal had been formally restored, and died in his possession. We have no evidence of what the animal died. There were no external marks of violence, and the symptoms stated are inconclusive. It is a pity the carcase was not dissected by either of the parties. If plaintiff had done this, and recent injury disclosed, it would, I think, have materially assisted him in his case. There is no proof death was not from natural causes. It may be contended the ox was over-driven, but the other eleven oxen composing the span are not shown as any the worse for covering seventeen miles with an empty wagon in four hours. There are reasonable grounds for considering Mr. Banks was not quite sober on the trip home, and that the driver had had some liquor. The driver should have been produced. In my opinion, there is no proof the ox was injured or ill-used.

Mr. Gardiner (for appellant) pointed out that defendant and his driver re-

turned home in liquor, and instead of looking after the oxen they turned them loose. It was the primary duty of the lessee to return the animal in the same state in which he originally had it.

Mr. Upington (for respondent) said it was quite clear that the ox died while in possession of plaintiff, who had to admit that when he got it back there were no signs of injury. The head was, however, swollen, and there was bleeding from the nose, but these might have been due to some form of cattle sickness.

De Villiers, C.J.: It appears from the evidence in this case that the plaintiff handed over to the defendant four oxen, three being hired, and the animals were then perfectly sound. Subsequently the plaintiff found one of his oxen near to defendant's kraal bleeding from the nose, and the eyes and head swollen, and he immediately gave notice to the Field-cornet of its condition, gave notice to defendant himself, and seems to have done what he could for the ox, but the animal died. Thereupon, the plaintiff sued the defendant for its value. The defence set up is that the ox fell ill and died without any negligence on defendant's part. It seems to me that it is a case in which the onus lay entirely on defendant to show how the ox came to be in that condition. He had charge of the ox, but he gave no evidence to account for the condition of the animal. But there is evidence to show that he was in liquor; he had been taking several "dops" of Cape brandy, and probably he himself would be unable to account for the illness of the ox. The defence is that the ox had died of *sponsziekte*. Here also I think the onus lay entirely on the defendant, who ought to have produced some evidence to show that the animal's symptoms were the symptoms of *sponsziekte*, but there was no dissection of the body, and no expert to state the cause of death. It seems to me reasonable to believe that there was some ill-treatment to account for the condition of the ox, especially when it is borne in mind what condition the defendant was in during the time when he was using the ox for the purpose of going to the market. The plaintiff has, in my opinion, done everything that could be expected from him under the circumstances, whereas the defendant was not in a condition to take proper care of the ox, and the evidence

subsequently given by him leaves the question in obscurity. As to the value of the ox, there is not much evidence on that point, but if the parties do not agree, the Court could fix it at £10. Do you object to that, Mr. Upington?

Mr. Upington: I really have no information at all as to what the value of an ox would be there.

De Villiers, C.J.: The Court gives judgment for plaintiff for £10, with costs in this Court and the Court below.

Buchanan, J., concurred.

[Appellant's Attorneys: Godlonton and Low; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

ENSLIN V. FORD. { 1902.
Aug. 13th.

Lien—Retention—Debt.

In the absence of agreement to that effect an ordinary creditor is not entitled to retain an article belonging to the debtor, which happens to be in the possession of the creditor, as a security for the debt.

This was an appeal from a decision of the Assistant Resident Magistrate of the Paarl.

The appellant, Jacob Hendrick Enslin, sued the respondent, Henry Gabriel Ford, in the Paarl Resident Magistrate's Court for the return of a carpenter's bench or its value (£2 5s.), and also £2 as damages. Enslin, in his evidence in the Court below, stated that he left defendant's employment on April 17 last, a carpenter's bench of his remaining in Ford's possession. He owed defendant 10s., and that was why he declined to give him the bench. The 10s. was paid on April 22, when Ford said he could have the bench, but as he could not carry it alone, he returned for it on the following day, when Ford stated that he was using it, and asked that it be allowed to remain until the afternoon. Returning the next day, Ford's manager told Enslin that the former had left instructions that the bench was not to be given up. For the defence, Ford deposed that plaintiff owed him 13s., and said that he would come and work for him again, leaving the bench, which was worth 30s. Defen-

dant denied that plaintiff had repaid any of the former sum. He was keeping the bench as security.

The following were the Magistrate's reasons for his judgment: It is quite clear that the plaintiff had a bench—his property—which he left with defendant. It is also clear that the plaintiff owed defendant 13s. According to the evidence, the plaintiff agreed, and made it a condition with defendant that the bench should remain in defendant's possession until he (plaintiff) had paid the 13s. This amount the plaintiff never tendered, and as he failed to carry out his part of the agreement—that is, to pay the 13s.—I gave absolution from the instance, leaving the plaintiff to pay the money and call for the bench. The defendant and his witness gave their evidence in a straightforward manner, whereas the plaintiff contradicted himself in cross-examination, and from the manner he gave his evidence, I could not place full credence thereon.

Mr. J. E. de Villiers for the appellant; Mr. Benjamin for the respondent.

Mr. J. E. R. de Villiers: The chief question in this case is whether there was any agreement between the plaintiff and defendant entitling the defendant to keep the bench until plaintiff should pay him what he owed him. Going through the evidence, hardly a trace can be found of such an agreement, and the Magistrate was clearly wrong in finding such an agreement proved, for the burden of proving it lay on the defendant. Moreover, promises of this kind have to be construed strictly in favour of the promisor and not of the promisee.

Mr. Benjamin (for the respondent): The whole question is really one of credibility. The evidence on behalf of the plaintiff is diametrically opposed to that of defendant and his witnesses. The Magistrate believed the former, and I submit that the Court will not readily reverse the decision of the Magistrate on a question affecting the credibility of witnesses. The substantial question is: Was the 13s. owing by the plaintiff or was it not owing. The defendant swears that no money was paid to him since January 24th. Plaintiff owned defendant 18s. for boots and 5s. for a plank. He had paid 10s. on account. He swears that he saw the defendant on the 22nd and paid the 10s. The defendant denies

that he saw him on that day. Apparently it is not disputed that the bench was given as security. On this point Slabbert's evidence is quite clear, and so is that of the defendant. The real point in litigation was, was anything owing or not.

De Villiers, C.J.: This is an action for the restoration of a carpenter's bench, or failing that for the payment of the sum of £2 5s. The defence is the general issue. There is no plea whatever that this bench was given to the defendant as a pledge or that the defendant had a lien upon it for debt owing by the plaintiff, and in the course of the cross-examination of the plaintiff and of his witnesses the question was not raised at all as to whether the plaintiff had agreed to allow defendant to retain possession of this bench until the debt alleged to be owing by the plaintiff to the defendant was paid. The defendant himself does not distinctly state that such an agreement was made, but one of the witnesses certainly does so, but only, apparently, in the course of cross-examination. The last witness said that the plaintiff consented to his bench remaining in the defendant's shop until he (plaintiff) brought the money he owed the defendant. The defendant himself has not gone so far as this witness. Then comes the judgment of the Magistrate, who in his reasons, says: "According to the evidence, the plaintiff agreed and made it a condition with the defendant that the bench should remain in his possession until he (plaintiff) had paid the debt." Well, really there is no evidence to support this finding of the Magistrate, and seeing that plaintiff was not cross-examined on the point at all, I think the Magistrate was entirely wrong in giving such a judgment. There was no lien, and the defendant had no right to retain this bench because plaintiff owed him money, and for these reasons I think judgment must be entered for the plaintiff for the restoration of the bench or payment of the sum of £2 5s., its value, with costs. There is a further claim for damages, but there is no evidence as to that.

Buchanan, J., concurred.

[Applicant's Attorneys: Botha and Wessels; Respondent's Attorneys: Faure and Zietsman.]

GOLDBLATT V. MERWE. { 1902.
Aug. 13th.

Sale and purchase—Articles to be manufactured Place of delivery.

The defendant, a manufacturer of cigarette boxes, undertook to supply the plaintiff with a certain number at a certain price. The plaintiff took delivery of some at the place of manufacture. After some delay on the part of the defendant in supplying the remaining boxes, the plaintiff demanded delivery of them at his own residence. The defendant offered to deliver them at the place of manufacture. Held, that the defendant was entitled to recover the price upon delivery at the place of manufacture.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town in an action in which the appellant was the defendant. It was alleged in the summons that on or about the 1st March, 1902, the parties entered into an agreement whereby the defendant undertook to supply the plaintiff with 30,000 cigarette boxes. In terms of the agreement, he supplied 10,000, and the plaintiff had paid him the value of this number. The defendant thereafter requested plaintiff to pay him £10 on account of the value of the remaining 20,000, which request plaintiff complied with. The defendant had, however, failed to deliver the balance, and plaintiff claimed the return of the deposit of £10, and also £10 damages. The action was heard on the 11th June. The defendant denied the debt, and filed a counter-claim for the balance of the purchase price, 15 guineas, and tendered delivery of the 20,000 boxes, and he also claimed 15s. for labels supplied. The item of 15s. was not in dispute. The Magistrate, in his reasons, stated that the defendant had not delivered the goods within the stipulated time, nor had he, up to the time of the action delivered them. He had delivered some in in-

instalments, but was paid for these instalments, although he (the Magistrate) was of opinion that plaintiff was not bound to make payment until the completion of the contract. The defendant had £10 deposited in his hands by plaintiff, and he should at any rate have delivered goods to this value.

Mr. Schreiner, K.C. (for the appellant): The judgment of the Magistrate overlooks the principle that the place of delivery is the place of manufacture (*Slater v. Fuller* (1, E.D.C., 1). There there was a question of damages for delay; in this case no such question arises, and that fact makes the case all the stronger. *Burge* (Vol. 3, p. 501, citing Dig. 5-1-19, 2). Here the appellant is the maker and has a lien on the goods he has made until he is paid. *Van Leeuwen* (1-4-19, 26); *Voet* (6-1-20); *Domat* (1-2-22, 15). The Magistrate was wrong in deciding that they should have gone on delivering until only £2 worth of goods were left.

Mr. Upington (for respondent): The argument for the appellant proceeds on the agreement between the parties. It is not disputed that plaintiff had paid money under the agreement. The only duty of the defendant was to receive the cigarette boxes as they were delivered.

[De Villiers, C.J.: To receive them where?]

At the store. It is the custom of the cigarette trade for the maker to deliver boxes.

[De Villiers, C.J.: But plaintiff went to defendant's place to get the boxes.]

He did not thereby waive his rights; he wanted the boxes, and he went to hurry the defendant. Defendant was not entitled to payment until he had completed the contract by delivery. Under the contract payment was not to be made until the boxes were delivered. The custom of the trade is that the boxes are to be delivered by the seller. This has not been contradicted. The boxes were not delivered within the time specified by the contract.

[De Villiers, C.J.: The time was waived.]

True, but now the defendant wishes to adhere strictly to the terms of the contract, but surely he cannot do that if he waives the contract in one respect. Light things such as ordinary shop goods are not subject to the same law as heavy

goods. The usual custom is for the manufacturer to deliver such light goods.

Mr. Schreiner in reply.

De Villiers, C.J.: The only question between the parties so far as I can gather is as to where delivery should be made of the cigarette boxes, which had been sold. Defendant was quite prepared to deliver the cigarette boxes at his own place of business, and he sent a message to that effect to the plaintiff, and repeated his offer by letter. Now, at the trial, the plaintiff did not insist upon the plea that he had not received the cigarette boxes in time. He seems to have waived any objection he might have raised on that ground. But he insisted upon these boxes being delivered at his own house. The defendant offered delivery of the cigarette boxes on payment of the purchase amount, but at his own place of business. In the case of a sale of specific goods the rule of our law is that in the absence of agreement as to the place of delivery they must be delivered at the place where they were at the time of the sale. If goods are ordered to be manufactured they must be delivered at the place of manufacture. If a local custom is relied upon as ruling the case out of the general rule, there must be clear proof of such a custom. No such proof is forthcoming in the present case. One of the witnesses indeed says that on the sale of cigarette boxes it is the custom for the seller to deliver them at the purchaser's place of business, but he has been only twelve months in the Colony, and is hardly entitled to speak with authority as to local customs. The plaintiff received delivery of the first 10,000 boxes at the place of manufacture, and the defendant, having been ready and willing to deliver the remainder at the same place, is entitled to claim the purchase price upon so delivering them. The appeal must be allowed, with costs, and judgment must be entered for the defendant on the claim in convention, and there must be judgment for defendant on his claim in reconvention for 15 guineas, he to deliver to plaintiff the 20,000 boxes on payment of his claim.

Buchanan, J., concurred.

[Appellant's Attorney: R. Greening; Respondent's Attorney: Friedlander and Du Toit.]

DALTON V. DUGGAN.

Mr. Alexander appeared for applicant, and moved for an order restraining the respondent from selling, or in any way disposing of the racehorse Raymond, pending an action to be brought for the recovery of certain money, and restraining any purchaser or purchasers from paying the amount of purchase price to respondent if a sale had been effected before the issue of the order restraining the respondent from selling.

Applicant's petition, which was verified by an affidavit, alleged that the applicant agreed to sell and the respondent to buy the half-share of the applicant in the racehorse Raymond, which was the joint property of the parties. The price was £80, for which amount a promissory note was given by respondent. Subsequently respondent gave the applicant £3 in cash and a cheque for £77, and on the cheque being presented it was found that there were no funds to meet it at the bank. The applicant had been informed that respondent was endeavouring to sell the horse.

A rule was granted calling on respondent to show cause on the 21st August why the interdict applied for should not be granted; the rule to operate as an interdict in the meantime.

Postea (August 21) the rule was made absolute.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REVIEW.

REX V. DEPPENAAR. { 1902.
Aug. 14th.

Martial Law—Escape from prison
—Act 23 of 1888.

*A civilian who has been tried
and sentenced to imprisonment*

*by a Court Martial cannot be
convicted under Sec. 29 of Act
23 of 1888.*

Maasdorp, J. : A case has come before me as Judge of the week from the Resident Magistrate sitting at Springbokfontein, Namaqualand. The accused was charged with contravening section 29, part 3, of Act 23 of 1888, in that, being a prisoner in the Springbokfontein Gaol, he, when employed on hard labour outside the precincts of the gaol, made his escape. The accused pleaded guilty, was found guilty, and sentenced to two years' imprisonment with hard labour. It appears from the evidence that the accused was a farmer living in that district, and that on the 23rd September, 1901, he was tried, and convicted by a Military Court. The original warrant was put in at the trial, but it is not here now; but it would appear from the evidence that the accused was a civilian, and it seems perfectly clear that he was tried by court-martial, and was convicted and sentenced, and on that sentence he is now under imprisonment. Well, this Court has never recognised convictions and sentences passed by any court-martial, and the escape by prisoner, under the circumstances, does not fall under Act 23 of 1888. The conviction and sentence must be quashed.

ADMISSIONS.

On the motion of Mr. Buchanan, Cyril William Elliott was admitted as an attorney and notary.

Mr. J. E. R. de Villiers applied for the admission of Pieter Hendrick de Kock as an attorney and notary.

Granted.

Mr. Buchanan moved for the admission as an attorney and notary of Douglas Davidson.

Granted.

Mr. Close moved for the admission of Johannes Neethling as a conveyancer.

Granted.

PROVISIONAL ROLL.

GREEF V. MCLEOD. { 1902.
Aug. 14th.

Mr. Bisset appeared for the plaintiff;
Mr. C. de Villiers for defendant.

This was an application for provisional sentence for £150, together with interest amounting to £36, on a promissory note made by defendant in favour of the plaintiff. The matter first came before the Court on the 12th July, when the case was ordered to stand over in order to enable defendant to file an affidavit. Subsequently it again stood over for plaintiff to make a replying affidavit. The defendant set up a claim in reconvention for £175 15s. 6d., and tendered the balance £10 4s. 6d. The plaintiff admitted that £63 5s. 3d. of the amount claimed in reconvention was due by her to plaintiff, and applied for judgment less this sum. The amounts in dispute in the account put in on the claim in reconvention were in connection with commission alleged to be due on certain sales, and in respect of certain costs incurred by him in an action undertaken by him on plaintiff's behalf. Plaintiff denied that the commission was due, and that she was liable for costs in the action referred to.

After argument, the Court ordered the principal case to be gone into.

De Villiers, C.J., in giving judgment, said: Upon the whole, the Court is of opinion that this is a case in which the parties should go into the principal case. At first it struck me that the defendant had somewhat shifted his ground, and that provisional sentence ought to be granted against him in respect of the amount which he originally tendered. But the affidavits now before the Court show that plaintiff has also shifted about and now admits a certain amount of the claim made by defendant. Under the circumstances no injustice will be done to either party by ordering the principal case to be gone into. Costs will be costs in the cause.

EQUAL. V. GREENING.

Mr. Buchanan moved for provisional sentence on a certain broker's note for £2,900, and for an amount due for rent.
Granted.

HUTTON V. STAPLETON.

Mr. Buchanan applied for provisional sentence on a promissory note for £45.
Granted.

STEER V. McDONALD.

Mr. Russell applied for a decree of civil imprisonment on an unsatisfied judgment for £37 18s. 8d. and £8 12s. 11d. costs.

Defendant did not appear, and the application was granted.

SMIT V. PELSER.

Mr. Buchanan moved for a postponement until the last day of term.
Granted.

JOSEPHS V. CLASSEN AND ANOTHER.

Mr. Schreiner, K.C., moved for provisional judgment on a promissory note for £600, signed by defendant and endorsed by plaintiff.

Granted.

ILLIQUID ROLL.

ZEEDERBERG AND DUNCAN { 1902.
V. BERMAN. { Aug. 14th.

Mr. Buchanan moved for judgment, under Rule 329d, for £79 16s. 3d., for goods sold and delivered.

Granted.

BRANN V. ETHERIDGE.

Mr. Close moved, under Rule 329d, for judgment for delivery of a certain cart, or payment of its value, £36, with costs of suit.

Granted.

AITKINS V. DOL.

Mr. C. de Villiers moved for judgment under Rule 329d. for £20 and £25 costs.

Granted.

MEROER AND SKAUGEN V. CATANIA.

Mr. Buchanan moved for judgment for £94 9s. 5d., balance of account for goods sold and delivered.

Granted.

SPIILHAUS AND CO. V. KRAMER.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £123 3s. 3d., for goods sold and delivered.

Granted.

REX. V. SMIT.

This matter had been before the Court on , and

it was then ordered that notice should be served upon the Commandant of Malmesbury, ordering him to return the original copy of the record in the proceedings in the Court below to the Supreme Court. This order had been served. The Attorney-General had been summoned to show cause why the proceedings in the case should not be reviewed, corrected, or set aside. The charge against the accused was for having contravened certain martial law regulations. The appeal was made on the grounds that the provisions of the Act which provided for the record to be sent to a judge for review had not been complied with, that there had been gross irregularity of proceedings, the Magistrate having acted in another capacity, being described as D.A.M.L., and that he did not allow the prisoner to cross-examine witnesses and to call witnesses; and also on the grounds of the incompetency of the Court, the accused being tried for an offence not known to law, and further, by reason of the fact that the Magistrate awarded greater punishment than by the constitution of his Court he had power to award.

It appeared that the original copy of the record furnished to the Court bore the letters D.A.M.L., and that the words "Resident Magistrate" had been erased.

Mr. Burton for the applicant; Mr. McGregor for the Attorney-General.

Mr. Burton said that on the certified copy which he had, the words Resident Magistrate were still in. This copy was made on the 14th July, and the attorney who made it would depose that the words Resident Magistrate were in the original when he copied it. There had been no time to make an affidavit, but he believed that this would be shown to be the case, and that there would be evidence to show that the words had been struck out.

[De Villiers, C.J.: Who is responsible for the alteration in the record?]

Mr. Burton: I do not like to go further than the papers before the Court show, but I am told that the Head Constable at Malmesbury is in a position to make an affidavit as to his having struck out the words on instructions. He (Mr. Burton) asked for the matter to stand over, in order that affidavits might be filed.

Mr. McGregor said there was no urgency about the matter. Counsel added that he thought it was desirable that serious allegations like these should not be made on instructions to counsel, but that application for postponement should be made and the allegations put on affidavit.

The Court ordered the case to stand over *sine die*.

REX. V. LE ROUX.

This, a similar application, was also ordered to stand over *sine die*.

REHABILITATION. } 1902. } Aug. 14th.

Mr. Alexander moved for an order for the rehabilitation of Martinus Johannes Prinsloo.

Granted.

GENERAL MOTIONS.

Ex parte KING.

Mr. Upton moved to make absolute a rule *nisi* under the Derelict Lands Act.

It appeared that the publication of the rule *nisi* had been made some time subsequently to its being granted.

Buchanan, J., said that attention had more than once been called to these delays in publication. It had been pointed out that this was not intended by the judge in chambers; otherwise a considerably longer return day would have been fixed.

The application was granted.

Ex parte JOHNSTON.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

Ex parte GOVEMBEDRA AND OTHERS.

Mr. J. E. R. de Villiers moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Granted.

ANNEAR V. ANNEAR.

Mr. C. de Villiers applied for leave to sue *in forma pauperis*.

De Villiers, C.J.: There is a defect in the service, and the summons had better be served in the proper form.

Postea, October 14, a rule absolute was granted to enable the plaintiff to sue *in forma pauperis*.

GREEN AND SEA POINT
MUNICIPALITY V. EGNAL
AND CO. { 1902.
Aug. 14th.

Municipal regulations—*Ultra vires*—Making bricks—Nuisance—Municipal Act 45 of 1882.

The Municipal Act, 1882, authorizes Municipal Councils to make regulations for restraining noisome and offensive trades.

Held, that a person making bricks from clay found on his own land for the purpose of building houses on such land does not carry on the trade of brickmaking, and that a regulation preventing such a person from making such bricks without the consent of the Council is ultra vires of the Council.

Held further, that if any nuisance is caused by such brickmaking it may be interdicted at the suit of the Council or of any person injured by such nuisance.

This was an application for an interdict restraining the respondents from continuing to make bricks at a kiln on the High-Level-road, at Sea Point.

In an affidavit, a surveyor in the employ of the Municipality, stated that he went to the property on May 7, and found that the respondents had commenced brickmaking.

Mr. R. H. Heward, engineer to the Municipality, deposed that the respondents had requested permission to make bricks on their property off the High-Level Road, but that permission was refused. On May 27 deponent visited the spot and found brickmaking going on.

In reply to the Court,

Sir Henry Juta said they denied the right of the Council to frame regulations preventing respondents from making bricks, although they admitted that if it could be proved that such brickmaking was an offensive or noisome trade, the applicants might be entitled to the interdict. They must, however, prove that it was a nuisance.

In their affidavit the respondents said they were builders and contractors and the registered proprietors of a certain piece of land situated above the High-Level Road, Sea Point. Proceeding, the respondents detailed the distances of the nearest houses, all of which were over 50 yards from the brick-kilns in question. The owners of all these houses, with the exception of Mr. Cook (who was in England) and Mr. T. M. Duncan, had signed a document intimating that they had no objection to the making of bricks on the property in question. About November last respondents, thinking they were obliged so to do, applied to the Council for permission to make bricks on the property, which was refused. A further application was made, and it was pointed out the bricks were only for use on the property in question, and that respondents had no intention of making any for sale. To this application, however, a reply was received stating that the Council regretted that they could not depart from their previous decision. Deponents said that with the exception of Mr. T. M. Duncan, to whom they did not apply, he being the prime mover in getting the application refused, none of the residents in the neighbourhood had raised objection. To meet the Council, the respondents had hired a house, at a rental of £7 10s. per month, for their coloured workmen, who would not exceed eight in number. It was also pointed out that owing to the non-existence of proper roads it was extremely difficult to bring bricks for the houses from elsewhere, and further that bricks had previously been made by another party in close proximity to respondents' ground without any nuisance being created. No nuisance had been created by respondents' action, and therefore they asked that the application be refused.

Dr. Kruger and Dr. Abelheim stated on affidavit that they had inspected the brick-fields, and found them situated a considerable distance from any dwelling-

houses, and they were of opinion that there was nothing noisome or offensive in the brickmaking.

A number of affidavits made by residents in the vicinity were read, the general effect of which was that the brick-making was not a nuisance, as proved by the experience during the time Mr. J. H. Mitchell had a brick-kiln in the vicinity.

On behalf of the applicants several further affidavits were read, in one of which E. G. Carter, residing at Avenue Terrace, said that he had in the first instance signed the document stating that he had no objection to the brick-kiln, but at that time he did not contemplate the nuisance it had become through the fumes from the bricks coming towards his house. He believed that in the summer time, when south-east winds might be expected, the nuisance would be more prevalent. In this affidavit, and several others of a similar tenour, objection was also taken to the brick-field on the ground that it brought an undesirable class of labour into the locality.

The Municipal Clerk (Mr. H. Herring), in an affidavit, set forth the complaints which had from time to time been made in connection with this brickfield. He stated that the value of the property of those who had consented to the brickmaking was only £6,640, while the value of the property of those who objected was £61,400. It was also pointed out that although at present brickmaking was only on a small scale, and not many employed, it could not be said to what extent it might be increased, while for the objectionable class of native workmen employed the police protection in the municipality would be quite inadequate.

A replying affidavit by the respondent Engal was read, in which he pointed out that the value of his property, £9,000, should have been added to that of those who consented. As to the properties of the objectors, some of the most valuable were over 1,000 feet from the brick-kilns, one being on the Main-road, 1,700 feet away.

Mr. Schreiner, K.C. (for applicants): The plaintiffs' contention is that we have no power to regulate brick-making. The powers, however, conferred by Act 45 of

1882 are much greater than those conferred by Ord. 9 of 1836. Regulation 148 was made under the Act, and is, I submit, *intra vires*. No doubt brick-burning is *prima facie* a nuisance, but I contend, independently of this consideration, that the regulation is a reasonable one. As to the powers of municipalities under Act 45 of 1882 (see *Trediga v. Rondebosch Municipality* (6 Juta, 321)). In that case the defendants had slaughtered on the same place for 40 years, and yet it was held that they could not continue to do this without the sanction of the Municipality. Slaughtering is not such a nuisance as brick-burning (see Act 27 of 1882, section 7, sub-section 8, and Act 23 of 1897). This Act requires that a trade should be noisome and offensive. Section 9 of Act 23 of 1897 gives much fuller powers. This regulation is not said to have been made under the Public Health Act of 1897, but in considering the question of *ultra vires*, I submit that the Court will look to all the Acts dealing with the powers of the Municipality. I go so far as to say that the Municipality can absolutely stop brick-making. They do not, however, go so far as that, but only insist that people who want to burn bricks should get permission from the Municipality. *Gifford v. Hare* (14 S.C.R., 255). That case goes no further than *Du Toit v. Du Bot* (2 Juta, 213.) In both these cases the Court laid down that they must look to the circumstances of the place, and to the condition of things to which a man comes. A municipality is bound to prevent nuisance, and not to wait until a nuisance has been committed. We are not bound to show that the smell was noxious; it is enough to show that it was unpleasant, and calculated to depreciate the value of the property. In England, the word "offensive" has been considered in various cases. As to offensive trades, see *Lumley on Public Health* (Vol. 1, p. 131), *Wanstead Local Board of Health v. Hill* (13 C.B.N.S., 479). In that case the Act 13 Vic., section 54, was relied upon, as the section restricted the term "noxious trades" to trades in which animal matter is worked up; and hence brick-making was held not to be offensive. Our Statute does not limit the term "offensive trade," as the English Act does.

[De Villiers, C.J.: Is brick-burning an offensive trade?]

There are plenty of English cases in which it has been decided to be a nuisance at common law.

[Buchanan, J.: This is not a question of a noxious trade. But our Act refers to noisome trades; a trade may be noisome without being noxious.]

If a trade causes offence to people, it is an "offensive" trade; it is not necessary in order to be "offensive" that it should be offensive to everybody, or injurious to health.

Sir H. Juta, K.C. (for respondent): I am not aware as to whether regulations on the subject of brick-making are general in this colony. Certainly there are no such regulations in Cape Town. Then the applicants give as a reason why no medical affidavit was sworn on their side that no bricks had been burned at the time the Municipality took action. But we had made bricks long before that. Mitchell did so, and so did one of our predecessors in title. These Municipal Regulations were framed under the Act 45 of 1882. No regulation has been framed under the Public Health Act. See *Dada v. Municipality of Mafeking* (12, C.T.R.). In that case there were two Acts in question—one Act 22 of 1893, the other No. 20 of 1896, which latter was much broader than the former. In the said case, the Act had been promulgated before the offence complained of had been committed.

[De Villiers, C.J.: That Act had not been proclaimed when the regulations were framed.]

That is so, but at the time the offence complained of was committed, the Municipality had power to prevent the offence.

[De Villiers, C. J.: The true test is: "Were the regulations valid when they were made?"?]

It does not appear on the record when they were made. These regulations were framed under the Act of 1885. It is not at all necessary that they should have been framed under any specific Act, it suffices to show that they had these powers under some Act or other. The appellant wishes the Court to hold of their own knowledge that brickmaking is an offensive trade; not that it may become offensive. But we say that this brickmaking is not carried on as a "trade"; the bricks are for respondent's own use, and if the appellant's counsel relies on the distinction between "and"

and "or" I am entitled to insist that no trade is carried on here. Then again the regulation of 1885 makes express provision for people carrying on brick-making on their own land. It cannot therefore be said that brickmaking is in itself an offensive trade. The Sea Point regulations require that any person wishing to burn bricks should obtain the consent of all of his neighbours who reside within a radius of fifty yards: beyond that radius the neighbours have nothing to say in the matter. In this case there is no house within fifty yards.

[Buchanan, J.: It seems that in this case two nuisances are complained of, viz., the burning of the bricks and the presence of the Kafirs employed in connection with the making of the bricks.]

Yes, the applicants bring in all sorts of objections when we press them. They also try to make a point that the people who object are property owners; but surely tenants who live in these houses know better what is a nuisance to them than their landlords, who live at some distance away. The Municipality may have power to regulate and restrain the making of bricks, but certainly not to prohibit it altogether.

[Buchanan, J.: If it is an offensive trade it may be prohibited altogether.]

But here both tenants and medical practitioners agree that there is nothing offensive. We are not within fifty yards of any habitation, and applicants' own regulations practically say that brick-making is not offensive unless it is pursued within that distance. All the reported cases go on the principle that a trade must be carried on in an offensive way in order to be offensive. Mr. Pegram seems to be the chief complainant, and what he complains of is—not the burning of bricks, but the presence of native labourers. It was argued for the other side that if even one person objected to the making of bricks, an interdict might be granted. But nothing has ever been interdicted as a public nuisance because one or two people considered it to be a nuisance. Then again, in the Public Health Acts, offensive trades are specifically mentioned, but brickmaking is not mentioned among these.

Mr. Schreiner (in reply): I submit that this is a case for an interdict. It is not necessary that a man should intend to sell the bricks he makes in order that he may be said to carry on a trade. The

making of bricks is a trade. Surely the Court would never interfere, if a man, having made his bricks, proceeded to sell them. This case differs altogether from *Dada v. Municipality of Mafeking*. Here the regulations were promulgated on the 3rd of August at a time when the Municipality had power to make them. In the Mafeking case there was no power to make the bye-laws when they were promulgated. The view taken by counsel for the respondents as to what constitutes a nuisance is opposed to *Roberts v. Clarke* (18, L.T.N.S., 49), and *Bamford v. Turnley* (3, B. and S., 62), which overrules *Hole v. Barlow* (4, C.B.N.S., 334). See *Lumley on Public Health* (p. 132), *Glen on Public Health* (p. 205), *Bareham v. Hall* (22, L.T.N.S., 116). Lastly, the regulations have never said that brick-making is not a nuisance if carried on more than fifty yards distant from the nearest residence. The regulations only say that if carried on within this distance the neighbours must give their consent.

The Court refused the application.

De Villiers, C.J.: The respondents are the owners of land at Sea Point, and they proposed to build certain houses on that land. It appears that they had obtained the consent of the Municipality of Sea Point to the plans for the buildings. They have clay upon the land, and from that clay it was proposed to manufacture bricks for the purpose of building their houses. *Prima facie* the respondents have a perfect right to do so, as much as they have the right to build upon the land. They are entitled to use the materials found upon their land for the purpose of erecting buildings. They have, however, asked the consent of the Municipality, because, at the time of such asking, they believed that they were bound by a certain regulation made by the Municipality, which provides that no person shall erect a brick, lime, or other kiln without having previously obtained the consent in writing of the owners or occupiers of property within 50 yards thereof, and also the express permission of the Council. The Council refused permission, and thereupon the respondents proceeded to make bricks without their consent. Now if they were not bound to obtain such consent, the fact that they have asked for consent cannot in any way diminish their rights, and therefore this

case has to be decided as though they had never asked the consent of the Council. The Council now asks the Court to interdict the respondents from making the bricks. The general principle of law is that every man may use his land, and the materials thereon, as he pleases, the only limitation being that he shall not do anything unlawful or injure his neighbour. *Sic utere tuo ut alienum non laedas*. Clearly the respondent would have this right, unless there is anything in the Act of Parliament which has been cited which authorises the Municipality to make such a regulation as that now in question, or unless be creates a nuisance to others. The section of the Act relied upon is subsection 5 of section 100 of Act 45 of 1882, which gives the Council power to make bye-laws or regulations for restraining noisome and offensive trades. For the purposes of the present case, the Act of 1897 does not carry the case very much further. There the word "or" is used instead of the word "and" in regard to noisome "or" offensive trades, and wider powers are given in respect to the regulating, restricting, or preventing of noisome or offensive trades. If the respondents are not carrying on a trade any regulation which prevents them from making bricks on their property, although they create no nuisance, would be *ultra vires*. The Act itself does not seem to consider brickmaking to be *per se* a nuisance, for among the purposes for which Municipal Councils may make regulations is that of granting permits for the making of bricks on Municipal lands. In my opinion, the mere making of bricks for the purpose of building a house on a man's property is not carrying on a trade. By the word "trade," I consider is meant any occupation from which a man derives profit or subsistence. In this case there was no profit or subsistence from the mere making of the bricks, and in my opinion, therefore, seeing that these bricks were to be used merely for the purposes of building houses on the property of the respondents, they cannot be considered as having carried on a trade at the time they were making those bricks. For this reason I do not think it is necessary for the Court to consider the further question which has been raised as to whether—even if respondents were carrying on a trade,

even if they made bricks for the purposes of selling them—the Act would be applicable. Any statement of the Court on that point would be a mere dictum, which would not be binding in any future case. We have now to deal with this case, where persons propose to use the clay on their own land to build houses thereon. In my opinion, they cannot be considered as carrying on a trade. For this simple reason I think the application must be refused, with costs. I must add this: That this decision does not conclude the matter so far as the rights of the Municipality or the rights of individuals are concerned. If the respondents make their bricks in such a manner as to be a nuisance to their neighbours, then the neighbours clearly can come into court for an interdict, and the Municipality can, under the powers conferred upon them by the Act, suppress the nuisance, and come to court for an interdict. But in that case they would have to show that the kilns are a nuisance, whereas the present application is not founded upon the fact that the kilns are a nuisance, but is founded upon certain regulations which have been infringed.

Their lordships concurred.

[Applicant's attorneys: Van Zyl and Buissinne. Respondent's attorneys: Tredgold, McIntyre, and Bisset.]

NEALE V. NEALE.

Mr. Upington moved that the rule nisi be made absolute restraining the respondent from withdrawing from the Post-office Savings Bank certain moneys deposited there in her name, and also restraining a third party from parting with certain money paid to him by the respondent, pending an action for divorce, which the applicant is bringing against the respondent.

Mr. Gardiner appeared for the respondent, who had no objection to the rule being made absolute, provided the applicant was ordered to bring his action during the present term. In the course of an affidavit, she alleged that applicant had no claim whatever to the moneys, nor foundation for his divorce action.

The rule was made absolute as prayed, applicant to bring his action during the present term.

LOUDAILLE V. VINE.

Mr. Schreiner, K.C., moved for leave to sign judgment against the plaintiff for not proceeding with his action. Summons was issued in February last.

Order granted as prayed.

MEIRING V. THE MASTER OF THE SUPREME COURT. { 1902. { Aug. 8th.

Master of Supreme Court—Minor children—Re-marriage.

M. and his late wife had executed a joint will whereby their children were instituted heirs to their immoveable property, subject to a legacy of the life usufruct to the survivor. M. being now desirous of contracting a second marriage, the Master insisted that, before doing so, he should in some way secure the children's inheritances. The Court ordered M. to file a record in the Deed's Office of all immoveable property due to the children on his death.

Mr. Searle, K.C., moved for an order compelling the Master of the Supreme Court to grant applicant, Petrus Johannes Stephanus Meiring, a certificate, under section 1 of Act 12 of 1886, enabling applicant to remarry, the said applicant having complied with the terms of the joint will of himself and his late wife. Counsel pointed out that under this will the children of the applicant and his late wife had a share in the movable property, while applicant had the landed property bequeathed to him, as survivor, for his lifetime, the children having no claim upon it until his death. Applicant had submitted the usual account as regarded the movables, but before he would grant the certificate now asked for, the Master insisted that applicant should secure the landed property to the children by passing transfer of it, retaining the life usufruct.

The Master appeared in person, and pointed out that he had not ordered the transfer, but had only suggested it as

one way of meeting the difficulty of securing to the children their interest in the landed property.

In the course of argument, Mr. Searle pointed out that the inheritance could not be said to be due until after the death of the father, the survivor, the will being clear on the point that the children only had a claim upon the property after that event. The applicant, however, was willing that a copy of the will should be deposited in the Deeds Office, or some other notification given, in order that the property might not be mortgaged or transferred, and that the interests of the minors might thus be protected.

After hearing counsel, the Chief Justice said that in one sense the inheritance might be said not to be due, but the minors had a vested interest, the testator having only a usufruct of the property, and he thought there should be a record of that in the Deeds Office. Upon that record being completed, the Master would give applicant a certificate. The applicant must have such a record completed of such property as had already been transferred to him, and with regard to property in the estate not yet transferred to him, he would have to give an undertaking to have such record made when transfer was passed.

Under these circumstances no order was made, it being understood that the Master would give the certificate when the suggestions of the Chief Justice were complied with.

TUNNELL, DUNCAN AND CO. V. SIR JOHN JACKSON (LIMITED).

This matter, which had been set down for to-day (Friday), was mentioned, and a postponement asked for, owing to the death of one of the principal witnesses through an accident at Simon's Town.

The postponement was granted, and September 2 fixed for the trial.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K. & G., LL.D.) the Hon. Sir JOHN B. CHANAN and the Hon. Mr. Justice MAASDORP.]

APPEAL CASES.

HART V. WILSON. { 1902.
Aug. 15th.

Landlord and tenant — Assignment of lease—Option of purchase.

Under a written agreement of lease of a farm the lessee had the right to purchase the farm at a certain price before the expiration of the lease on giving notice in writing to the lessor. The lessee assigned his rights under the lease to the defendant, who was accepted as tenant in lieu of the lessee by the lessor (the plaintiff), and paid rent to her. Before the expiration of the lease the lessee informed the plaintiff that he did not wish to purchase the farm himself as he had assigned his rights to the defendant, and the defendant gave notice in writing to the plaintiff of his (the defendant's) intention to purchase the farm at the price agreed upon.

Held, that the defendant was entitled to completion of the purchase and transfer of the farm.

This was an appeal from a decision of the Chief Magistrate of Griqualand East, sitting at Kokstad, in an action in which the present respondent, Mrs. Wilson, was the plaintiff, and the present appellant, Richard Hart, was the defendant. The action was for £25, for the rent or hire, of a certain farm, and also for £100 damages. The defendant's plea was to the effect that

he had an option to purchase the farm, having taken over the lease of the farm, along with the said option, from one Pretorius, to whom it had originally been granted. Defendant claimed, in reconvention, that he should be allowed to take over the farm for £450. The point in dispute was whether the assignment of the lease and option to purchase was a good one or not. The action was first heard before the Acting Resident Magistrate at Qumbu, who found that Mrs. Wilson had consented to the assignment, and gave judgment for Hart. Mrs. Wilson thereupon appealed to the Chief Magistrate, who reversed the decision of the Magistrate, and gave judgment for Mrs. Wilson for £20 damages. Against this decision Hart now appealed.

The Magistrate, who tried the case in the first instance, in giving the reasons for his judgment in favour of the defendant, said: In this case the plaintiff, Mrs. Wilson, sues the defendant, Richard Hart, for £25, being amount of rent at £5 per month for the farm Roza; secondly, to show cause why he should not be forthwith ejected from the said farm, and thirdly, for £100 as and for damages sustained by her in consequence of defendant neglecting and refusing to deliver up possession of the said farm at the end of the year 1901. The defendant files a plea in which he pleads the general issue to all the allegations set forth in the summons, and claims, in reconvention, transfer of the said farm Roza within reasonable time, on payment of the purchase price, £450, which sum he has tendered and still tenders. To this plea of general issue the plaintiff joins issue, and pleads with regard to the claim in reconvention that any agreement entered into between Hart and Pretorius is not binding upon her, in that according to the law of the Colony a lessee of country lands has no right to sublet or cede such lease without the written consent of the owner, that no such written consent having been given, and that Hart has no title as against her for the said farm. From the evidence it is clear that the defendant in reconvention did lease the said farm on the 20th July, 1898, to one Pre-

torius for a term of three years, one of the stipulations in the lease being that Pretorius should at any time during the continuance of the said lease, on giving notice of his intention so to do, be at liberty to purchase the said premises for £450. Subsequently Pretorius, it is alleged, assigned all his rights, titles, and privileges to Hart, and the question here arises, was there an assignment? From the letters produced, it is quite clear that there was. The next question to be considered is, has there been an acceptance of the assignee by the lessor? The plaintiff in reconvention, on coming to terms with Pretorius, interviewed Mrs. Wilson, and told her he had purchased the lease from Pretorius, and told her he intended to occupy the farm, and she said she was very pleased, and consented to his occupation. Goss then, with the knowledge and consent of both parties, went out, and pointed out the boundaries of the farm to Hart, who subsequently occupied the farm. Mrs. Wilson raised no objection at the time, and in her evidence says she acknowledges Pretorius's right to place Hart on the farm, and that she accepted Hart. Hart has from time to time paid the rent, and received receipts in his own name. The two letters of the 5th and 15th July, from Mr. Heathcote to Mrs. Wilson, dealt almost entirely with the subject of the transfer, and in her reply to these, Mrs. Wilson simply deals with the mortgage on the place, and raised no objection in her reply to Hart's rights, nor does she deny that he purchased the farm, but states that she can take no steps in the matter without consulting her son-in-law, and although it is denied by Mrs. Wilson, her son Brian, in his evidence, states that his mother gave him to understand that Hart could purchase the farm, if he wished to do so, when the lease expired, and in her letter of 20th July, 1901, to Mr. Hart, she states, referring to the farm, "which you now hold from me." Up to the time Brian Wilson became engaged to Miss Hart, all parties concerned were on friendly terms, and up to this time no objection was raised; but on the contrary, Hart was led to believe that he could acquire the farm, in terms of the lease, by purchase, when the lease expired.

The lease expired on the 19th July, 1901, and in terms of the 4th paragraph, Hart gave Mrs. Wilson notice in writing on the 6th April, 1901, of his intention to purchase the place when the lease expired, and to this Mrs. Wilson states she did not think it necessary to reply. Mrs. Wilson admits that all letters, etc., produced to the Court, with the exception of the one dated 20th January, are correct. One receipt, dated 19th June, contains the words, "part payment of lease." It is clear that there was an acceptance by the lessor of the assignee, but was that acceptance under the lease? One of the stipulations of the lease is that certain rent was to be paid annually. Mrs. Wilson looked to Hart for this rent, not to Pretorius. This is proved by her two letters asking for loans. He was therefore held responsible under that paragraph of the lease. If one paragraph of the lease applies, the whole lease must be taken into consideration, and the 4th paragraph states that the lessee, whose rights have been assigned to Hart, has the right to purchase at any time during the continuance of the lease. This expired on 19th July, and Hart sent notice of his intention to purchase in April. Mrs. Wilson denies the acceptance of the assignee under the lease, but states she accepted him as agent for Pretorius, and in reply to questions by the Court, she states she treated Hart as agent for Pretorius in giving receipts and other matters, but she did not treat him as the agent for Pretorius when he said he wished to purchase the farm. In my opinion, there was an assignment of the lease, and there was an acceptance of the assignee by the owner. From a ruling of the Supreme Court (which I regret I am unable to quote), that Court has held that an assignment of a rural tenement may be verbal, and also that the consent of the owner need not necessarily be in writing, but may also be verbal.

The Chief Magistrate gave his reasons for reversing the decision of the Acting Resident Magistrate as follows: It appears that plaintiff leased the farm for a term of years to one Pretorius, and in this lease option was given to Pretorius to purchase during the currency of the lease at a fixed price. Hart purchased Pretorius's

right under the lease, occupied the farm, and paid the rent to Mrs. Wilson. Now if Mrs. Wilson consented to the assignment and transfer to Hart of the rights of Pretorius under the lease, she is out of Court. This is the real point to be determined. The Supreme Court has decided that written consent is not necessary. Mrs. Wilson pleaded in reply to Hart's claim that written consent was necessary. The plea was not objected to as bad in law, and besides, she pleaded the general issue, so that, on appeal, she cannot be held bound to give transfer to Hart, simply because in her plea she made a mistake in stating the law. If this transaction had been regularly arranged, the assignment would have been endorsed on or attached to the lease, and the lessor's consent thereto also, and the stamp required by law affixed. This not having been done, it lies on Hart to prove unmistakably by other means that Mrs. Wilson gave consent to the assignment. All that he proves is that, having come to take occupation of the farm without any previous communication with Mrs. Wilson, the latter consented to his occupying it, and accepted the rent from him, which Pretorius had contracted to pay. Judging from Hart's own evidence, the whole course of his conduct, the letters written by him giving notice that he intended to purchase the farm, and from the plea that he put on the record, his contention all along has been that, by an arrangement with Pretorius, to which Mrs. Wilson was in no sense a party, and of which she had not even proper notice, he (Hart) could step into Pretorius's position, and that, in order to enjoy the latter's rights, Mrs. Wilson's consent to the transaction was in no way needful. There is not the slightest evidence that Mrs. Wilson's consent was ever even formally asked. Hart's attitude can only be explained on the supposition that he did not consider Mrs. Wilson's consent necessary, and therefore did not ask for it. The whole onus of proof lay on him, and the evidence does not justify a finding that Mrs. Wilson's consent to the assignment of the lease was so unmistakably given as to entitle Hart to Pretorius's rights under the lease. The appeal is allowed with costs. There is not much on the record to assist the Court in ar-

iving at an equitable decision as to damages. Mrs. Wilson's claim for rent cannot be entertained, but to some damages she is entitled. The judgment of the Court below is altered to judgment for plaintiff, with costs, defendant to vacate the farm on or before the 1st of May, 1902, and to pay plaintiff the sum of £20 as damages for having wrongfully kept her out of possession of her farm.

Mr. Searle, K.C., appeared for the appellant; there was no appearance for the respondent.

The Chief Justice asked whether there were any evidence as to Pretorius's position.

Mr. Searle said that Pretorius was written to by the respondent, asking whether he wanted to purchase the farm, and Pretorius himself gave evidence, and said he wrote saying he had given over all his rights to Hart, and had executed a written cession.

The Chief Justice asked if the right of purchase was one that could be exercised by Hart.

Mr. Searle said that if there had been an unqualified acceptance by the landlord of Hart as a tenant under the lease, surely Hart was entitled to exercise all the rights under the lease. He did not say that the acceptance of payment of the rent by the landlord would be sufficient, but he thought the evidence showed that there was an unqualified acceptance of the assignee by Mrs. Wilson.

[De Villiers, C.J.: Is there any appeal in this case?]

I think so.

[Buchanan, J.: My impression was that there was no appeal from the decision of the Resident Magistrate to the Chief Magistrate in the case of Europeans.]

See Section 1 of Act 32 of 1898 and Section 110 of the Proclamation No. 391 of 1894. Act 26 of 1894 gives an appeal direct from the Resident Magistrate's Court to the Supreme Court. The lease between Mrs. Wilson and Pretorius was for three years, at £8 for each of the second and third years. The rent claimed is really in respect of what has accrued subsequent to the expiration of the lease. I submit that the judgment in the Court below was perfectly right. There may be a verbal assignment, as well as a verbal lease. The verbal lease is recognised in *Green v. Griffiths* (4 Juta, 346). But, of course, there must be satisfactory evidence of acceptance by

the original lessee—something more than mere acceptance of rent. *De Pass v. Colonial Government* (4 Juta, 393).

[De Villiers, C.J.: Does the assignment of a lease, assign also a right of action in respect of the lease?]

Yes, we cannot take one clause of a lease and leave out another. If Pretorius had wished to exclude Hart from buying that would have been contrary to good faith, but the evidence all goes to show that he wished to assist Hart as far as possible. Mr. Wilson knew that Pretorius had assigned all his rights to Hart. I submit that the judgment of the Court below should be restored.

De Villiers, C.J.: It appears to me that the Magistrate who tried the case in the first instance was perfectly correct in his finding, and also in the reasons upon which that finding is based. He found that there had been a complete cession by Pretorius of all his rights under the lease, and that the plaintiff had accepted the defendant as tenant in lieu of Pretorius. The acceptance was unqualified, and the Magistrate was justified in coming to the conclusion that the plaintiff, knowing that Pretorius had assigned all his rights under the lease to the defendant, accepted the defendant as the party entitled to exercise those rights. There was no danger of Pretorius himself claiming the right to exercise the option of purchase seeing that he had informed the plaintiff of the cession of his rights to the defendant. But even if such notice had not been given her conduct would have estopped her from taking advantage of such want of notice. On the 6th of April a letter was written to her by Hart, in which he claimed the right to give the notice which Pretorius might otherwise have given, supposing the latter wished to exercise the option of purchasing the farm. Hart gave notice that he would exercise this option of purchase, but there is no answer sent by the plaintiff to Hart. She left him under the impression, as far as I can judge, that it would be all right, that his offer would be accepted, and it was not until the 29th of July, when the lease had already expired, and when it would not be possible for Hart to induce Pretorius to give the requisite notice, that she repudiated Hart's right. It appears that on the 15th of July Hart's attorney had

written to the plaintiff, taking it for granted that the purchase would take place, and making some inquiry in regard to the encumbrances on the title deeds. In her answer plaintiff does not repudiate Hart's right; the only objection she makes is that she can do nothing without consulting her son-in-law, and, as I said before, it is not until the 29th of July that she entirely repudiates Hart's right. Under such circumstances, I am of opinion that Hart was entitled to conclude that he had been accepted as the person who could give notice in place of Pretorius. In regard to her own evidence, her opinion is that Hart was acting as the agent of Pretorius. Well, if Hart was such an agent, then he would also be entitled on behalf of Pretorius to give this notice, which he did in writing. Therefore from whatever point of view the Court looks at the case, the Magistrate in the first instance was correct in giving judgment for the defendant, and, as I said before, the reasons which he gives seems to me perfectly correct; that there had been a complete cession of all interests in this lease to Hart and that Hart had been accepted by Mrs. Wilson as tenant in lieu of Pretorius, with all the rights which Pretorius had under the lease. Therefore, when the letters were subsequently written giving the requisite notice, Mrs. Wilson was bound to accept that notice and give transfer. The only mistake, it strikes me, that Hart made about the business was in endeavouring at one time to obtain the farm at a less price, and at another at a higher price. That circumstance might have constituted a reason for holding that he did not take over all the obligations of Pretorius, if he had not on the 6th of April, that is long before the expiration of the lease, given the definite notice to which I have already referred. The appeal will, therefore, be allowed and the judgment of the Magistrate in the first instance restored, with costs in this Court and in the Courts below.

Their lordships concurred.

[Appellant's Attorneys: Van Zyl and Buissinne].

WALKER V. FENELE. { 1902.
Aug. 15th.

Prescription—Exception—Attorneys fees and disbursements.

To a claim by an attorney in a Magistrate's Court for fees and disbursements the defendant pleaded prescription on the ground that three years had passed since the dates of the different items. It not appearing from the evidence at what date judgment had been given by the Court in which the attorney had been employed, the Supreme Court remitted the case to the Magistrate's Court for further evidence on this point.

Prescription runs from the time when proceedings for the recovery of fees could be taken, and not from the date when the costs were actually taxed.

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This was an appeal from a decision of the Resident Magistrate of Engcobo.

Appellant was the plaintiff in the Court below. The plaintiff sued on a summons which alleged that he was an attorney of the Supreme Court, and that the defendant, in September, 1898, instructed him to proceed in the Court of the Resident Magistrate against one Mahoney for damages for adultery with his (defendant's) wife, and, further, to proceed with an action for civil imprisonment. As instructed, the plaintiff did proceed with an action against Mahoney and obtained judgment. Plaintiff alleged that he had incurred costs to the amount of £14 10s. 7d., for which defendant was liable, and which he refused to pay. Defendant admitted that he was liable for the sum of £3 5s. 9d., which he tendered; but took exception to the remainder of the account on the ground that there had been prescription under section 5 of Act 6 of 1861. The Magistrate upheld the exception and gave judgment for the amount tendered, refusing an application by plaintiff to put interrogatories as to the date when the services were performed. The bill of costs began in December, 1898, and

ended on August 28, 1899. The £3 5s. 9d. was made up of two items, which were the last on the bill, being dated June 8 and August 28, 1899. The Magistrate, in his reasons, stated that Walker sued the native for the amount of his account. Mr. Chaplin, defendant's attorney, admitted the items of £2 2s. 9d. and £1 3s., and pointed out that two items of 10s. 6d., entered on plaintiff's account subsequent to these, accrued when the case came on in February, 1899. Mr. Chaplin took exception to the rest of the account under Sec. 4, Act 6, 1861. He (the Magistrate) held that the remainder of the account was clearly prescribed, more than three years having elapsed. The application for interrogatories was refused on the ground that plaintiff was bound by the dates he had stated. The point of the case was whether, when there was an attorney's bill of costs for a continuous service, prescription began to run from the first item, or whether it ran from the time that the work was completed. The Act provides that no suit or action for fees of advocates, attorneys, public notaries, etc., shall be capable of being brought at any time after three years from the time when the cause of action first occurred.

Sir Henry Juta, K.C., for appellant. Respondent in default.

Sir H. Juta, K.C.: According to the account rendered by the appellant to respondent there was a bill of costs running from December, 1898, to August, 1899. Plaintiff (now appellant) got judgment for two items incurred in July and August, 1899. Defendant pleaded that the other items were prescribed. The question then is: whether in case of a bill of costs prescription runs from the date of the first item, or from the date when the continuous service of the attorney was concluded. Section 5 of Act 6 of 1861 dates prescription from the time that the cause of action accrued. And I must here point out that the bill which was taxed on April 24th was for many items incurred long before. An attorney cannot sue for his fees until his bill is taxed; and then only does his cause of action accrue. Each item cannot be taxed separately and sued on separately.

[Maasdorp, J.: Why cannot an attorney sue till his bill is taxed?]

Because the Court would at once tell him to get it taxed.

[De Villiers, C.J.: Why cannot an attorney get his bill taxed when the first items have been incurred nearly three years previously, in order to prevent prescription from running?]

If he could do that he would have just as much right to have every item taxed separately.

[De Villiers, C.J.: That would be a foolish thing to do; still what is to prevent him from doing it if he thinks proper to do so?]

If an attorney came into Court with a dozen bills taxed and each one stamped, all these referring to the same matter, he would meet with very scant consideration from the Court—and rightly so. The only case bearing on the question which has been decided in our Courts, as far as I am aware, is *Bell v. Loxton* (12 E.D.C. 1.) As to English authorities see *Darby and Bosanquet on the Statute of Limitations* (p. 38), and the cases there cited. See also *Digest of English Case Law* and cases there mentioned; *Coburn v. Colledge* (1 Q.B., 1897, p. 702); *Whitehead v. Lord* (7 Exch., 691). By the very fact of his payment of the later items defendant admits that the employment was continuous.

De Villiers, C.J.: It is clear that the Court has not sufficient information before it to decide the matter, and the case must be remitted back to the Magistrate, to take further evidence, not only as to the dates of the different services performed, but also as to the dates when the different judgments were given; because I cannot agree with the view that the Court is bound to make the date of the taxation of the appellant's bill of costs the criterion as to determining at what date the action accrued. If this were so, then an attorney might, by delaying the taxation, delay the date of the accruing of the action and consequently of the running of prescription. In my opinion, the test is, rather, the date upon which such judgment was given as would entitle the attorney to sue his client, and upon that point the Court has really no information. The Court, therefore, will remit the case to the Court below to take evidence as to the dates upon which the services were performed, and as to the dates of the different stages of the proceedings in the Court below in the case

in which the present defendant was the plaintiff, and Manie the defendant. Costs to stand over.

Their lordships concurred.

[Appellant's Attorneys, Walker and Jacobsohn.]

LEVIN V. MANASCHOWITZ. { 1902.
Aug. 15th.

Promissory note — Counterclaim
—Weight of evidence.

This was an appeal from a judgment of the Court of the Resident Magistrate of Oudtshoorn. The appellant was sued in the Court below for the sum of £8 13s. 6d. on a promissory note. There was a counter claim for work done for £16 7s. 6d. Judgment was given for plaintiff, and absolution from the instance was given in regard to the counter claim.

The evidence taken in the Court below was to the following effect: Defendant and his wife said that plaintiff owed Levin the sums claimed, in reconvention, for services as transport driver. Defendant said he had asked plaintiff for a settlement, but the latter had put him off. Plaintiff said he had paid for all the services rendered by defendant as a transport driver, excepting £1 5s., which he had deducted from the amount of a promissory note. In cross-examination plaintiff said he kept books, but he did not produce them. In his reasons the Magistrate said that he found that the evidence of defendant and his wife was very unsatisfactory. Defendant, it appeared, was a poor man, and relied solely upon transport riding for his subsistence. Defendant claimed that he had paid off the amount of the note by the value of services rendered by him to plaintiff, and that he was entitled to £5 7s. 6d. in addition. It did not appear natural to the Magistrate that a man of the circumstances of the defendant could have allowed this amount to be owing to him for such a long period. It was not until he was summoned by plaintiff—twenty months afterwards—that he set up the counter claim. He found the plaintiff's evidence more reliable, and so gave judgment for him.

Mr. Wilkinson for the appellant. The respondent was in default.

Mr. Wilkinson: The defendant's evidence given before the Magistrate was

much stronger than that of the plaintiff.

[Buchanan, J.: I am bound to say that I consider the plaintiff's evidence very unsatisfactory.]

Yes, particularly, as he produced no books, though he admitted that he kept books. Of course defendant kept none; transport drivers never do; and then he is quite an illiterate man.

The appeal was dismissed with costs.

De Villiers, C.J.: It is a question entirely of credibility, and the Magistrate was satisfied that plaintiff's version was correct. Plaintiff sued upon a promissory note, the genuineness of which was not denied. The defendant set up a counter claim which far exceeded the amount of the promissory note, and that makes the defendant's story very doubtful, because he was a very poor man, and one would suppose that he would see that payment was made of any sum due to him. On the other hand, it may be said that plaintiff, being a shopkeeper, ought to have entered in his books any payment which he says he has made to the defendant. But I do not think that is conclusive against him. If the Magistrate, notwithstanding this fact, believed the plaintiff's version, then the Court should not, in my opinion, interfere. The appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Tredgold, McIntyre and Bisset.]

DE JAGER V. NOORDWYK. { 1902.
Aug. 15th.

Resident Magistrates' Court Acts
—Jurisdiction—Title to land.

Where, owing to the form of an action in a Resident Magistrate's Court, it is impossible to do justice between the parties without deciding a question of title to land between them, the Magistrate is justified in allowing an exception to his jurisdiction.

This was an appeal from a decision the Resident Magistrate of Riversdale in an action in which Willem Hendrik van Noordwyk was sued by Hendrik Petrus de Jager for £20 damages, it being alleged that defendant did wilfully and maliciously break down and destroy or

cause to be broken down and destroyed a certain wire fence and embankment on the farm Corente Rivier on December 12 last; also that he did on December 15 wilfully and maliciously destroy the tobacco crop of the plaintiff; and, further, that on May 10 last he broke down and destroyed or caused to be destroyed a certain cattle kraal or enclosure on the said farm, all of which were then in the possession and occupation of the said plaintiff.

In the court below, Mr. Attorney Hauptfleisch, on behalf of the defendant, took exception to the summons on the ground that the title of the land was in dispute, and that consequently the Magistrate had no jurisdiction in the case. Evidence was led on this point, and the Court upheld the exception, with costs of suit.

The Magistrate, in his reasons for this judgment, said: In this case the defendant's attorney took exception to the jurisdiction of the Magistrate on the ground that the title of land was in dispute. From the evidence given upon this point, I am of opinion that a *bona fide* colour of right to land was introduced during the proceedings, and following the decision of the Honourable the Supreme Court in the case of *De Kock v. Du Toit* (3 Searle, 228), the exception was upheld and the case dismissed.

Against this judgment the plaintiff appealed.

From the evidence led in the court below on the point of title, the defendant said that the farm Corente Rivier was sub-divided two years ago, and a certain portion was allotted to the defendant; that share occupied by the plaintiff falling within defendant's portion. Thereupon defendant gave the plaintiff notice to quit. Before the award of the arbitrators on the sub-division of the farm plaintiff lived in a house belonging to defendant on the farm. Plaintiff had bought a share of the farm Corente Rivier from defendant's brother. Defendant stated that the house and a portion of the ground occupied by the plaintiff fell within the share allotted to defendant by the arbitrators, also that portion on which the fence and kraal were situated.

The plaintiff, in his evidence, stated that he bought a certain portion of the farm Corente Rivier from the brother of

the defendant about three years ago, the seller showing him where he could build a house and garden. The defendant wrote to the seller, saying that plaintiff should stop building until they could meet. At the proprietors of the farm came together, except Mrs. Van Noordwyk, and the result of the conference was that plaintiff was allowed to continue building. Defendant, who was plaintiff's brother-in-law, assisted plaintiff to build the house the latter now occupied, and plaintiff proceeded to make a garden, wagon-house, etc., on the ground which he thought would fall to him. In the beginning defendant did not molest, but rather assisted plaintiff, but upon the second sub-division of the property a dispute arose about the property now occupied by plaintiff. Plaintiff never received notice to be present at the division of the property, one of the arbitrators to whom he appealed saying that he need not bother, as he would look after his (plaintiff's) interests. When defendant, with his servants, came upon the ground and destroyed the fence, cattle kraal, etc., plaintiff then considered that defendant came on the property which he (plaintiff) had bought from defendant's brother before the sub-division.

Mr. Schreiner, K.C. (for appellant): The question is whether in this case title to land was in dispute. The Magistrate relied on *De Kock v. Du Toit* (3 Searle, 228), but he does not seem to have had his attention directed to later cases. There is no question as to title to land.

[Buchanan, J.: But if a man comes on to ground and removes a fence, does not a question of title arise?]

Not necessarily. Confessedly we were in possession. The title to the property was never in question. In *De Kock v. Du Toit* the Court went further than later decisions would justify. According to the later cases there must be a question of title *Reed v. Grahamstown Municipality* (5 Juta, 127), where see particularly the judgment of De Villiers, C.J. Then came the case of *Kennard v. Hirsch* (6 Juta, 323).

[De Villiers, C.J.: But the claim of the plaintiff could be supported only by ownership.]

He merely says that he was in lawful occupation, and that defendant broke down his kraal, etc. There is no question of ownership. He comes before the

Magistrate, not as owner, but as a *bona fide* possessor. Plaintiff never disputed defendant's title. We do not claim the land. Even a *mala fide* possessor has a right to compensation before he can be ousted. So also with a lessor, *De Biers v. L. and S. A. Co.* (10 Juta, 359). In this case a *bona fide* possessor brings his action for damages, for interference while he is in quiet possession. The most recent case dealing with this matter is *De Wet v. Jooste* (9 Juta, 239). There the case of *Koller v. Abba* (8 Juta, 254) was distinguished. All recent cases turn on the question as to whether title to land is in dispute.

[Maasdorp, J.: Suppose a man is accused of trespassing on land, will not the question of title come in there?]

Surely if a man has held and improved land *bona fide* for years and another man comes in and violently dispossesses him, he must have a remedy of some kind.

[De Villiers, C.J.: In a question of tort there is no limit to damages, but in a question of compensation, the question arises. "What is the value of the land to you?"]

I would therefore venture to suggest that the whole matter should be referred back to the Magistrate to ascertain the value of De Jager's improvements. The evidence in support of the exception was insufficient and the Magistrate ought to have gone into the merits.

[Maasdorp, J.: As to the question of damages, can a trespasser claim damages?]

If your lordship asks whether "compensation" ought not to have been used in the summons instead of "damages," defend the terms of the summons to find whether title was in issue. We must look to the summons and the evidence of the parties, and not attempting to set aside the decision of the arbitrators, who had no jurisdiction to dispute any part of the estate or to dispute any part of the claim. The summons for the respondent was upon the merits.

[De Villiers, C.J.: It appears to me in this case that the Magistrate could not do complete justice between the parties without deciding the question of the ownership of the land. The summons is not based upon the ground that plaintiff was in *bona fide* possession at the time, that the defendant sought to

evict him, and that he now, as *bona fide* possessor, is entitled to compensation for the manner in which the value of the land has been enhanced. If that had been the form of the summons, then no doubt there would have been no question that could oust the Magistrate's jurisdiction. But the plaintiff claims damages, in that the defendant did wilfully and maliciously break down and destroy certain property. It is based entirely upon the view that the plaintiff and not the defendant had a title to the land. If there were any doubt upon the point, that is removed by the evidence itself. The whole evidence shows that, as far as the defendant is concerned, the question was the title to the land, and the plaintiff himself was examined, and it is clear that he also regarded this property as his, and that it was on that ground that he considered that he was entitled to claim these damages. Under these circumstances, I think the Magistrate was right in holding that the question of the title to the land was raised. Then, as to the cases cited, I do not think that, in any case where in order to do justice between the parties the question of title had to be decided the Court has ever held that the Magistrate has jurisdiction. The appeal must be dismissed, with costs.

[Appellant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Walker and Jacobsohn.]

MCKAY V. MCKENZIE AND CO. 1902. Aug. 15th
Landing agent — Mis-delivery —
Damages—Negligence.

The defendants having been employed as plaintiff's agents to land 300 bags of bran from a vessel, landed the same, and thereafter, in their capacity as delivery agents for M., mis-delivered 225 bags to M.

Held, that the defendants were liable in damages to the plaintiff for such mis-delivery.

This was an appeal from the decision of the Resident Magistrate of Cape Town.

In the action in the Court below the present appellant, James McKay, sued the respondent, A. R. McKenzie, lately trading as McKenzie and Co, on a summons calling on him to show cause why he had not paid to the plaintiff the sum of £20, which plaintiff alleges he owed him as and for damages sustained. The plaintiff alleged that in or about the month of December, 1900, defendant was the duly appointed landing agent for the plaintiff, to land certain cargo consigned to order of plaintiff, and place the same as directed by the Harbour Board, and that, as such agent, he received, *ex Norman, inter alia*, certain 225 bags of bran, and wrongfully and unlawfully, and contrary to his duty, made delivery of the same to Daniel Mills and Sons, Cape Town. Plaintiff alleged he had suffered damages in the sum of £20. The defendant pleaded general issue. The Magistrate gave absolution from the instance, with costs, and against that judgment the appeal was now brought. The Magistrate's reasons set forth the details of the case and were as follows:—The plaintiff is a produce dealer at Cape Town, and the defendants are landing, shipping, and delivery agents. In December, 1900, plaintiff contracted to supply Pentz Bros., of Cape Town, with 300 bags of bran at 7s. 5d. per bag, delivery to be given in the first week in January, 1901, and he ordered 300 bags of bran from Pyott, of Port Elizabeth, for the purpose. During December, 1900, the 300 bags of bran were shipped at Port Elizabeth by the S.S. Norman, and consigned to plaintiff. It appears that a quantity of bran was at the same time consigned to Mills and Sons, Cape Town. The Norman arrived in December, 1900, and defendants were, in accordance with Harbour Board regulations, appointed by the ship consignees agents to land the cargo in question, and appear to have done so about the 17th December. Tunnell and Duncan were appointed to deliver the 300 bags bran on behalf of plaintiff to Pentz Bros., and the defendants, acting as Mills and Sons' delivery agents, had to deliver to Mills and Sons the bran consigned to them. Tunnell and Duncan promptly attended to the matter, but only found and delivered 75 bags of

bran, and could not find the remaining 225 bags or any trace of them. The plaintiffs then communicated with Pyott, who informed him that 225 bags bran in question had been delivered to D. Mills and Sons, and that the latter had paid for the same. The defendant's manager admits that Mills and Sons has been delivered a quantity of bran in excess of the quantity they were entitled to, but does not admit that such excess was delivered by them. I found as facts that the 225 bags of bran in question were delivered by defendants to Mills and Sons, that such wrong delivery was due to the negligence and carelessness of the defendants; that Mills and Sons actually received the 225 bags of bran; that plaintiff was not able owing to the wrongful act of the defendants in delivering the bran to Mills and Sons and to their receiving and appropriating the same to fulfil his contract with Pentz Bros.; that bran at the time, the first week in January, 1901, was scarce in Cape Town, and was not to be had under 10s. a bag; that Pentz Bros. claimed from plaintiff damages for the breach of contract, basing the claim on the difference in the contract price of the bran 7s. 5d. and the market value 10s. a bag, but compromised with the plaintiff for £20, which amount was paid by the latter in settlement of the claim, and this amount the plaintiff now sues for. It appears to be clear that Mills and Sons were aware that 225 bags bran were delivered in excess of the quantity they were entitled to, and they must have known that such excess of the quantity they were entitled nevertheless appropriated the same, and benefited by the high price then ruling in Cape Town, and should therefore, in my opinion, have been sued. The plaintiff was aware of these facts before he issued his summons, having been informed by Pyott shortly after the occurrence that Mills and Sons had received and paid for the 225 bags bran in question. On these grounds my judgment was absolution from the instance, but I expressed the opinion that but for this view of the case I should have had no difficulty in finding for the plaintiff for the amount claimed, with costs, as against the present defendants.

Mr. Schreiner, K.C., for applicant;
Sir H. Juta, K.C., for respondent.

In reply to the Court, Sir Henry Juta said that he did not admit the findings of the Magistrate.

Mr. Schreiner, K.C. (for the appellant): The record in the Court below seems to be very incomplete, but there is quite sufficient to justify the Magistrate's finding that Mills did not send for the bran. Instead of following the directions of the Harbour Board, or of Tunnell and Duncan, defendants were delivering to Mills and Sons. There is evidence of that. The Magistrate says that we should have sued Mills and Sons. No doubt we might have done so, but then Mills and Sons would have had to sue McKenzie. But why multiply suits in this way? Mr. Sexton is the only witness for the respondent, and all he can say is that Mills and Son sometimes send for goods in their own carts. Against this there is the admission that McKenzie and Co. were delivery agents, and that they delivered bran to Mills and Son. In *Lister v. McKenzie* (10 Sheil, 480) the whole question of the duties of landing and delivery agents were fully discussed.

Sir H. Juta, K.C., (for respondent): This case is very different from many others. There is nothing in plaintiff's evidence to show that these goods were not delivered to the Harbour Board. From the rebutting evidence of J. P. Roost it is clear that delivery had been made to the Harbour Board. There is no evidence to show that defendants did not do their duty as landing agents, and there is no evidence that they wrongfully took goods out of the custody of the Harbour Board and handed them to Mills.

[Buchanan, J.: How did the goods get into Mill's possession?]

I don't know, there is no evidence to show. On plaintiff's evidence the Magistrate should have given absolution from the instance. As to defendant's evidence, delivery to Mills and Son is expressly denied by Sexton. Mills had bran consigned by this steamer, and they got an excess; but there is no proof that this excess was delivered by McKenzie. Sexton says that McKenzie and Co. did not deliver it, and he is not contradicted. We do not know how Mills got hold of the excess, but if we are sued for delivering it, plaintiffs must prove that we did so. Where does the Magistrate

find that "delivery was due to the negligence and carelessness of the defendant?"

Mr. Schreiner, in reply, was not heard.

The Court allowed the appeal, with costs.

De Villiers, C.J.: The Magistrate found as a fact that McKenzie delivered the bran to Mills and Sons, but, unfortunately, he drew a wrong conclusion from this fact: he came to the conclusion that Mills and Sons should be sued. In this the Magistrate erred, because if McKenzie negligently made wrong delivery, then he is liable, even if Mills and Sons are liable, and plaintiff would have his remedy whether he proceeded against Mills and Sons or McKenzie. The only question, therefore, to decide is whether there was sufficient evidence to justify the Magistrate in coming to the conclusion that McKenzie did, in fact, deliver the bran to Mills and sons. The evidence for the plaintiff is no doubt weak upon the point, but plaintiff is quite entitled to take the benefit of the evidence given for the defence. There can be no doubt of two facts; first of all, that Mills and Sons received this bran, which ought to have gone to the plaintiff. The other fact which, I think, does not admit of doubt, is that McKenzie was the delivery agent of Mills and Sons. Mr. Sexton, the defendant's manager, says: "I believe Mills and Sons got bran in excess of what they were entitled to, but we did not deliver it to them. The defendant is Mills and Sons' delivery agent. He (defendant) delivered bran by the Norman to Mills and Sons about the end of December, 1900. "I do not admit that we delivered the 225 bags of bran to Mills and Sons." Then comes this: "I cannot say how much bran we delivered to Mills and Sons. We did not clear the bran for Mills and Sons." Well, if he could not say how much bran was delivered to Mills and Sons, it is difficult to see how he could be so positive that he had not delivered more bran to Mills and Sons than they were entitled to. The facts that McKenzie was Mills and Sons' delivery agent, and that there was no other possible way in which to explain the delivery to Mills other than through McKenzie were, in my opinion, sufficient to justify the Magistrate in coming to the conclusion

that McKenzie had delivered the bran to Mills. For these reasons, I am of opinion that the appeal ought to be allowed, and judgment entered for the plaintiff for £20, with costs in this court and in the court below.

Their lordships concurred.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton; Respondents': Silberbauer, Wahl and Fuller.]

GENERAL MOTION.

GORDON STEWART DRUMMOND FORBES
AND OTHERS V. OFFICIAL LIQUIDATOR
OF THE TIMBER SUPPLY COMPANY
(LIMITED).

Mr. Schreiner, K.C., moved for leave to appeal from a judgment of the High Court of Southern Rhodesia, and to fix a day for the hearing of the appeal.

The application was granted, and the 4th September fixed for the hearing, costs to be costs in the cause.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

STAYN V STAYN AND { 1902.
CLEMSHA. { Aug. 18th.

This was an action for divorce, brought by the plaintiff Stayn against his wife, on the ground of her adultery with one Walter Clemsha.

Mr. Wilkinson appeared for the plaintiff.

Defendant appeared in person.

The case had been set down for hearing in default of plea, but defendant appeared in person, and alleged that plaintiff was himself living in adultery with one Bettie Digby. She further alleged that plaintiff has been a party to her committing adultery, and had lived upon the proceeds of her immoral conduct.

John Stayn, the plaintiff, said he lived at 38, Caledon-street, where he carried

on business as a working jeweller and watchmaker. He was married to defendant at Maritzburg in March, 1898. They lived happily together for about a year, when their relations became unhappy, defendant being unfaithful to him, and she attempted to take his life on several occasions. They separated in England, and then he met her again in Cape Town, walking arm-in-arm with a man named Clemsha, with whom she was apparently on terms of intimacy.

In reply to the Court, the plaintiff denied the allegations as to his conniving at his wife's adultery and living upon the proceeds of her immorality.

In reply to the defendant, he said he had never threatened to drive her from the house when she did not bring him in enough money. As to the woman Digby, plaintiff said that she was a servant, who came to his shop to clean it out, and she cleaned and looked after his house. He denied having misconducted himself with her. He admitted that he had gone under another name in Natal.

Richard Francis deposed to defendant hiring a room from him, and living in it with another man as man and wife.

In reply to the Court, defendant admitted that she had lived with Clemsha, but repeated her allegations against the plaintiff, and said she had witnesses to prove the truth of her statements.

After several witnesses had been called in support of her allegations, Mr. Wilkinson said he would ask for a postponement, so that he might call rebutting evidence.

The case was ordered to stand over.

Postea, August 21.

Mr. Wilkinson called

John Rost, who said he knew plaintiff in Durban. He carried on a jeweller's business in West-street. Witness knew nothing to his discredit while in Durban.

Peter Johnson, Caledon-street, said he had been living in plaintiff's premises for the past two months, and had never observed impropriety between plaintiff and the woman Digby.

Bertha Digby was called and denied the allegations made by defendant. She said she was Steyn's servant.

Witnesses were called to show that plaintiff was carrying on a bona-fide business in Caledon-street.

Mr. J. J. Michau said that he rented premises to plaintiff, acting as attorney for the landlord. In May witness obtained information which satisfied him that the premises were being used for immoral purposes, and he gave plaintiff notice to leave. When witness saw plaintiff about the matter the latter said that the woman witness spoke to him about was not a bad character, but was his (plaintiff's) wife.

The woman Abrahamse (recalled) identified the woman Digby as the woman who occupied the same room as plaintiff. They lived together as Mr. and Mrs. Burns.

De Villiers, C.J.: The plaintiff sued for divorce on account of the defendant's adultery. There can be no doubt as to the defendant's adultery. She admits that she has lived an immoral life, but she sets up the defence that the plaintiff himself has been guilty of adultery, and upon that point there has been a great conflict of testimony. The Court is satisfied that the counter-charge has been proved. We attach considerable weight to the evidence of Mrs. Abrahamse; she gives it in such a way as to satisfy us that she was speaking the truth when she said that she had seen acts of immorality between the plaintiff and Bertha Digby. The evidence of Mr. Michau, I think, is of some importance in the case. Although he cannot give any direct evidence as to what he himself has seen, he charged the plaintiff with using the house for immoral purposes, and the plaintiff then admitted that he was living with the woman, at all events he did not deny that he was living with the woman who was in his house, and that was Bertha Digby. But his plea was that she was his wife, that he was not living in adultery with her, but that she was his wife, and then, subsequently, when Mr. Michau gave him notice to leave, because he was satisfied that there was immoral life there, he left without any remonstrance. If he could have shown that this girl was his servant in the house, that they were occupying different rooms, he would not have left so readily upon Mr. Michau's dismissal as he seems to have done. Upon the whole, therefore, the Court is of opinion that the counter-charge has been proved, and that the claim for divorce must be dismissed.

[Plaintiff's Attorney: R. Greening.]

PERLSTEIN V. TABLE BAY { 1902.
HARBOUR BOARD. { Aug. 18th.

Injury—Negligence—Damages.

A traction engine belonging to the defendants struck a house of which the first floor was let to the plaintiff, who kept a boarding-house therein. Only the dining-room was visibly injured, but some of the boarders left because they considered some of the other rooms to be dangerous to live in. In the absence of any proof that the rooms were dangerous to live in, Held, that the plaintiff was not entitled to claim damages for the loss sustained by him by reason of the boarders leaving.

The plaintiff was a boarding-house keeper, carrying on business at the corner of Caledon and Harrington streets. He claimed £250 as and for damages sustained by reason of a traction engine belonging to the Harbour Board having run into and damaged the place where plaintiff carried on his boarding-house. The declaration stated that on the 12th May last plaintiff occupied, and still occupied, a portion of the premises known as 5a, Caledon-street. On that date a traction engine belonging to the Harbour Board knocked down a wall of the premises, and rendered the plaintiff's part of the building unfit for habitation and for the conduct of his business. Plaintiff further alleged that defendants had wrongfully taken possession of his (plaintiff's) part of the premises, and had used the same as a workshop for the purposes of repairing other parts of the building, of which plaintiff was not in occupation.

In their plea the defendant Board admitted responsibility for the damages directly caused by the accident, but denied that plaintiff's portion of the premises was rendered unfit for habitation or for the conduct of plaintiff's business. They further stated that by agreement with the owner of the premises, they (the Board) undertook to repair the damage, and they used part of the premises occupied by plaintiff. They had admitted

damages, and had tendered to pay £50 therefor, with taxed costs to date of tender.

The replication was general.

Mr. Searle, K.C. (with him Mr. Wilkinson), for plaintiff; Mr. Schreiner, K.C. (with him Mr. Buchanan), for defendants.

Mr. Searle called

Mr. Connelly, an architect, who deposed to having shortly after the accident seen the building, which was at the corner of Harrington-street and Caledon-street. Plaintiff's premises were on the first floor over shops. The witness gave particulars as to the damage caused. Plaintiff could not have occupied his portion of the premises as a boarding-house. It took about two months to repair the damage to the building. Plaintiff rented about ten rooms; only two were fit for occupation after the accident. Plaintiff continued to live in the place after the accident. The furniture was damaged. He first visited the place on the 12th May. On the 30th May he again went there. There were no boarders there then. The premises were not yet in proper condition. The rooms had just been "patched up."

Cross-examined by Mr. Schreiner: Witness did not know whether the landlord had accepted the repairs made by the Harbour Board. His first visit to the premises was on the 16th May. Among other damage the doors of some of the rooms would not work properly, and there were cracks in the walls, in one case in the outer room towards Caledon-street. On May 30 witness was about half an hour in the house.

Mr. Searle put in a copy of the "Cape Times" Weekly containing photographs of the accident, and pointed out that these pictures showed that the whole place was shaken to its foundations.

Julius Rosenstein said he had been plaintiff's partner since March 1, and managed the business of the boarding-house. When the accident happened witness was in the dining-room. After the accident it was impossible to carry on business. In the first place he had no accommodation to serve people, and secondly, the place was unsafe. There were ten rooms, including kitchen. The largest room was the dining-room, and that was the room of which the wall was knocked down altogether. There were

five bedrooms, one a large room accommodating four people, and the others single and double rooms. These rooms were all full at the time of the accident. The rents witness received from each person ranged from 7s. 6d. a week to £2 10s. a month. Then for food they would each pay 5s. per day. In addition people came in for meals. His boarders all left because they thought the house was unsafe. Witness thought it was unsafe, but he had to remain there himself along with plaintiff. They occupied the room furthest from the scene of the accident. No boarders remained with them during the rebuilding, which was completed about July 12. His house was now nearly full again. The couch in the dining-room was destroyed, and the tables were injured by the carpenters working on them. The accounts had been framed by Mr. Marcus from information supplied by witness. During the two months previous to the accident the profits from the business came to £95 per month. That included the profits from the sale of tobaccos, cigars, and mineral waters. After the accident ten of the witness's boarders left, and two stayed because they could not get accommodation elsewhere. While the repairs were being made it was impossible to keep the bar in its original place, and he had to move it. Witness supplied Mr. Marcus with information and with vouchers to enable him to make up the bill.

Cross-examined by Mr. Schreiner: Witness did not sue with Perlstein, because the agreement in connection with the premises was in the latter's name. Witness could not say what his takings were for May and June. Men had been there playing cards and drinking aerated water while the alterations were proceeding. Witness charged in the account for a suite of furniture, damaged to the amount of £30. The workmen of the house had damaged a number of chairs.

Re-examined by Mr. Searle: Witness handed over all the papers he had to Mr. Marcus.

Saul Hyman Marcus, accountant, deposed to having made up the account rendered to defendants in connection with the damage. Witness made up an account for February and March; he had not sufficient time to make up the April results, and thought that the two

months' account would suffice. Witness made a return as to the income from the supplying of meals. He made this on information given him by the last witness as to the average number of meals served daily. There were certain items in the account which witness had not put in.

Julius Perlstein, plaintiff, gave evidence. He had taken Mr. Rosenstein into partnership on the 1st March. The lease was in witness's name. The witness gave evidence confirming statements made by previous witnesses.

Cross-examined: Only a few of the boarders came back after the accident, and only four or five came for meals, and they could not supply them. There were only witness, his partner, and two others there. He could not explain why his butcher's bill for May was as heavy as it was for March.

Louis Stern said that before May 12 last he was a boarder with plaintiff, and paid him 7s. a week for lodging and 5s. a day for meals. The day the accident happened witness left, as he was afraid of his life, the place being unsafe. The man who occupied the room along with witness left on the same day. He could not say how many boarders there were. He would say sixteen, seventeen, or eighteen there.

Samuel Hobson, a painter, said that up to May 12 he lived at plaintiff's boarding-house, and paid 7s. 6d. a week for lodging. There were a good many boarders there, and besides, many more people came there for meals. Witness left on the evening of the accident, because he was afraid, seeing the condition of the place. Others left on the same day. A good business used to be done at this place.

Anton Kaliowski, a baker, said he used to supply plaintiff's boarding-house with bread. He had done so since last Christmas. After the accident, plaintiff took very little bread. Plaintiff took 5s. a day bread before the accident—sometimes more—and after the accident he took about 4s. a day less.

Cross-examined: The day after the accident plaintiff only took a few rolls.

Abraham Shere said he used to supply plaintiff's boarding-house with poultry, butter, eggs, etc. After May 12 plaintiff took much less of witness's produce. Before the accident witness used to sell plaintiff £4 or £5 a week's worth, but

after the accident his account ranged from 15s. to £1 per week only.

Abe Levetan, a wagon-driver at the mineral water manufactory who supplied plaintiff with mineral waters, said that after the accident plaintiff took much less.

A. Salenski, a butcher, deposed that before the accident he used to supply plaintiff with £7 10s. worth of meat per week. After the accident witness supplied only about 36s. worth per week.

Mr. Wilkinson said that this closed the plaintiff's case.

[De Villiers, C.J.: Have you proved damages in excess of the tender of £50? No books were kept.]

Mr. Wilkinson (for plaintiff): We have produced oral evidence to show how the business fell off. The building appeared to the boarders to be dangerous, and they left in consequence.

[De Villiers, C.J.: Is not the damage you thereby suffered too remote? If their fears were groundless, could you claim damages?]

Their fears were by no means groundless, but were based on the actual condition of the building. Then, again, the dining-room could not be used—the bar had to be removed, and business consequently fell off. It was morally impossible to carry on any business, let alone that of a restaurateur, in such a tumble-down place.

[De Villiers, C.J.: He may not have had the same conveniences that he had before, but, in point of fact, he still carried on business.]

He thereby showed that he was anxious to do his best, and not to take undue advantage of the accident. I submit that the damage was not too remote, and that the fears of those who left the house were by no means groundless.

[De Villiers, C.J.: Was not some profit made from people who came to view the scene of the accident?]

Only a few chance visitors came; the regular customers and boarders were driven away. The evidence shows that the regular profits were £89 a month. A small amount of business may have been carried on subsequently, but whatever profit was made from that was swallowed up in expenses. If the plaintiffs are to be believed as to the amount of their monthly profits, they assess their damages at a very moderate amount.

Mr. Schreiner was not called upon.

The Court gave judgment for the plaintiff for the amount tendered, with costs to the date of tender.

De Villiers, C.J.: It is admitted in this case that this traction engine belonging to the defendant Harbour Board did certain damage to a portion of a house of which plaintiff was the lessee, and for any direct damage by reason of this injury to the house he is of course entitled to claim from the Harbour Board. But the damage must be clearly proved to the satisfaction of the Court. Now, in the present case there is an utter absence of any books kept by the plaintiff to show that this damage was actually sustained. If the plaintiff had produced books to show that up to the 12th May, 1902, his profits had amounted to so and so, and that the books showed that subsequently, during the period which elapsed until the repairs were completed, the profits fell to so much, then the Court would at once have a criterion as to the damages which were sustained, but no books whatever have been produced, and all we have are certain accounts showing the produce bought before and after the accident. There are no books showing the actual receipts. We have a statement made by Mr. Rosenzweig as to what his share of the profits did amount to, but unless evidence such as he gave is supported by his books, or by independent testimony, the Court is not bound necessarily to accept it. So far as the meat account is concerned, there is really no substantial diminution in the quantity of meat supplied after the accident. There was certainly a diminution in the months of June and July, but not such diminution as would justify the Court in coming to the conclusion that more than £50 damages were sustained. It is said, however, that several lodgers left the place, and that therefore the Court is bound to conclude that there has been some loss, but there is no satisfactory evidence that the boarders were bound to leave the premises. The dining-room, no doubt, was injured, but there is no proof that any of the other rooms were in such a condition that it would have been in any way dangerous for these people to remain. In point of fact, several people did remain; the premises were not given up altogether. What the plaintiff must now show is that the difference between the profits

made by him before the 12th of May and the profits made subsequent to the accident amounts to more than £50. He has not said at all what the takings were after the accident. He has not said at all what the profits were. There is no doubt that he has said that there were no profits at all after the accident, but it would have been more satisfactory to show what were the receipts before and after the 12th of May. It appears to me that the class of boarders who appeared as witnesses are respectable enough, but I don't think they are men from whom much profits would be made, and the defendant's tender of £50 seems to me to be fair and reasonable under all the circumstances. It was for plaintiff to prove his case clearly, and as he has not proved that he has sustained damages to the extent of more than £50, the judgment of the Court must be for plaintiff for £50 damages, with costs to the date of tender only, the plaintiff to pay all costs incurred subsequent to that date.

Buchanan, J.: I fully concur. I think the tender of £50 covers all the legitimate damages which can be claimed in this case.

Maasdorp, J, also concurred.

[Plaintiff's Attorney: R. Greening;
Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

JURGENSON V. JURGENSON. { 1902.
Aug. 20th.

This was an action in which the plaintiff sued his wife for divorce.

Mr. Benjamin appeared for the plaintiff; defendant was in default.

Smith Jurgenson, the plaintiff, deposed that he was married to defendant in July, 1896. After their marriage they went to Kimberley, where they lived together for a month, and then defendant, without assigning any reason, left him. Witness had told her that if she would return he would take her back, but she never returned. Last year witness came

to Cape Town, and heard something about his wife having gone through a form of marriage with one Jennings.

William Jennings said that at the end of 1900 he went through a form of marriage with defendant, who gave the name of Wessels, which witness ascertained was the name of her mother's first husband. Witness did not know that defendant was a married woman, and after the form of marriage he lived with her as husband and wife. After two months she left him without giving any reason. She went to Steynsburg, and as witness had heard something about her having been married before he went there to see her. She refused to come back with him. Before they were married defendant told witness that she had lived with a man at Kimberley.

The Court granted a decree of divorce as prayed.

VAN DER BYL V. LATEGAN. { 1902.
Aug. 20th.
" 21st.

Negligence—Burning of veld—
Damages.

A fire having originated on defendant's farm, and having, as the Court found, been kindled by defendant's servants, spread to the adjoining land of the plaintiff.

Held, that as the spreading of the fire was due to the negligence of defendant's servants, he was liable to the plaintiff in damages.

This was an action for damages, laid at £1,500, brought by Mrs. Van der Byl, owner of the farm Klein Constantia, which included a piece of land known as Grootbosch, against Daniel Stephanus Lategan, owner of the adjoining farm, Plumstead. The declaration set forth that on February 14 last the defendant kindled a fire upon his farm in the neighbourhood of the boundary of plaintiff's farm, and that the fire continued to spread, until on February 16 it crossed the boundary into plaintiff's farm, and did great damage; that owing to the negligence of the defendant in not having the fire properly extinguished the plaintiff had sustained

damage to the extent of £1,500 through the destruction of thousands of valuable trees, besides herbage, etc. The defendant in his plea admitted the kindling of the fire on his farm on February 14, but denied the other allegations, saying that he caused the fire to be properly extinguished, and that he took all the due precautions to prevent it from spreading. He denied any negligence, and said that he was not in any way responsible for the fire of February 16. He further said that no notice was given him by plaintiff until April, and until then he was not aware of any damage having been caused. He insisted that with due and ordinary care the plaintiff could have prevented any damage.

Mr. Schreiner, K.C. (with him Mr. Upington), for plaintiff; Sir H. Juta, K.C. (with him Mr. McGregor), for defendant.

Mr. Schreiner said that the issue appeared to be whether or not this fire, kindled by defendant on February 14, continued to smoulder, and did cross the boundary to plaintiff's farm on February 16, and whether that was due to negligence on defendant's part in not putting the fire out.

Mr. Schreiner called

Mrs. Van der Byl, the plaintiff, who said that she was a widow, and owned Klein Constantia, including Grootbosch, in her own right. Witness knew nothing about defendant kindling the fire on his farm one Friday in February. Witness was on her farm at the time. She had been living there about eleven or twelve years. She had been offered £22,000 for the property, but would not sell, as she valued it much higher than that. Mr. Murray managed the farm, which was 228 morgen in extent. At midday on Sunday, February 16, witness's attention was first directed to the fire. By that time it had reached the place named Malbroek. The bell was rung at witness's place to bring people together to put out the fire. There was a strong wind blowing from the direction of defendant's farm. Witness thought the estimate of the damage at £1,500 was a very low one. Witness did not give defendant any notice at the time of the fire, because she expected defendant to come over himself and see about it. He did not come, but she did not write to him, as she was greatly concerned at that time about the illness (which after-

wards proved fatal) of her sister. As a matter of fact, although they did not communicate with defendant, they had gone into the matter, and a demand would have been sent but for the fact that the power of attorney witness was to give was mislaid, so that she could not sign it before leaving to see her sister.

Cross-examined: Mr. Murray saw to everything in connection with the farm. There were convicts employed on the farm, but witness could not say at what point they were working at that time. Witness knew about some martial law regulations directing that all fires at night on properties must be reported. This fire was not reported, but everybody must have seen it, as it was big enough. Anybody could, from the bywoners' cottages, see the rise all along which the fire went. The ground was to a large extent scrub, and it was common in that district to burn the scrub to get grazing; but as witness had plenty of grazing for her livestock, they did not burn the scrub on her farm. Some eight years ago a good bit of the farm was burned down, most of the trees being destroyed.

Re-examined: After the previous fire, steps were taken to replant trees on the ridges. There was a large plantation of young trees, with some old trees among them. Witness never read the regulations mentioned.

William T. Ward deposed as to the correctness of the plans prepared by him, and now put in. There was a continuous mark of fire from defendant's to plaintiff's property. Witness had made search, but could find no trace of a firepath.

Thomas Murray, manager of plaintiff's farm, said he had been at the farm for seven or eight years, and was familiar with it. Witness had no notice or knowledge that Mr. Lategan was going to make a fire, or that he had made a fire. Witness first observed the fire when at the Government Wine Farm on the Sunday. The manager of the Wine Farm drew his attention to smoke, which was rising from near the boundary of the two farms. There was another fire further towards the centre of Mr. Lategan's property. Witness took steps to get the convicts out. There was some little delay in getting the authority of the chief warden to allow the convicts to

go out. Afterwards witness did all he could with the convicts to put out the fire. Convicts were brought from elsewhere, and about 50 were altogether employed in combatting the fire. From Lategan's boundary to the place marked on the plan as "Klein's Cottage," there was one continuous belt of fire. Witness endeavoured to stop the fire by making a path near Malbroek. The fire, however, jumped the path. There was a strong south-easter blowing. Witness had counted 4,700 fir-trees which were burned. The main portion of these were of between seven and eight years' growth. About 2,000 silver-trees were destroyed, also a number of hardwood (wild) trees. Witness estimated that the commercial value of the farm was reduced by at least £1,500 by the fire. With the growth between the two properties, it would naturally be expected that fire would spread from Lategan's to plaintiff's farm. The fire mark ran distinctly from Lategan's property to plaintiff's.

Cross-examined by Sir Henry Juta: Witness could not tell where the convicts were working on the Saturday. Witness may have seen the smoke on the Friday; he could not say definitely whether he did or not. On the Sunday witness was told by several persons that the fire had been burning all the previous day. Witness knew that it was provided by the martial law regulations that fires at night had to be reported. Witness had most probably spoken to the people on the farm about the martial law regulations. Witness had never been employed in valuing wood, excepting in this instance. He had previously burned a patch on the plaintiff's farm. He had not then given notice to anyone. Portion of the burned ground was being used for cultivation.

Re-examined: Klein had cultivated part of the burned ground. Witness could not say whether any of the convicts were working at the spot where the fire first appeared on plaintiff's property previous to his discovery of the fire.

Martais Klein said he was the occupier of Klein's cottage on the plaintiff's farm. On the Friday he saw fire on Lategan's property. He observed convicts working at the fire, which was almost between the line of the two farms. At two o'clock in the morning of Saturday witness went

to Simon's Town with vegetables. A couple of stumps were then still burning on defendant's side of the boundary. On Lategan's side the vegetation was charred; on plaintiff's side it was still green. On the Sunday witness noticed the fire on the plaintiff's side. The fire went close to witness's cottage, and witness was busy on the Sunday afternoon in trying to protect his own property. Witness afterwards saw the burned patch right across from defendant's to plaintiff's property.

Cross-examined by Sir Henry Juta: On the Friday night witness saw the fire near the boundary line. When witness saw the fire he did not, when driving away on the Saturday, inform anyone of the fire, nor did he do so when returning on the Saturday. From his house witness could see the flame. It was very common to have these fires in that district. Since the fire witness had cultivated part of the ground over which the fire had travelled. Witness knew that police patrolled the district. Witness did not know that it was the duty of the police-constable to report fires.

George S. Rowan, overseer, in charge of the convicts on the sub-station of Constantia, said that on the Friday he saw smoke rising on the boundary between Lategan's and Van der Byl's farms. He knew the boundary, having previously cultivated land in the neighbourhood. Witness had a house about 120 yards from Mrs. Van der Byl's homestead. He could not say whether the smoke he saw proceeded from defendant's side. On the Sunday morning witness observed that the smoke was rising from Lategan's side of the boundary. There was a burnt patch on Lategan's property, and the smoke was rising from this patch.

Cross-examined by Mr. McGregor: Witness first saw the smoke rising on the Friday afternoon. The smoke could be seen from the plaintiff's house. He did not think the fire dangerous, and took no notice of it. On the Sunday he saw Mr. Murray, who spoke to him about the fire. Witness went away, being on leave. He did not then think anything of the fire. Witness could not tell from his house where the fire was. Witness visited the vineyard on the Sunday morning, and could then discern almost exactly where the fire was.

Cross-examined by Mr. Upington: On Sunday morning, witness saw that no part of Mrs. Van der Byl's property was burned.

By the Court: Witness could not, on the Sunday, see the boundary line, and could not say whether any part of Mrs. Van der Byl's property was then on fire.

Henry C. du Toit, convict guard, deposed to having made a fire-path, on Mr. Lategan's instructions, on his (Mr. Lategan's) property. He kindled the fire.

By the Court: The fire-path was made to protect Lategan's property.

Examination continued: The fire was kindled in several places. Witness knew of no fire-path being cut on the boundary between Lategan's and plaintiff's properties. Witness's span of convicts worked up in the bush on Saturday. On Sunday witness saw the fire on Van der Byl's property, near Klein's house. Witness had since observed a continuous track of fire from the place where he had started the fire to plaintiff's property. On the Sunday witness, with others, tried to cut a path to preserve plaintiff's property, but the efforts were unsuccessful.

Cross-examined by Mr. McGregor: Witness was working on the Friday on a part of the defendant's farm away from the boundary. Mr. Lategan told witness that the reason he wanted a fire-path constructed at the place where witness made the path was because he was afraid of the wind taking the fire to the adjoining property. Witness could not, from the station, see any fire on the Friday evening. Nor did he observe fire on the Saturday morning or evening. He next saw the fire at midday on Sunday.

Henry Rowan, farmer, and J. de Kock, gave evidence for plaintiff as to the damage caused, by the fire.

Johannes B. Brink, farmer, said that when fires were burned, it was usual to make fire-paths, and men were left there to see that the fire did not cross the path.

Cross-examined: The path was to protect the border.

Mr. Schreiner closed his case.

Mr. McGregor called

Daniel Stephanus Lategan, the defendant, who deposed that he

was a wine-farmer. On the 14th Februry, between one and two o'clock, witness burned some grazing veldt. The piece of ground which he wished to burn was about seven or eight morgen in extent. Witness started the fire on the boundary. There was then a strong north-west wind. Williamse, the guard, and convicts followed witness. Witness did not make the fire-path on the boundary between his and plaintiff's property; he did not think it necessary. At about seven o'clock, on the same day, witness went along the boundary, and there were then no stumps alight. Witness gave certain instructions to his overseer that evening. On the Saturday evening witness saw there was nothing burning. He looked particularly, and observed no smoke. Unexplained fires had happened on witness's farm. Witness had been over plaintiff's farm. Trees of from 7 to 8 years' growth were in witness's opinion, not worth more than 6d. a tree. Witness was desirous of extinguishing the fire on the Friday because of Martial Law regulations prohibiting fires at night. Witness met Mr. Murray subsequently, and the latter said nothing to him about the fire.

Cross-examined by Mr. Schreiner: The fire was beaten out on the Friday. Witness did not use water; nor did he use sand. Witness gave instructions to his overseer to put out the fire on the boundary. Witness took care that his fire was properly put out on the Friday, and he was convinced on the Sunday that the fire at Van der Byl's was not from his property. There was a track of fire from where witness burned to Van der Byl's property. The fire might have been kindled on plaintiff's property and gone back to the place witness burned. Witness considered it a good thing that the greater part of the growth on plaintiff's ground burned. The fire had damaged the farm.

Marthinus Gerber said that on the Friday night he went along the boundary on the instructions of Mr. Lategan. He examined the place carefully, and found no fire. He observed no burning stumps. On the Sunday witness saw smoke ascending.

Cross-examined: After the Sunday witness saw stumps burnt on Mrs. Van der Byl's property. Witness had no recollection of his wife having, on the

Saturday night, drawn his attention to lights on the property, nor did he remember saying to his wife, "Are you afraid of spooks? That is only the fire Mr. Lategan made yesterday."

Marthinus Williamse, convict guard, said he put out the fire on defendant's property at four o'clock on the Friday afternoon. No fire remained so far as witness saw.

Cross-examined: Witness did not tell Mrs. Rowan on the Sunday that the fire on plaintiff's property must have been caused by the re-kindling of the stumps.

Peter John, a convict at Tokai station, said he was one of the gang under the charge of Williamse. The fire started on the Friday was put out that evening. Witness saw no smoke or burning places on the Saturday.

Cross-examined: There were no burning stumps to put out on the Friday.

September John, convict, gave corroborative evidence. The fire did not get out of hand.

Rafe A. M. Myburg, farmer, said that on the 9th August he went over plaintiff's farm to make an estimate of the damage. He was accompanied by Mr. Van Niekerk. Their examination took about three hours, and they estimated that the damage amounted to about £150. The area traversed by the fire was about seven morgen. Apart from the injury to the timber the fire would do no damage to the veldt, as veldt.

Benjamin T. van Niekerk gave similar testimony.

Petrus Mories, said he was employed by defendant. On the Saturday he passed the place where the fire was made on the previous day, and then saw no fire.

Hadjie Abdul Sadien, carter and wood-cutter, said he inspected the plaintiff's property at the request of the defendant, and estimated the damage done to the young trees at £75. One other tree of the value of 5s. was damaged.

This concluded the evidence.

The Court intimated that they would wish to hear Mr. McGregor on the question of liability.

Mr. McGregor (for defendant): Mr. Murray heard nothing about this fire till it had got beyond control. Defendant examined the ground on Friday and Saturday, and found no signs of fire. No doubt some of the witnesses exaggerated. But then I may be asked:

"How did the fire originate?" I would suggest that it was caused by people going along the line, and that on a Saturday evening in particular, when many coloured people and others were going along the road to Brink's farm or to Van der Byl's, they might easily have raised the fire by dropping matches, or knocking ashes out of their pipes. In February, when grass is very dry, a fire would soon spread. I submit that this is a much more reasonable explanation of the fire than the explanation which attributes it to Lategan's fire on Friday. And this theory which I have ventured to propound is confirmed by Lategan's evidence as to the burnt tree stump. If that stump had been burning since Friday, it would have been entirely consumed before the Monday. Save for the facts of the fire on Friday and on Sunday, and that the farms are adjoining farms, there is nothing to connect the one fire with the other. I therefore ask your lordships to dismiss the plausible theory that Sunday's fire resulted from Friday's. But even supposing it did; if the defendant has not been guilty of negligence, he is not responsible. See *Digest* (9, 2, 30, 3). The Court, I submit, will not demand *summa diligentia*, but *diligentia boni patris familias*. The fire was not of a formidable character when we lighted it. We had guards and we had convicts working to put the fire out, and they did put it out. Lategan took every precaution to see that the fire was extinguished. That he would naturally do in his own interest. He did all he possibly could do, and hence was not responsible for what followed. If one must take a standard of perfect diligence as it exists on paper, we get out of the realm of practicalities, and go beyond the useful provisions of the law. Then, as to notice. We were not bound to give notice. Mr. Murray was not in the habit of giving notice before burning his veld. We have made no unnatural use of our land; we have only followed the ordinary rules of good husbandry, and done what we had a right to do, and hence we are not liable. During two months not a single word was said by Mrs. Van der Byl to Mr. Murray as to liabilities.

The Court intimated that they would like to hear Mr. Schreiner on the question of damages.

Mr. Schreiner, K.C.: An offer of £22,000 had been made for this farm.

The fire has swept over some 30 morgen.

What, then, would the farm have realised after this fire? Possibly some £2,000. Something must be allowed for the appearance of the farm—the *amoenitas loci*. Some seven or eight years must elapse before the farm can be restored to the same condition. Mrs. Van der Byl considers £15,000 as her *pretium affectionis*. As to the mere commercial value of the wood consumed, the last witness clearly had not been round to see what damage had been done. I submit that £500 would be a very fair average value for the timber destroyed. One witness says that these trees were worth 6d. each—another appraises them at 4s.; let us then take an average, and say that they were worth 2s. 6d. each. Mr. Bowers estimates the damage at £750, and another witness says that the trees still standing are worth £75.

The Court gave judgment for plaintiff for £250 damages, with costs.

Buchanan, J.: The plaintiff in this case is the owner of the farm known as "Klein Constantia," and the defendant owns the adjoining farm "Plumstead." On the 14th February last the defendant kindled a fire upon his own farm for the purpose of burning his veld, as is the customary and usual practice among farmers in this district. Mr. Lategan, in his evidence, has described how this fire was started, and the precautions taken by him to prevent it spreading across the boundary of his farm. He says further that on the Friday evening he went himself to the boundary and saw that the fire had been extinguished, and that on the Saturday he sent up his overseer (Gerber) to the boundary line. This overseer says that he then found no traces of fire being in existence. On the Sunday morning the wind, which had previously been from a northerly direction, changed round to south-east, and early that morning fire was discovered on the plaintiff's ground. The first question the Court has to decide is how this fire on plaintiff's property was caused? The defendant says he took all possible precautions. It is, of course, quite possible for the fire to originate in different ways, but the only suggestion which has been thrown out in this case as to how the fire—if not caused by the fire made on defendant's farm—was started, is that someone passing on the

Sunday morning might have dropped a lighted match or let fall some ashes from his pipe. Now, we have the admitted fact that a fire had been kindled on the defendant's property on the Friday, and we have evidence of witnesses that the fire was seen by them still burning on the Saturday; and we have, further, the strong, cogent fact that there was a continuous belt of burnt ground extending from the place where the fire was started on defendant's farm to the plaintiff's property. It seems to me that, under these circumstances, sitting as a juror, there is little ground for hesitation in coming to the conclusion that these fires on the plaintiff's farm originated through the fire started on the defendant's property. Mr. McGregor has quoted a passage from the *Digest* to show that if a person takes all due precautions, and has acted with all due diligence, he is not liable for any damages which may result from a sudden, unexpected gush of wind carrying fire to his neighbour's field; but in this case there has certainly been negligence on the part of the defendant or his servants, in not seeing that the sparks of the fire lit by them were not extinguished. The defendant himself said it was necessary to extinguish any such fire, and sent his man next morning to see that it had been done. The only conclusion I can come to is, that although the man went up to the spot as directed by his master, he must have overlooked the fire which was then burning. It is certainly extraordinary that the plaintiff gave no notice to the defendant of the fire and of the damage done to plaintiff's farm until nearly two months afterwards. The plaintiff's explanation of this is that she was much taken up with attending on her sister, who was ill, and subsequently died; but although it would have been very much better if the plaintiff had given notice at once, the lapse of time does not destroy her right of action, though it may make more difficult the proof of negligence and of damage done. Two months after the fire a demand was sent, and the defendant then set up the same defence which he now pleads, namely, that he took all due precautions, and that the fire was not communicated from his to the plaintiff's property. After hearing all the evidence, I am bound to come to the conclusion that the fire of which plaintiff complains originated on defendant's property, and that it was

due to the negligence, not, probably, of the defendant himself, but of the defendant's servants, in leaving the fire alight on his property, which fire, by the wind changing to the direction in which winds usually prevail in February, was conveyed to the plaintiff's ground. The first issue of fact raised in this case must, therefore, be decided in favour of the plaintiff. The only other question open is the amount of damage done. Mrs. Van der Byl says the value of the farm is reduced by £1,500, and her relative (Mr. Van der Byl) says he would not have had such a fire on his farm for £2,000. But neither of these persons give any details upon which to base their estimates. In a case like this, it is exceedingly difficult to estimate the exact amount of damage. Mr. Kock, a farmer, says he has spent a hour and a half in inspecting the place and arriving at a judgment as to the amount of the damage, and he estimates it at about £850. He, too, only gives a general estimate, and does not take into consideration the value of the wood left. Mr. Boner, the witness for the plaintiff who goes most into details, fixes the damage done at £750, but he, too, makes no allowance for the value of the wood left after the fire. On the other hand, two witnesses for the defendant fix the damage at £150. The probability is that the true amount exceeds £150, and on the other hand, the £750 mentioned by the witness Rowan appears to me to be far too great. It seems to me that a sum of £250 would be sufficient to compensate plaintiff for the damage caused her. Had there been anything like vindictiveness or ill-will, or revenge, to which this fire could have been attributed, of course the Court might have made the damages greater, but in this case there is nothing of the kind. Mr. Lategan took precautions, but did not take sufficient precautions, and I think he ought not to be visited with anything like vindictive damages. The justice of this case will be met by judgment for the plaintiff for the sum of £250 damages, with costs.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorney: J. J. Michau.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Sir JOHN BUCHANAN.]

Ex parte FARQUHARSON. } 1902.
 } Aug. 21st.

Attorney Articles—Service in Scotland.

F. had served five years under Articles of Clerkship to a Solicitor in Scotland. He had also served other three years in that country, not under Articles, and had there passed two examinations in general knowledge, as prescribed by the Law Agents' (Scotland) Act of 1873. Thereafter he came to this Colony and served with an Attorney of the Supreme Court (but not under Articles) during upwards of three years. He now applied for admission as an Attorney of the Supreme Court. The Court refused the application, but intimated that the applicant would be admitted when he should have served Articles of Clerkship to an Attorney of the Court for the period of one year.

This was an application for admission as an attorney of the Supreme Court and a notary public of the Colony of the Cape of Good Hope.

The petition of Robert Charles Farquharson, of Queen's Town, Cape Colony, showed.

1. That the petitioner came to this colony in March, 1898.

2. That for eight years prior to that date he had been in the service of solicitors in Scotland, five of which years had been served under an indenture, as per extract (registered indenture, bearing date August 13, 1891, hereto annexed; marked A).

3. That on arriving in this colony, petitioner entered into the service of

John William Bell, an attorney of this Hon. Court, practising in Queen's Town.

4. That your petitioner remained in the continuous service and employment of the said John W. Bell until the appointment of the said John W. Bell to the office of Master of the Supreme Court of the Transvaal on August 5, 1901—a period of three years—and has had and obtained tuition from him in all the branches of his large and varied practice.

5. That Joshua S. H. Atkinson, an attorney of this Hon. Court, took over the practice of the said John W. Bell in Queen's Town in August, 1901, and your petitioner has been, and still is, assisting him in his practice.

6. That your petitioner has thus served ten years—six in Scotland (five of which were under articles) and four in this colony.

7. That your petitioner did not enter into formal articles with the said John W. Bell, as this was not thought necessary, in view of service in Scotland.

8. That your petitioner passed two examinations under the Law Agents of Scotland Act, 1873, as per certificates hereto annexed.

9. That your petitioner also passed the Law Certificate Examination of the University of the Cape of Good Hope, as per certificate annexed.

9. That he was 21 years of age on March 10, 1896.

10. That your petitioner would respectfully refer your lordships to the affidavits of the said John W. Bell and Joshua S. H. Atkinson as to service and competency, hereto annexed.

11. That under all the circumstances before narrated, your petitioner would humbly pray:

That your lordships would grant him permission to be admitted as an attorney of this Hon. Court without further service, or to make such other order as to your lordships may seem fair and equitable.

Petitioner filed a supporting affidavit.

The affidavit of John W. Bell, of Pretoria, Master of the High Court of the Transvaal, stated that the petitioner was actively employed in all the branches of his (Mr. Bell's) business of an attorney-at-law and notary public from April, 1898, till July, 1902. That during deponent's absence on active military

service, petitioner was the responsible manager of deponent's business. That deponent considered him thoroughly qualified to be admitted as an attorney and notary, and would have entered into articles of clerkship with him had petitioner so desired, or deponent deemed it necessary.

The affidavit of Joshua S. H. Atkinson bore general testimony to applicant's legal qualifications and ability to conduct the business of an attorney and notary.

Mr. Schreiner, K.C. (for applicant): The applicant now asks to be admitted as an attorney of the Supreme Court. He passed a general examination in Scotland, but he was never admitted as an attorney. He subsequently came out to this country, and served with Mr. W. H. S. Bell, of Queen's Town, and subsequently under Mr. Atkinson, for a period of five years in all. He was not articulated to either of these gentlemen. While Mr. Bell was absent from his business on active service, Mr. Farquharson conducted his business. Moreover, he had passed the examination of the Cape University for the Law Certificate. The case *ex parte Turnbull* (3 Juta, 80) was very similar to the present case, and there the applicant was ordered to serve articles for one year. See also *ex parte Milligan* (11 S.C.R., 111). The applicant would have been entitled to practice in the Sheriff's Court in Scotland, but not in the Court of Session. In that case the applicant was admitted as an attorney of the Circuit Court of this colony, and I would ask that the like privilege be conceded to the present applicant, and that he be ordered to serve one year as a qualification for admission as an attorney of the Supreme Court. (See Rule 198). *Milligan's* case clearly shows that the applicant can be admitted as an attorney of the Circuit Court.

Mr. Gardiner (for the Law Society): See Scots Act (30 Sec., 54 and 55). The applicant would have had to pass a law examination before he could have been admitted in Scotland.

[De Villiers, C.J.: Turnbull was not entitled to be admitted in Scotland.]

The report in that case does not say. But I am instructed to call the attention of the Court to the fact that Turnbull was indentured to a Writer to the Signet. Farquharson was indentured to an at-

torney—presumably an attorney of the Sheriff Court. See Rule 151. Rule 293 provides for the admission of Writers to the Signet and solicitors of the Court of Session, but not of the Sheriff Court. The service in Scotland should have been with someone who was himself eligible for admission as an attorney of this court. Act 36 of 37 Vic., C 63) puts solicitors and law agents in Scotland on the same footing; but they are not on the same footing with Writers to the Signet. In the case of the present applicant, there has been no service under articles in this colony. See *in re Smith* (13 S.C.R., 100). The Law Society has no wish to take up a harsh position, but deems it its duty to bring this matter to the notice of the Court.

Mr. Schreiner (in reply: In *Milligan's* case and that of *Montgomery Walker* it was held that Scots law agents could be admitted as attorneys of the Supreme Court. All that the applicant now asks for is that he may be ordered to serve articles for one year as a condition to admission.

De Villiers, C.J.: The 151st rule was framed as far back as the year 1829, and that rule speaks only of writers to the signet in Scotland; but since that time I think solicitors have been placed in Scotland on the same footing as writers to the signet, and therefore, as applicant has served a full four years, I think the Court may now, under the 151st Rule of Court, direct that, upon his being bound to serving an attorney of this court for a period of twelve months, he be admitted as an attorney. The application must, therefore, be refused; but after the applicant has served articles to an attorney of the court for one year, he will be admitted.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton.]

PROVISIONAL ROLL.

LE SUEUR V. CLEWS AND (1902.
ANOTHER. (Aug. 21st.

Mr. Alexander moved for judgment on a mortgage bond, and for specially hypothecated property to be declared executable.

Granted.

WEEBER V. MOCKE, JUN.

Mr. Close moved for provisional sentence on a promissory note for £150.

Granted, subject to the production of the certificate of presentation.

PIENAAR V. MOCKE, JUN.

Mr. Close moved for provisional sentence for £20, balance due on an acknowledgment of debt.

Granted.

DEMPERS AND VAN REYNEVELD V. WEIDNER.

Mr. De Waal moved for judgment for interest and costs on a certain mortgage bond. The principal sum had been paid that morning.

Granted.

DEMPERS AND VAN REYNEVELD V. DE VILLIERS

Mr. De Waal moved for provisional sentence for £50 on a mortgage bond.

Granted, specially hypothecated property being declared executable.

DALTON V. DUGGAN.

Mr. Alexander moved for provisional sentence on a dishonoured cheque for £77, dated August 4, 1902, and also to make absolute a rule nisi granted by the Court on 13th August, calling upon defendant to show cause why he should not be interdicted from disposing of a certain racehorse.

Granted.

MURRAY V. PETERSEN.

Mr. Upington moved for the final adjudication of the defendant's estate.

Granted.

CHAPMAN V. CLEWS.

Mr. Upington applied for judgment under Rule 329d for £60, rent due.

Granted.

STUBBS V. ISAACS.

Mr. Alexander applied for judgment for £149 9s. for goods sold and delivered.

The application, which was made under Rule 329d, was granted.

ESTATE OF PRINSLOO V. KRUGER.

On the motion of Mr. Benjamin, the Court granted an order for ejectment under Rule 319, in default of plea.

GENERAL MOTIONS.*Ex parte* **NEIL AND MATTHIE.**

This was an application by Messrs. Neil and Matthie against the Master of the steamer Bucknall, which was lying in the Albert Dock, and was about to sail that day (Thursday). The plaintiff firm unloaded the steamship upon the acceptance of their tender, amounting to £317. The respondent refused to pay the account, and he had stated that he would be prepared to fight the matter out in Court. A demand had accordingly been made upon him to deposit security for the costs of the action, but up to the present this had not been done.

Mr. Upington for applicants. Respondents in default.

The Court granted a rule calling upon the respondent to show cause why the ship should not be attached unless he deposited a sum of £380, including £60 security for the costs of the action.

THE "MARGA" V. SEARLE AND CO. AND OTHERS.

Mr. Benjamin moved for a commission in the matter of the barque Marga against Searle and Co. and others for a commission to take the evidence of Captain Cliffe, now at Port Elizabeth, who was about to leave for Europe.

Leave was given for an affidavit to be made before the Magistrate at Port Elizabeth, the costs of the application to be the costs of the cause.

Ex parte **SCHIEPERS.**

This was an application for release on bail. Applicant was prepared to give £2,000 personal bail and £1,000 in two sureties. Mr. Benjamin moved.

Mr. Nightingale, on behalf of the Crown, raised no objection, and

The application was accordingly granted.

LACE V. HARBOUR BOARD.

This was an application by Mr. Bisset for removal of bar.

Mr. Schreiner, K.C., appeared for the Harbour Board.

It appeared that the action arose out of the loss of a package and a claim by Mr. Lace for £350, for the value of a certain case. The Harbour Board contended that they were not liable for above £100.

Leave was given to plead, and it was ordered that the case should proceed on the day already fixed, the costs of the application to be costs in the cause.

COMPANHIA LOURENCO MARQUES V. MASTER OF THE S.S. "TEUTONIA."

Mr. Schreiner, K.C., on behalf of the plaintiffs, applied for leave in the matter of the Companhia Lourenco Marques v. the Master of the S.S. Teutonia, to take the evidence of the Master of the Teutonia on commission.

Leave was granted, the costs to be costs in the cause.

Ex parte **HOWARD AND OTHERS.**

An application was made by Wm. Howard and five others for release on bail.

Mr. C. de Villiers appeared for the applicants.

Mr. Nightingale, for the Crown, intimated that the matter of these six actions had been disposed of before another Court in Barkly East, and that the present application was really unnecessary.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

SMITH V. PATTISON AND MORRIS. { 1902.
 { Aug. 21st.

Landlord and tenant—Defective lift—Personal injury—Damages.

This was an action for £750 damages brought by the plaintiff against the defendants on the ground of the alleged negligence of the latter in connection with the condition of a certain lift.

The declaration set forth that the plaintiff was manager of the South African branch of a London firm, and two weeks before the 17th May last hired a room for the purpose of the business from the

defendants, Messrs. Pattison and Morris, of Economic Buildings, Plein and Spin-streets, Cape Town. The defendants were the owners of these buildings, and carried on business on the ground floor as grocers, while the first and second floors were let to tenants. Plaintiff hired a room on the second floor, and he alleged that on May 17 last, while he was lawfully using a certain lift in the building in order to bring down certain parcels of cameras and camera accessories to the ground floor the rope suspending the lift, and by which it was worked, broke, and the lift falling a distance of 30 feet to the floor plaintiff sustained a severe shock and injuries, being rendered unconscious for a time. In consequence of the accident he suffered a severe illness, and was still suffering from nervous prostration and weakness, and was unable to carry on his business. That it was for the defendants to see that the lift was in strong and sufficient working order, and that they were aware of the defective state of the rope, but took no steps to have it repaired, or to have it replaced by a sufficient rope, and that therefore by their negligence they were liable for the damage sustained by plaintiff.

The defendants in their plea stated that there were stairs provided as a means of egress and ingress to the room occupied by plaintiff, and that the lift was constructed for the conveyance of goods only. They said that there was no valid agreement in existence whereby plaintiff was entitled to use the lift; that the defendants were under no legal obligation to allow the use of the lift, nor did they exercise any control over it, but they gratuitously allowed plaintiff to use it for the carriage of goods only. At the time of the accident the plaintiff was not lawfully using it, and they denied that the rope was insufficient. If any damage had been done it was due to plaintiff's wrongful and negligent conduct.

Mr. Searle, K.C. (with him Mr. Buchanan), for plaintiff; Sir H. Juta K.C. (with him Mr. Russell), for defendants.

Robert Hoey Smith said that in May last he was the commercial representative and manager of the South African branch of the firm of W. Gerike, of London, who dealt largely in musical instruments, cameras, etc. He had been with the firm for about three years, and

came out here for Gerike on April 22. On April 28 witness completed arrangements with the defendants for getting an office and show-rooms in their buildings at the corner of Spin and Plein-streets. The matter was arranged through Messrs. Graham and Morris. Before taking the place witness went to see the rooms, and saw someone working the lift. There was a steep staircase, and no one would take goods to the upper floor without using the lift. Witness had goods coming out, including pianos, cameras, etc. When witness saw the agents, Mr. Morris said that pianos could not be taken up the lift, and witness hired a store in Bree-street for the storage of the pianos. Witness got into the place about May 1. His goods arrived from England later on, and witness saw Mr. Pattison to ask how the lift worked. Mr. Pattison sent one Mr. Tubrugi, a shopman in his employ, to show witness how to work the lift. Tubrugi got into the lift, and told witness to get in also. Tubrugi pulled the lift the length of the first floor, and then told witness to pull himself to the second floor. Tubrugi seemed dead beat, and could not pull the lift further. The lift was very stiff, and it was impossible to take up goods by it unless a person went up with the lift himself. The lift was so stiff that witness had seen two or three persons pulling on the rope. Tubrugi showed witness how to work the lift, and afterwards witness got all his goods up by it. There was no notice on or near the lift stating that it was to be used for goods only. Mr. Pattison had never said anything to witness about using the lift for goods only. On May 17, witness had to supply some cameras and outfits to a customer. He took the first lot down by means of the lift, and returned to his room by the stairs. He pulled up the lift again, and put on to it eight or nine parcels, and then the lift gave way, and he fell to the bottom. He was stunned for a little, and became sick. His left boot was split up. Witness then went round to Pattison and Morris, and told them he had had an accident. One of the defendants, Mr. Pattison then came round with witness. There was a Mr. Oullen there, and witness heard him say something about "Didn't I tell you," when Pattison stopped him. Witness returned to the Royal Hotel, where he was residing, and, al-

though his ankle was bad and he was a bit lame, he did not feel so very bad until the Monday night (May 19), when he vomited blood. On the Tuesday, witness saw Dr. Fuller, who made him go to bed, where he remained off and on for eight days. He was still suffering and unable to carry on his business. Witness's principal, Mr. Gerike, had had to come out from England himself to take charge of the business. Since the accident witness had lost considerably in weight. Before the accident witness went in for cycling, and had won prizes in cycle racing. Now, witness's nerves were altogether shaken, and only a week ago he was spitting blood. Witness believed there were brakes on the rope now, but there were none at the time of the accident. The ropes had now been reversed so that now it was possible to lower the lift from the landing. Witness's salary was £7 5s. a week and 15 per cent. commission, and rent, petty cash expenses, and such-like, were all debited to the firm. Witness could not say what he could have made altogether out here as it was his first trip, but he would not have come out here if he had not thought he could do better, and at Home he averaged £12 a week—salary and commission.

Cross-examined: Witness had received his wages since the accident. He could not call upon his customers. He did not have any "go" about him now. On the days that he felt well he got a few orders. He did not do much business. About three or four weeks after the accident witness was able to do work now and again. He did about £500 business. Witness would get 15 per cent. on gross profits, and he supposed Mr. Gerike would make on the £500 about 50 per cent. gross profit. Witness had not thought over his future plans. Witness had paid himself £7 10s. a week up to last week, but he could not expect that Mr. Gerike would keep him on doing nothing. He intended to take a trip round the coast or Home, to try and get up his health again. Witness could not say exactly what he said to defendants after the accident. He was too excited at the time. Witness met Mr. Graham in Adderley-street some time afterwards, and told him about the accident, but beyond that witness could not remember what he said.

Re-examined: All witness's goods came up by the lift, but it was a tedious business, all the same. Witness never noticed any catch at the top of the lift. Witness's going away was altogether dependent upon the advice his doctor would give him. Witness thought he had already paid the doctor £11 or £12.

By the Court: There was another tenant on the same floor as witness. That tenant, and also the people on the first floor, constantly used the lift.

Dr. E. B. Fuller said he attended plaintiff, whom he first saw on Tuesday, May 20. Plaintiff was then in a very confused mental condition, and said he had a severe pain across the region of the stomach. He complained to witness about having vomited blood, and related the circumstances of his accident. There were one or two minor bruises. Plaintiff, at first, was inclined to make light of his accident, and wanted to go back to his work, but witness insisted upon his going home immediately and going to bed. As usual in cases of bruising of the stomach, the vomiting had been repeated from time to time. Plaintiff was suffering from nervous shock as a result of the fall of 30 feet, and also bruising of stomach, which was getting better. When a person fell 30 feet like that, and did not break a bone, and the shock was not broken at all, generally the nervous system suffered, and, in this case, the nerves surrounding the stomach suffered very much indeed. If plaintiff had broken a bone he would not have suffered so much. The wonder to witness was that the stomach was not ruptured. In witness's opinion plaintiff was not in a fit condition to attend to business, and witness had advised him to take six months' holiday clean away from business. Plaintiff wanted to go to Johannesburg, to start business there, but witness said that a prolonged journey in the train would be the very worst thing for him. It was not likely that plaintiff would be himself for a year or more. Certainly he would not be all right in a shorter time, and the accident might leave its effects on him for a longer time still. To use a term that might be clearer to laymen, plaintiff was suffering from what might be called "railway spine." When a person sustained a severe injury, for instance, in a serious railway accident, but no bones were broken,

then the softer parts of the spinal cord and brain were to a certain extent torn away from the bony part, which affected their functions. By "railway spine," he meant such injuries as might be sustained in a bad railway accident.

Thomas J. Cullen said that in May last he was manager of the American Printing Works, and their premises were on the second floor of the Economic Buildings. They went there in the early part of January of this year, hiring the premises from Messrs. Graham and Morris. They used the lift in question for nearly all their goods, and had brought up heavy machinery and stacks of paper by means of that lift. Everyone in the building that witness knew of used that lift. Mr. Hill, who had at one time occupied the room which plaintiff afterwards hired, also used the lift. Going up the lift could be used for a light load without getting into it, but in order to get down one had to get into the lift and pull the rope continually.

By the Court: It was very unhandy going down; one could not manage at all going down without getting into the lift.

In the course of further examination, witness described the condition of the lift for some time previous, which was such that he thought fit to call defendant's attention to the danger that existed. After the accident witness saw Mr. Smith leaning over the cart with Mr. Morris standing over him. Witness asked what was the matter, and about a minute afterwards Mr. Smith answered and said that he had fallen down the lift. Witness turned to Mr. Morris and said: "I told you something would happen with that lift." Morris answered that the man could not have fallen the whole way down the lift or he would have been killed. Since the accident new ropes had been put up, so that it was possible to let the lift down from the inside without getting into it. There was a rope on one side as a brake, but the other rope was broken near the top so that it was no good as a brake.

Cross-examined: Everyone knew that it was a dangerous lift. Witness did not warn plaintiff about the dangerous state of the lift when he saw him using it.

For the defence, Sir Henry Juta called Benjamin Levine, who said that his firm were the owners of and built the

Economic Buildings some years ago. When they built the buildings they had the lift in question made. It was a lift for goods, and was meant to take a fair weight. While they were in occupation of the building the lift was constantly used, but only for goods, and no one ever got into the lift. All that time no accident occurred and no one was injured.

Cross-examined: He left the premises about four years ago, and had not been there since. Witness could not say whether or not people got on the lift when he was not there. All the time witness occupied the buildings the upper floors were not let.

Mark Bronkhurst, an electrician, said that in May, immediately after the accident, he was called in to repair the lift. He made no examination to discover the cause of the break, but tried the working of it. He had experience of lifts, and if this lift had come down 30 feet it would have smashed to pieces. In this case the cage of the lift was scarcely damaged, beyond ordinary wear and tear. The lift could be worked without getting into it, and it could be worked from the landing.

Cross-examined: Witness had seen the lift before the accident, but only casually. He had never tried the lift as it was before the accident. When witness tried the lift, the rope was in the same position, but the hauling-rope worked in a different way. At the time of the accident it would be impossible to get from the landing at the rope for lowering the lift without crossing the cage. The fitting up of the rope in a different way after the accident was not done with any intention. It was simply a mistake on the part of the men. At the present moment it was possible to work the lift up or down the landing without going into the lift. He had never worked it with goods in it, but he had worked it with one man in it.

James Daniel Stephens, an electrician, employed by the same firm as the last witness, corroborated as to it being possible to work the lift up or down without getting into it. If the cage had fallen 30 feet, witness thought it would have been very considerably damaged, while as a matter of fact the cage was not damaged at all when he saw it two or three days after the accident.

Cross-examined: He had worked it

with men in the cage, but had never worked it with goods in it. That was after they had fitted up the new rope. When effecting the repairs, witness found that in the old way there was a tendency to chafe, and he changed the position of the ropes, but that did not affect the working.

By a Jurymen: There was no necessity for anyone to get into the cage to work the lift.

William Ivan Morris said he was one of the defendants, and they became the owners of the Economic Buildings at the beginning of this year. His firm did not carry on any business in the premises reached by the Spin-street entrance, and did not use the lift. When the plaintiff hired the room he asked witness if he could get a piano up the lift, and witness said he could, if he could get the piano into the lift. Witness saw plaintiff often before the accident, but he never said anything about the lift. He had seen plaintiff using the lift for his goods. With regard to Cullen, two or three days after the rope came off in February, Cullen came to witness, and said that the rope had come off, but that Wilson had put it right. Cullen never said anything to the effect that somebody would be killed by the lift yet. After the accident, witness saw plaintiff, and the latter said he must have fallen about 15 feet. Afterwards witness said either 15 or 20 feet, from somewhere near the first floor, not from the top. Plaintiff then said to witness: "It is no fault of yours; you are not to blame." Witness first heard of plaintiff making any claim about three weeks afterwards. Witness saw plaintiff again at his residence, and he repeated that the accident was no fault of defendant's. Witness never used the lift, and knew little about it.

Cross-examined: Cullen and Wilson spoke to witness about the breaking of the rope shortly after it broke in February. It had never occurred to witness to warn Mr. Smith about using that rope. Witness never knew that these people never used the lift without getting into it. Witness had never pulled up or pulled down goods in the lift. They never used it.

James Pattison, a member of the defendant firm, said that personally he knew nothing about the working of the lift. He had never seen anybody in the lift,

and never told anybody that they could use the lift. It was a goods and not a passenger lift. Nobody ever came to witness with complaints about the lift.

Cross-examined: Shortly after Smith came into the place he came to witness and said that the lift would not move, and witness sent Tubrugi to show him how to work it.

Theodore Francis Tubrugi deposed that in May last Mr. Pattison sent him with Mr. Smith to see to the lift. Witness saw what was wrong, and took the lift to the first floor, and would not go on to the top floor with Mr. Smith, saying that it was too dangerous. After the accident plaintiff got witness into his room, and in the presence of a young lady spoke about witness showing him the lift. Witness then reminded plaintiff about having said at that time that it was dangerous. To the best of witness's recollection, plaintiff then said that he was taking down some goods; he did not expect that the lift would break after he had been using it; that as it was going down it seemed to go down very rapidly, and came down on the floor. Witness said: "Why did you use the lift after I warned you it was dangerous?" Plaintiff replied: "I did not go on the lift. I just went to place my stuff on, and I must have fainted when the lift went down."

Cross examined: The first time witness used the lift was on the occasion he went there with Mr. Smith. The very appearance of the lift suggested danger, because everything depended on the rope.

This concluded the evidence.

After counsel's address to the jury and his lordship's direction on the facts of the case, the jury retired, returning after a short absence with a verdict for the plaintiff for £100 damages.

Mr. Searle moved that judgment be entered for the plaintiff for £100 damages and costs.

Judgment was entered accordingly.

[Plaintiff's attorneys: Scalen and Syfret. Defendant's attorneys: W. E. Moore and Son.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr Justice MAASDORP.]

BAATJES V. BAATJES. { 1902.
} Aug. 22nd.

This was an action brought by the husband against his wife for divorce, on the ground of her adultery.

Mr. Benjamin appeared for the plaintiff; the defendant was in default.

Evidence having been given in support of the plaintiff's allegations, the Court granted a decree of divorce as prayed.

CHAMBERLAIN V. WILSON.

Hotel premises—Misconduct of lessee—Sale of goodwill—Cancellation of sale—Consideration.

W. had leased from Ohlsson & Co. a certain hotel. Owing to the business being improperly conducted, the licence was jeopardized, and the lessors insisted upon W. disposing of the goodwill. This he did to the plaintiff for £750, but the Licensing Court refused to grant transfer, and plaintiff now sued W. for the return of this money.

Held, that W. having failed to fulfil his contract to transfer the licence to plaintiff, who had received no consideration, the sale must be declared cancelled and judgment given for the plaintiff for £750, with costs.

This was an action for the cancellation of the sale of a certain hotel, for the return of the purchase money, and for damages.

The declaration set forth that the plaintiff resided in Cape Town and the defendant in Woodstock. Previous to and during January, 1902, the defendant carried on business as a hotel-keeper in duly licensed premises known as the Balmoral Hotel, which he leased from

Ohlsson's Cape Breweries (Limited), and to whom he was tied for certain liquors dealt in. About January 7 the defendant sold, and the plaintiff purchased, for the sum of £750 the goodwill of the said hotel, a stipulation being that the consent of Ohlsson's should be obtained to the substitution of plaintiff as tenant, and that defendant should have the licence transferred. Thereafter the consent of Ohlsson's was obtained, and plaintiff entered into possession on January 15, and paid the £750. Subsequently, in March, the Licensing Court refused to renew the licence to the hotel, and therefore, defendant having failed to comply with the terms of purchase, plaintiff claimed that the sale should be annulled, and the purchase price of £750 returned, and he further claimed damages to the extent of £1,000. Plaintiff had an alternative claim for £1,750 damages.

Since the declaration was drawn up there had been an amendment thereto, plaintiff's partner in the venture—one Werner—being joined as co-plaintiff.

The defendant in his plea denied any knowledge of Werner in the matter, and alleged that one of the conditions of the sale was that plaintiff had to satisfy Ohlsson's, before obtaining their consent to his becoming the tenant, that the police had no objection to him as licence-holder, and secondly, that the defendant should do all things necessary on his part to obtain transfer of the licence. He alleged that plaintiff obtained the consent of Ohlsson's by representing that the police had no objections to the transfer of the licence to him, and that thereupon he entered into possession and paid the £750. Defendant said he was willing and ready to transfer to plaintiff, but owing to the police objecting, the licence was not transferred to plaintiff, and when at the Licensing Court an application was made to have the licence transferred into the name of Werner, the application was refused. Defendant denied that it was a condition that he had to see that transfer was given, and said that he had performed all the obligations on his part.

Mr. Buchanan for plaintiff; Mr. Benjamin (with him Mr. Upington) for defendant.

Mr. Buchanan called

George Chamberlain, who said that he was one of the plaintiffs in the case, the other plaintiff being John Werner,

who was a partner of witness for the purpose of buying the hotel, but he took no part in the negotiations. Previous to January last witness was a barman at the Altona Hotel, but was looking for a hotel to purchase, and a friend of his named Darling put him on to the Balmoral Hotel. Witness knew defendant Wilson, and meeting him one Friday or Saturday asked him if his house was for sale. He said "Yes," and witness asked him what price he wanted, to which he replied £850. Witness asked to have a look at the hotel, and Wilson replied, "There are too many of you people coming to look at it, and you never buy." Witness then left, but the succeeding Monday he walked with Mr. Lee in the direction of the Balmoral Hotel. On the way they met Wilson, and witness asked him again what he would take for his house, and Wilson said £850, and that as there were two or three others after it witness had better "buck up" if he wanted it. Witness offered £700 for the hotel, but Wilson would not take that. Wilson then went away, saying that he would see them later in the day. Witness and Lee went back and saw Wilson later on at the hotel. Witness was trying to get Wilson to sell the house at a lower price. Witness, after he left Wilson, went down to Ohlsson's, where Lee introduced him to Mr. Bultitude.

Witness was proceeding to detail his interview with Mr. Bultitude when Mr. Benjamin objected to that evidence being led.

[Buchanan, J.: It would have made the matter clearer if the evidence were taken now, but, if necessary, witness can be recalled.]

Examination continued: Mr. Bultitude arranged with witness to meet defendant at his office next morning. Lee and witness went to the office and met Wilson and Bultitude there. The two last named had a private conversation for about ten minutes, and then Bultitude came and said that Wilson would not take less than £750. Witness replied, "All right, Mr. Bultitude, that is mine." Mr. Bultitude asked for a deposit, and witness gave a cheque for £50. What witness purchased was the goodwill and licence of the house. Lee had most of the conversation with Mr. Bultitude. The latter told witness to go round and see if the police would accept him as the licence-holder. Witness did so, and

returning the same day told Bultitude that the police had said he must send in a written application. Mr. Bultitude then said "All right, I will do that for you." Consequently witness did not send in any written application. He saw Mr. Bultitude again on January 13, and the latter then said, "I have not got time now; you had better come round on Wednesday." On Wednesday, January 15, witness went down and again saw Mr. Bultitude. Wilson was also there. Witness asked if everything was all right and Mr. Bultitude said "Yes, everything is all right; all you have to do now is to pay your money and take possession." Witness then paid the £350, one of Pritchard's bills for £100 and one of Sedgwick and Co.'s for £250. Then witness signed the agreement produced with Ohlsson's Cape Breweries. Witness never read over the agreement. Witness owed Bultitude some money on current account, and Bultitude said "I cannot transfer the licence to Chamberlain before you settle this account." Wilson did not have the money on him, and witness lent him £2 or £3 to pay the account. Witness entered into possession of the hotel that day. He never got the licence. He first heard about something being wrong about the end of January, and on going to see Mr. Bultitude the latter asked if witness had received any notice from the police. Witness replied in the negative, and went round to see Inspector Clark. While he was waiting, Bultitude came there and went in to see Inspector Clark, remaining with him for about an hour. When he came out Bultitude said to witness "You are not a proper person to have a licence; you have been chucked out of the police." Witness asked what he was to do, and Bultitude said that he had better go and see Wilson, and get his money back. For the £750 witness was guaranteed the licence. Previous to the occasion when Bultitude saw Inspector Clark, witness understood from what Bultitude said that it was all right, that he had seen the police, and that was why witness paid the £750. Witness went to Werner afterwards, and asked him to try and get the licence in his name. Witness never applied for a licence. The Licensing Court in March refused to licence the house, and on April 10 the place was closed by the police. Witness had never received the licence at all.

Cross-examined : Witness had on several occasions mentioned to Wilson and Bultitude the name of his partner, Werner. Witness had not while in the police been guilty of insubordination.

[Buchanan, J. : How did you leave the police?]

Witness : I resigned, and I have got a good discharge from the police, with Inspector Clark's signature on it. The police did not tell me that they objected to the transfer of the licence to me on account of my conduct while in the police.

Cross-examination continued : Witness never told Mr. Bultitude that he had seen the police, and that they had no objection to him as licence-holder. Mr. Bultitude had not in January sent for witness and then asked what he had meant by his misrepresentation as to the police having no objection to him. He did not know until the end of January that the police had refused the temporary transfer of the licence to him. Wilson, when they saw him at the hotel, guaranteed to get witness the licence, and said that he had been there for thirteen years and there was only one conviction against him for selling drink to a native, for which he was fined £2. Witness afterwards discovered that the fine in the case had been £5.

In re-examination, the discharge witness had received on leaving the police was put in. This showed that witness had resigned, and on the back, under the signature of Inspector Clark there were details as to his (witness's) character as follows :—Education, fair; sobriety, sober; zeal, good; efficiency, good; remarks, nil.

William Lee, a diver at the Docks, corroborated as to his going with plaintiff towards the Balmoral Hotel, and meeting defendant on the way, when the conversation took place as to the sale of the hotel. Afterwards, when they saw defendant at the hotel on the same day, defendant said that he had been in the place thirteen years, and there was no conviction against him except one for selling drink to a native, and it was not he who did that. Defendant said to plaintiff : "If you buy the place I will guarantee you the licence." Witness and plaintiff then left, and saw Mr. Bultitude. Proceeding, witness corroborated as to the negotiations at Mr. Bultitude's office the next morning, which resulted in plaintiff purchasing the

goodwill and licence for £750. Mr. Bultitude, after the deposit of £50 had been made, said: "What about the police?" Plaintiff said he would go and see them. Plaintiff immediately afterwards went to the police, witness accompanying him, but waiting outside the office for him. In consequence of what he was told there plaintiff went back to see Bultitude, but witness did not accompany him. The matter of defendant guaranteeing the licence was not again mentioned in Bultitude's office.

Cross-examined: Witness had known the plaintiff for four or five years. Witness had not contributed any money towards the purchase price of the hotel. The reason that he took such an interest in the matter was that a few years ago plaintiff lent him some money, and witness was now in a position, if plaintiff wanted it, to lend him some money and so return the favour, but plaintiff did not want the money. Defendant said at the hotel on the occasion mentioned that he would guarantee the licence, otherwise there would be no sale.

James Tennant, clerk to the Licensing Court, produced the records in connection with the Balmoral Hotel. Application for transfer (temporary) was made on the 15th January, and was refused on the 20th January. The application for a renewal to Wilson was heard on the 5th March. The application was postponed until the 20th March, when the renewal was refused. There was a letter from a law agent in which application was made for confirmation of the transfer. There had been no transfer, and so there could be no confirmation. The application was for confirmation of transfer and renewal. The Court did not consider the application, deciding to refuse the licence.

By the Court: The Licensing Court were going to refuse Wilson's application on the 5th March, but application was made for a postponement, which was granted. The police objected to the renewal on the ground that the house was not wanted, and was badly conducted. Witness was in court and heard the name of Werner mentioned.

Mr. Buchanan closed the plaintiff's case.

Mr. Benjamin called

Carl Osberg, Sub-Inspector in the Cape Police, who said that in January application was made for transfer of the licence

to Chamberlain. Witness made a report to the Chief Inspector regarding Chamberlain's career when in the Cape Police, and the application was refused. At the Licensing Court an application was made for a renewal to Wilson. There was a postponement, and at the subsequent sitting of the Court something was said about Werner. The police objected to the renewal of the license at all. Something was said about the police not knowing Werner, and the President of the Court said: "We have nothing to do with Mr. Werner. We have to do with Mr. Wilson." The Chief Inspector gave Chamberlain an excellent character.

Thomas Wilson, the defendant, said he had held the license for 13 years. There was a conviction against him last year for a barmaid selling to a native, and Mr. Bultitude advised witness to sell the place. Chamberlain approached witness. He came twice to the hotel, and subsequently went down to Ohlsson's. There was a conversation between Mr. Bultitude, plaintiff, and witness. Witness did not at any time say he would guarantee the license. Mr. Bultitude said Chamberlain would have to see the police. A deposit of £50 was made. On the Wednesday the sale was completed. Chamberlain then said he was all right with the police. Witness did not authorise application to be made in his name for renewal.

[Buchanan, J.: Then who applied in your name?]

Witness: Mr. Bultitude. I gave him authority to act in my name as well as Chamberlain.

Mr. Benjamin said that under the Act it was necessary for the licensee to sign the form of application.

In answer to further questions by Mr. Benjamin, witness said he did not have any rent from the place during the two months Chamberlain was in.

Mr. Buchanan: What do you say you sold to Chamberlain?

Witness: The Balmoral Castle.

The only thing you had was the license?—Yes.

Did you sell that?—Yes

Have you given the license?—I left it with Mr. Bultitude to get it transferred.

The sale was on condition that the license was transferred?—Yes.

Archibald Bultitude, general manager of Ohlsson's, gave corroborative evidence. Witness did not know the house

had a bad character; the locality was a bad one. After the conviction, witness advised Wilson to sell. Before the money was paid Chamberlain came and told witness that it was all right, that he had been to see the police, and that Chief Inspector Clarke had said he would pass him into the Balmoral. Witness would not have agreed to the lease of the premises unless Chamberlain had said that. After the transfer was refused, witness saw Chamberlain, and asked him why he had told him a lie about having seen the Chief Inspector. Chamberlain said he had seen a sergeant of police. Witness made application at the Licensing Court on behalf of Wilson and Chamberlain, but withdrew the application in the latter's name on receipt of the letter from the Magistrate refusing transfer to Chamberlain.

[Buchanan, J.: You know the police were dead against the house?]

Witness: Yes.

That there was not the slightest chance of getting a renewal?—I did not know that until the police reports came out.

You had no idea as to how this house had been conducted?—I know it was a very rough house, and a rough neighbourhood.

Then you knew the house was in jeopardy?—I should not have called it a safe licence at any time.

By Mr. Buchanan: The house was no good without the licence. Witness thought the sale would not be an effective one until the licence was transferred. Witness thought the reason why the licence was refused was because the house was not wanted there.

Mr. Benjamin closed his case.

After argument on the facts by counsel, the Court gave judgment for the plaintiff.

Buchanan, J., in giving judgment, said: The plaintiffs in this case are George Chamberlain and John Werner, trading as George Chamberlain, and the defendant is Thomas Wilson. A transaction took place between Chamberlain and Wilson, in which Werner's name was not mentioned; but it is immaterial to Wilson whether he has to deal with Chamberlain and Werner together or Chamberlain alone. It is common cause that at the time the contract referred to in

the pleadings was entered into Wilson, the defendant, was the lessee of the Balmoral Castle Hotel. Up to this time he had conducted this hotel for 13 years, and had had his licence renewed from time to time; but shortly before the date of this transaction the conduct of this hotel had been such as to create alarm in the minds of the landlords of the hotel, who are Ohlsson and Co., and consequently their manager (Mr. Bultitude) insisted upon Wilson disposing of the goodwill of the hotel, so as not to jeopardize the licence. When negotiations with plaintiffs took place, Wilson stated that he had conducted the hotel for 13 years, and had had only one conviction against him during all that time, and that this conviction was not his fault. He also, according to the evidence of Mr. Lee, who gave his evidence in a very straightforward and credible manner, guaranteed the transfer of the licence to the purchaser. As a matter of fact the police evidence which has been called, and the statements made before the Licensing Court show that instead of having conducted this hotel well he had been conducting it in such a manner as to induce the police to report most strongly against him. After the agreement was entered into to complete this contract, Wilson signed an application for the temporary transfer of the licence to Chamberlain, and this was sent to the Magistrate, who refused it. Plaintiffs say that a condition of the contract was that Chamberlain was to obtain the consent of Ohlsson and Co., the landlords, to the transfer, and that the defendant guaranteed that the licence would be transferred to the plaintiff Chamberlain at the ensuing sitting of the licensing Court. The defendant, in his plea, says that there was no condition, that he left it to Chamberlain to satisfy the police and that he (Wilson) did everything on his part to complete the contract. In his own evidence, however, he admits that the transfer of the licence was a condition of the sale. When the matter came before the Licensing Court, the only question before them was the renewal of the licence to Wilson, and the Court unanimously resolved that the licence should not be renewed. They considered that the conduct of the hotel was such as not to entitle the licence to be renewed, and that the place did not require the licence. As the licence was

not renewed, there could be no transfer of it to plaintiff. Here we have a complete failure of consideration. Who is to suffer the loss of this failure? Wilson has received £750 for what turned out to be an utterly worthless goodwill, and Mr. Bultitude has said that there could be no effective sale until there had been transfer of the licence. On the evidence of Lee, I am convinced that it was one of the conditions of the purchase that there should be an effective transfer of the licence to Chamberlain, and that this was guaranteed by Wilson. Wilson having been unable to perform his contract after receiving the money, and the contract having failed through his being unable to fulfil his part of the contract, the sale must be declared cancelled. Judgment will be for the plaintiff declaring the sale cancelled, and ordering the repayment of the sum of £750, with costs. No evidence whatever has been given as to damages, and therefore the Court cannot give any damages in this matter.

Maasdorp, J., concurred.

[Plaintiff's attorneys: Silberbauer, Wahl, and Fuller. Defendant's attorney: Sonnenberg.]

Ex parte **THE WORCESTER BUTCHERY COMPANY (LIMITED).**

Mr. Schreiner moved for an order winding up the above company, and for the appointment of an official liquidator. The petition showed that the capital of the company was £3,000 in 3,000 shares of £1 each, whereof 606 had been issued and the rest held in reserve. On the shares only £163 16s. had been paid. On August 7, one D. J. Maritz obtained a judgment against the company for £111 12s. and costs—which were estimated at £500—and it was expected that a writ of execution would be issued at once. This would seriously prejudice the interest of other creditors, the company being insolvent and unable to pay its debts, and therefore it was equitable and just that it should be wound up. A special meeting of the directors, held on August 14, had accordingly resolved to petition the Court for a winding-up order under Act 25 of 1892. It was suggested that Mr. Daniel Bland, of Worcester, be appointed official liquidator.

The Court granted a rule *nisi*, returnable on August 30, calling upon all per-

sons interested to show cause why the company should not be placed in liquidation, and Mr. Daniel Bland appointed official liquidator, with the powers conferred by the 149th section of the Act, upon giving security to the amount of £500, the rule to operate as provisional sequestration meanwhile.

Postea (September 9). The rule was made absolute.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

KIMBERLEY BOROUGH COUNCIL V. KIMBERLEY WATER-
WORKS COMPANY. { 1902.
Aug. 25th.

This was an application for the removal of bar, and for leave to plead. The case was originally brought before the High Court by way of motion, and an interdict was then granted, but it was discharged on appeal to the Supreme Court. The matter was in respect of the supplying of water by the Kimberley Council.

The affidavit of Mr. Syfret, of Scanlen and Syfret, stated that the action had been twice withdrawn, and that after the final summons, delay had occurred which prevented the Council from filing their plea in time.

Mr. Schreiner, K.C. (with him Mr. Burton) for applicants; Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for respondents.

Counsel for the respondents (plaintiffs in the action) offered no objection to the application.

The Court ordered the removal of the bar, and granted leave to plead, costs to be costs in the cause.

REX V. C. A. MYBURGH.

Mr. Goch moved for the release on bail of the petitioner, who had been committed for trial as a first-class offender under the Proclamation in respect of rebellion.

Mr. Nightingale, who appeared for the Attorney-General, consented to the application on condition that bail was fixed on the following terms: Accused to give personal security for £2,000, and to find two sureties in the sum of £1,000 each.

An order was granted accordingly.

REX V. P. B. MYBURGH.

The same counsel appeared, and a similar order was made.

CRAIK V. ROBERTSON. (1902.
(Au. 25th.

Partnership.

The plaintiff, a grocer, sued the defendant, a commercial traveller, for £150, made up of balance of account against the defendant and of money advanced to him by plaintiff. On being pressed by the plaintiff for payment of his debt, the defendant claimed the £150 as due to him in consideration of his having retired from an alleged partnership entered into by him with the plaintiff. The Court, finding on the evidence that no contract of partnership had ever been completed, gave judgment for plaintiff with costs

This was an action to recover a balance of account.

The plaintiff's declaration was as follows:

1. Plaintiff is a merchant, carrying on business at 38 and 40, Long-street, Cape Town. Defendant is a commercial traveller, residing at Rosenberg, Kloof-road, Cape Town.

2. On or about the 9th March, 1893, defendant agreed with the plaintiff to serve him as a shop assistant and canvasser, in consideration of a salary of £9 a month, which was subsequently increased to £12 a month, and a commission of 1 per cent. on the cash taken by the plaintiff for goods sold in his said business. Defendant continued in this employment till the 12th March, 1902.

3. During the period of the said service defendant had a running account with the plaintiff, including goods supplied and money lent by plaintiff to defendant, which account, at the termination of the said service, showed a balance of £150 due from defendant to plaintiff. The said balance has since been reduced by the payment of £5, leaving £145 still due from defendant to plaintiff.

4. In respect of the above debts and causes of action, accounts were on the 16th March, 1902, stated between the plaintiff and the defendant, and £145 was upon such stating of accounts found to be due from and payable by the defendant to the plaintiff.

5. The defendant has refused and still refuses to pay the said sum of £145, or any part thereof.

The plaintiff claims: (a) Payment of £145; (b) alternative relief; (c) costs of suit.

To this declaration the defendant pleaded as follows:

1. Defendant admits the allegations contained in paragraph 1 of the declaration.

2. As to paragraph 2, the defendant says that on or about the day alleged therein, the plaintiff and defendant agreed to open a certain grocery business in Cape Town, each superintending a different department thereof. A loan was effected for the purpose of buying stock and carrying out certain building alterations, and one of the terms of the said agreement was that defendant was to receive as his share, until such time as the aforesaid loan was paid off, 1 per cent. of the gross takings of the said business and a maintenance allowance of £9 per month, which was subsequently increased to £12 per month. It was also agreed at the aforesaid time that a deed of partnership was to be drawn up between the plaintiff and defendant on the repayment of the said loan.

3. Subsequently a fresh loan was effected for building purposes, and one Albert Edward Clarke joined the said business. It was thereupon again agreed that on the repayment of the said loans a deed of partnership between the parties was to be drawn up, plaintiff under such deed to receive 50 per cent. of the profits, and the defendant and the said Clarke 25 per cent. each.

4. On or about the 13th of March, 1902, defendant agreed to leave the business, subject to being compensated for the loss of his share in the business and partnership aforesaid.

5. Save as above, the defendant denies all and singular the allegations contained in paragraph 2, and especially that he acted as a shop assistant and canvasser for a salary.

6. As to paragraph 3, the defendant admits that, during the time he was connected with the said business, he, in common with the plaintiff, had a running account in the books of the firm. He says, however, that at the date when the defendant agreed to leave the said business, there appeared to be due from the defendant to the firm the sum of £137 6s. 7d., which account was duly settled by the defendant, as hereinafter explained in paragraph 7.

7. The defendant says, further, that on or about the 13th March, 1902, aforesaid, the plaintiff agreed to credit the defendant with the sum of £150, as and for his share in the business and partnership aforesaid, and in consideration of his having contributed to building up the said business. The plaintiff deducted the £137 6s. 7d. aforesaid from the said £150, leaving a balance in the defendant's favour of £12 13s. 5d.

8. The defendant denies that the amount of £5, or any part thereof, was paid by the defendant or on his behalf on account of any debt due by defendant to the plaintiff or the firm aforesaid, or in part payment thereof; he says that the said £5 was paid to the plaintiff without the defendant's knowledge or consent by one James Cooper, of Salisbury, Rhodesia, in settlement of a debt due by the said James Cooper to the defendant.

9. Defendant denies the allegations contained in paragraph 4, and says that on or about the 13th March aforesaid, accounts were finally settled and adjusted between the plaintiff and defendant, and the balance of £12 13s. 5d. aforesaid, was duly paid to the defendant.

10. Defendant admits that he refuses to pay the sum of £145 mentioned in paragraph 5, but says that he is not indebted to the plaintiff in that or in any other sum. Wherefore the defendant prays that plaintiff's claim may be dismissed with costs.

And for a claim in reconvention.

The defendant (plaintiff in reconvention) says:

1. That on or about 15th May, 1902, one James Cooper, of Salisbury, Rhodesia, without the defendant's knowledge or consent, paid to the plaintiff (defendant in reconvention) for, and on account of the defendant (plaintiff in reconvention), the sum of £5, being in payment of a debt due by the said James Cooper to the defendant.

2. The plaintiff (defendant in reconvention) has refused and still refuses to pay the said sum, or any part thereof, to the defendant (plaintiff in reconvention), though repeatedly requested so to do.

Wherefore the defendant (plaintiff in reconvention) claims: (a) Payment of £5; (b) alternative relief; (c) costs of suit.

The replication was general.

Mr. Schreiner, K.C. (with him Mr. Wilkinson) for plaintiff; Mr. Searle, K.C. (with him Mr. Alexander), for defendant.

David Craik, the plaintiff, said he was a general dealer, carrying on business in Long-street. He first met Robertson about a year before starting business in March, 1893. Robertson introduced Clark. Witness had about £250 when he started business. He commenced, temporarily, in Church-street, and afterwards went to an establishment near the tram terminus in Long-street, where he now carried on business. Witness told Robertson, who was a personal friend, of his intention to open business, and offered him a salary of £9 a month and a commission of 1 per cent. on cash taken for goods sold. Witness employed Clark on the same terms. There was no truth in the allegation that Robertson came in as a partner. On starting witness raised a loan, which he paid off 18 months later. Books (produced) showed the amount of capital put into the business by witness. Witness made a deposit of £6 10s. which was shown in the books. Robertson probably put in this amount because he had an interest in the business, and thought perhaps that by helping with money he would increase the interest. The money was not put in on a partnership business. After the year 1898 Robertson never had a credit balance with witness, but always owed

him money. The loan was raised in witness's name after Robertson had joined him. Clark did not join as a partner. The relations between witness and Robertson were friendly for five years, and in 1898 witness advanced Robertson money to assist him in furnishing a house on his marriage. Witness afterwards had occasion to object to Robertson's conduct, and although the latter promised to reform he failed to do so. Witness frequently gave him chances to reform, and Robertson on one occasion wrote a letter asking for forgiveness. In 1901 witness went to England. Clark was then manager of the business, and witness gave him his power of attorney. Witness discharged defendant in 1902, saying that he had forgiven him time after time, and that he must now go. There was a conversation about defendant's debt to witness, and defendant agreed to give him a bond on the furniture for the amount. The amount of the indebtedness when witness discharged Robertson was £130 odd, and £5 was written off this amount in Robertson's presence. Robertson said he had nothing to meet the month's expenditure with, and asked witness to give him a cheque, making the amount up to £150. Witness gave him a cheque for £20, and Robertson said he would never forget witness's kindness. On the 24th and 27th March witness wrote to defendant respecting the furniture. In April a letter was received from defendant's agent alleging partnership. Witness had never previously heard anything of a claim to partnership by Robertson. Witness, Robertson, and Clark agreed to lend a mutual friend named Cooper £15. Witness agreed to advance the money on condition that Clark and Robertson each held himself responsible for a third. Witness gave Robertson the money to send. He debited Clark and Robertson with £5 each, and credited it with them when the money was repaid by Cooper. Witness's business was a very valuable one, and he would not sell for £25,000.

Cross-examined by Mr. Scarle: Witness and Clark had married sisters.

And since then you have been trying to get rid of Robertson?

Witness: Oh, no.

Witness did not reply to Mr. Shaw's letter at once, because he was making up

his mind what to do in the matter. He was considering whether, if Robertson was repudiating the debt, it was worth while suing him, as the matter would have to go to the Supreme Court, and the whole amount would perhaps be eaten up by costs, but defendant defied him in such a manner that witness took him into Court. Witness went to defendant's house one Thursday evening and tried to prevail upon him to fulfil his promise to transfer the furniture into his (witness's) name. He did not tell defendant that he would ruin him if it cost him a thousand pounds, but he did say that he would fight it to the bitter end. When defendant left witness he went to Pfuhl Brothers, and naturally took with him a few customers who were personal friends of his. Witness never said to Pfuhl that he had no claim against defendant. Pfuhl only asked witness as to defendant's character. Witness denied that he ever said to one Zoer, Pfuhl's manager, that he had no claim against defendant. Witness knew nothing about defendant lending money from the business to an employee named Baxter. Witness absolutely denied that there was any deed of partnership by which defendant was to get 25 per cent., Clark 25 per cent., and plaintiff 50 per cent. Witness never told one Booyen that defendant had taken away some of his customers, and that he (witness) would ruin defendant if it cost him a thousand pounds. What he said to Booyen was that he would take defendant into Court and have the balance due if it cost him a thousand pounds.

Albert Edward Clark deposed that he was plaintiff's bookkeeper. He had been with plaintiff since three weeks after he started business. Witness never at any time, until after defendant left, heard anything about a partnership between defendant, witness, and plaintiff. No claim was ever made by defendant for a statement of profit and loss, and no suggestion was ever made that such a statement should be prepared. There was never any agreement made as to a future partnership. Everything belonged to plaintiff. There were occasions when defendant was not able to attend to his business. Witness remembered the occasion when defendant left. Defendant came in and plaintiff asked witness to come with them into his office. Defend-

ant then said that what had happened would not occur again, but plaintiff said that it had occurred so repeatedly that defendant would have to go this time. Defendant took a few shillings from his pocket, and said that that was all he had in the world. His account was £137 odd, and defendant said he would take it as a great favour if plaintiff would make it up to £150. Plaintiff said he would not like to do that, but he would send a cheque to defendant's wife. Defendant promised to pass his furniture as security. There was no discussion whatever as to defendant getting something for his interest in the business.

Cross-examined: When witness came into the business defendant was already there. Defendant himself had told witness the terms of his engagement. Witness drew his salary month by month, and defendant did the same. At the time of his discharge defendant was drawing, between his salary and commission, nearly £400 per year.

Mr. Schreiner closed his case.

Mr. Searle called

James Tindall Robertson, the defendant, who said that on March 13, 1893, he came into the business. About twelve months previously witness and Craik had talked the matter over, and Craik said that he would do well by witness and see that he got a footing in the business; that it was a young business, and would grow. At that time witness was employed in the grocery trade in Cape Town, but at the time when the business was actually started witness was at Pearce's, at Claremont. Craik started in Church-street. Craik put money into the business, and witness also put in what he had. Witness was well up in the grocery trade. Craik did not tell witness that he was merely to get a salary of £9 per month and 1 per cent. commission on the gross profits. Craik said they would live upon as little as possible to start with, put in all they had, and in the course of time come to an arrangement as to the share in the business. At first there was a loan incurred for building the premises in Long-street. A few weeks after the start of the business Clark came into it. For the first year or two witness was inside in charge of the shop, Craik was outside taking orders, and Clark was bookkeeper. The last named had no knowledge of the grocery trade or business at all. With regard to the loan they

agreed to live carefully for several years, and work the business carefully until it was clear of debt. Craik promised that in course of time, when the business was quite free, witness would have a partnership in the business. Subsequently, in 1898, Craik obtained further assistance from the bank. That ran on from time to time, and it was arranged that when everything was cleared there should be a partnership, Craik taking half, witness one quarter, and Clark one quarter. Stock was to be taken, but stock had never been properly taken since witness had been in the business, and that was why he waited. When he left these loans from the bank had not been paid off. Witness never knew that he was only to get a salary, and could be sent away at any time. It was an understood thing that he was to get a sort of maintenance allowance, which was afterwards increased to £12 per month. There was no definite salary arranged. Witness drew money at any time during the month. Craik never took up the position that he could dismiss witness on a month's notice. Witness knew the whole working of the business, and was never in the position of an ordinary employee, taking Craik's orders. He had an equal voice with Craik, so far as the management of the business was concerned. On Friday, March 7, witness did not feel fit for business, and he told Craik and Clark about it, and they said he had better have a few days off. Witness had been working hard, almost night and day, when Craik was in England. Witness took the holiday, and then on his return worked a day and a half, when it was suddenly sprung on him that he had better resign. Witness said that was rather sudden, and was a surprise to him, but that they had evidently thought the matter over. He then asked how he stood, how about the books, and how about his interest in the business, and what about the partnership. Craik said that was all right, that they had made up their minds, and that witness had better come down the next day. The following afternoon he went there. The books were lying on the desk, and Craik said that witness would see that there was a debit balance against him of £137 odd. Witness asked how he was to know that was right, seeing he had been there nine years, and could not go all through the books,

and had never received a statement of his affairs. Afterwards witness said he supposed he would have to take it for granted that the statement was right, and asked what interest he had in the business. Craik replied: "The business is all in my name; you have no claim whatever"; but he added that it was not his intention that witness should walk out of the business altogether without anything. He said, "We will make it a level £150, and cry quits," and he then told Clark to write out the cheque for £12. Witness took the cheque and left. Witness was so disgusted that he said, "Very well, I will go out of it." Witness was afterwards employed by Messrs. Pfuhl as a traveller. He met Craik afterwards one day in Houtstreet, and Craik said, "I believe you are going about town showing a list of my customers, and offering yourself to canvass them for commission?" Witness replied: "I must make a living; that is all I have to fall back on now." Craik said, "I will show you," and with that he went away. When witness received the letter asking him to come down and fulfil the promise in regard to passing his furniture as security, he could not understand it, and as he was very busy at the time, he paid no further attention to it. He then received the letter of March 27, asking what he would do about his account, and on April 1 Mr. Shaw wrote back, on behalf of witness, saying that the matter was settled by the cheque. Witness denied Clark's statement as to Mr. Craik, at the time of witness's dismissal, having said anything about it having occurred too frequently.

Cross-examined: Dr. Jackson advised witness to go for a change, and witness went to Caledon. Witness admitted that on different occasions he had been away from his business on account of intemperance, but said that Craik had been absent himself just as often for the same reason. Mr. Clark was a total abstainer. When witness was dismissed, there was no word said about his furniture and an inventory being made.

By the Court: There was no partnership, but witness had an interest in the business.

Re-examined: Since 1898 witness's relations with Mr. Craik had been satisfactory, although there was a little feel-

ing between the wives of Craik and Clark and witness.

Robert Penn Sawers, manager to Messrs. Pfuhl Brothers, said he once went to the plaintiff's shop to inquire as to the character of Mr. Robertson. Mr. Craik said he had nothing against Mr. Robertson, excepting that he had once recently stayed away under suspicious circumstances, and that he had dismissed him in consequence.

John Henry Pfuhl, grocer, Woodstock, deposed that Robertson came to him for employment in March last. Witness afterwards met Craik, who said that taking Robertson was not quite fair to business. Witness said that it was quite business-like, and that he had sent his man round to his (Craik's) shop to inquire as to Robertson. Witness heard Mr. Craik say something about Robertson taking a loan on his furniture, but he did not take especial notice.

Robert F. Robertson, plaintiff's brother, said he worked with Craik for some time in 1899. He (witness) understood that defendant was a partner. Witness took orders from defendant; he never heard Craik give orders to defendant. Craik consulted defendant and Clark on all "vital" matters.

James Faxter said he was employed at the plaintiff's store for a time. He sometimes had occasion to require advances of salary, and on such occasions he approached Robertson, who went to the office and brought him money. Witness took orders from Robertson in the same manner as he took orders from Craik. Witness had seen Robertson, Craik, and Clark conferring together.

Robert Duncan said he did the Custom-house work for the plaintiff's shop for some three years after the shop was started in Church-street. Witness got orders from Robertson, Craik, and Clark. Neither of the three seemed prepared to do anything until the other two had been consulted. He dealt with them in a different capacity subsequently, and during the whole time he noticed the same conditions existing between the three.

By the Court: The shipping documents were in the name of Craik.

This concluded the evidence.

Mr. Searle, K.C. (for defendant): We hold that there was a partnership between plaintiff and defendant. We do not ask for a statement of account, but

there certainly was an agreement that the defendant was to get 25 per cent. of the profits. He was not a mere employee. In the letter of May, 1901, and also in a subsequent letter written by Craik to defendant, defendant is clearly treated as a partner. He was no mere monthly servant. He was doing very well at Claremont before he joined Craik: he had money, which he put into the business. It is true that Craik took the lease of the business premises in his own name, but it can hardly be supposed that Robertson worked for 19 years as a mere shopman, particularly as he was drawing a salary of £400 a year. On the pleadings plaintiff does not take up the position that defendant was a shopman. Craik says that plaintiff was owing him £137, and that then he (Craik) gave Robertson £12 more. Craik did not look like a man of that kind, and his whole story was most improbable. It was impossible to get a straight forward answer from Craik. It is quite inconceivable that Robertson should have been content to be sent away for £12 down when he was drawing £400 a year from the business. The fact is that Craik and Clark, who were related by marriage wanted to get rid of Robertson, and they offered to make up the money advanced to him to £150, in order to get him out. Robertson and Craik consulted together on all ordinary business matters. They stood to each other in the position of partners, and not in that of master and servant. I submit that the Court will find that there was a settlement of accounts when the books were produced. Surely Robertson was not going to walk out of his partnership simply because he had been absent for two days at Caledon.

[Buchanan, J.: Would he have walked out if he had been a partner?]

Yes, because he was not getting on well with Clark and Craik, and for the sake of peace he agreed to go for £150. Craik pointed out to him that everything was in his (Craik's) name, and he was content to go for the £150. There is no statement in the declaration that defendant had misconducted himself and been dismissed. Then as to the running account, hundreds of pounds were debited to defendant month by month; servants are not usually treated in this way by their firms. The main point is not what was Robertson's share in the business,

but was there a settlement on March 13. Craik thought that Robertson was taking away his custom; he got away, and then sued for his £150. This was a mere afterthought.

Mr. Schreiner (for plaintiff) was not called upon.

Buchanan, J.: The plaintiff in this case, a young man of considerable energy, started business in Cape Town in 1893 as a grocer. He had a small amount of capital, and incurred certain liabilities to enable him to start business. He had two friends—the defendant Robertson and one Clark—and he induced these two men to join him in working up his business, but the business all through from the commencement was the business of the plaintiff. He agreed with both the defendant and Clark to pay them a monthly salary, and as an incentive to induce them to put their heart into the business, he offered them, in addition to their salaries, the very handsome percentage of 1 per cent. on the gross profits of the business. The business was successful. The salaries paid to the two assistants were at first £9 per month each, afterwards, with the development and growth of the business, increased to £12 per month, and in the case of Clark even higher still, with commission. At the time disputes arose between the parties the defendant Robertson derived from his salary and commission an income of something like £400 per year. During his employment the defendant Robertson misconducted himself twice, and in December, 1898, we have a letter written by him to the plaintiff, in which he admits this fact. Afterwards, in consequence of subsequent disagreements, arising out of a failing on the part of defendant, not to use too harsh an expression, in March, 1902, the plaintiff dispensed with Robertson's services altogether. At that time defendant Robertson had a current account in the books of the business. When notice of dismissal was given, plaintiff said to defendant: "I will give you a month's notice, or you can go at once." He referred to the books, and found there was a debit of £137 standing against defendant. Defendant said he would leave at once, but as he had only a few shillings left in his pocket, he asked Craik to make his debit up to an even sum of £150, which Craik good-naturedly promised to do, remembering

the friendship which had existed between the parties. Robertson then promised to bind to Craik his furniture as security for the debt, and Craik gave Robertson the cheque for £12. Robertson then left the business, and a few days afterwards, as Robertson did not perform his undertaking to come and effect a pledge of his furniture, Craik wrote to him to the effect: "Seeing you have not so far come down with what you promised I shall now deem it a favour if you will send an inventory of the furniture so that we may make it out." Robertson took no notice of this, and shortly afterwards a second letter was written to him, asking him to come down and settle his account. From previous proceedings in this Court, it will be seen that Robertson, instead of complying, shortly afterwards advertised his furniture for sale by public auction. Craik applied for an interdict, but this was not granted, and he thereupon brought this action for the recovery of the £150 alleged to be due to him by Robertson. There is no doubt but that according to the books of the business £150 appeared to Robertson's debit when he left, but Robertson now alleges that as there had been an agreement between Craik and himself and Clark that there should be a partnership this amount was paid to him to give up his share in the business. This is the first issue we have to decide: Has there been any such partnership proved? Now the utmost Robertson can himself say is that Craik promised that in course of time, when the business was quite free there should be a partnership, that "in course of time we might come to a satisfactory arrangement as to our shares in the business." This is the strongest evidence that has been given in this case in proof of this allegation of partnership. On this evidence, it is utterly impossible for the Court to come to the conclusion that there was any agreement for a partnership. No doubt the parties had been friends, and if things had gone smoothly it is not at all unlikely that in course of time an energetic manager might be taken into partnership. But no such agreement was ever come to; it has not been proved that any such partnership was agreed upon or ever existed. Robertson now alleges that he received this £150 in consideration of his foregoing his share in the

promised partnership and for abandoning all claim upon the plaintiff. On this issue I am bound to come to the conclusion that this is not a correct version of what took place at the termination of the employment. I think rather that plaintiff made the further advance to defendant out of friendship and upon consideration of his passing of a pledge upon his furniture. This Robertson did not do, but sold the furniture. The debt still existed—the furniture being only intended as security for it—and Craik now comes into court and sues him for the amount due to him. On the evidence given in this case the plaintiff is entitled to judgment for the amount.

Whether the judgment will be of any use to the plaintiff or not that is not a question for the Court to decide. We have only to decide what are Craik's legal rights, and clearly there was this account due by Robertson, who has not set up any legal defence why he should not be ordered to pay it. There is a sum of £5 claimed in reconvention, which is really a matter of account between the parties. There was a friend of the parties who borrowed £15 from Craik, who agreed to advance this money on condition that Robertson and Clark shared liability. This amount has been repaid by the party and Robertson and Clark, who had been debited with £5 each, have now been credited with a like amount. That reduces the debt due by the defendant to £145, for which judgment will be given with costs, and the plaintiff (defendant in the claim in reconvention) is also entitled to judgment in reconvention. I may say with reference to the question of the alleged partnership that it is not necessary to go further than the plaintiff's own letter written in 1898, in which he refers to the kindness he has received from Craik, and goes on to say "the kindness you have shown me ever since you had me working for you." That certainly would not be the language used by any one having a partnership in the business.

Maasdorp, J., concurred.

[Plaintiff's attorney: R. Greening. Defendant's attorney: J. J. Michau.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

LEVY V. THE TABLE BAY } 1902.
HARBOUR BOARD. } Aug. 26th.

Negligence—Injury to person and
property.

This was an action for £250 damages, brought by the plaintiff, Harris Levy, against the Table Bay Harbour Board for injuries sustained.

The declaration alleged that the plaintiff was a barber, carrying on business in a shop at the corner of Harrington and Caledon streets, and on May 12 a traction engine belonging to the defendants ran into the building, of which defendant's shop formed a part. At the time plaintiff was in the shop, engaged in shaving a customer, and in consequence of the shock he was thrown over and cut his hand with the razor. It was alleged that this accident was the result of the negligence of defendants' servants or the improper condition of the traction engine. Plaintiff's hand was so injured that it prevented him carrying on his business as a barber, and so earning his livelihood. In addition, the rebuilding of the premises, rendered necessary by the accident, prevented plaintiff from using his shop and carrying on his business there. In consequence he had suffered loss to the extent of £250, which sum he now claimed.

The defendants, in their plea, admitted that they were liable for the injuries plaintiff had sustained to his hand, but they said that the cut was not serious. They admitted that plaintiff was prevented for a time from personally operating as a barber, but he was not otherwise prevented from carrying on his business. They admitted that the building was repaired by them, but denied that thereby plaintiff was prevented from carrying on his business. They tendered plaintiff the sum of £15, with costs to the date of tender, June 23.

Upon these pleadings issue was joined. Sir H. Juta, K.C. (with him Mr. Alexander) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Buchanan) for defendants.

Counsel stated that the traction engine

accident, out of which this case arose, was the same as came under the notice of the Court recently in another case.

Sir Henry Juta called

Harris Levy, the plaintiff, who said that he had a barber's shop in the building at the corner of Caledon and Harrington-streets, into which a traction engine ran on May 12. Witness was a barber himself, and had in his shop an assistant, whom he paid £14 per month, and a younger man as improver, to whom he paid £6 a month. Witness himself worked in the shop as a barber. He also kept cigars, cigarettes, and tobacco for sale. Witness's shop was separated from the part which the traction engine ran into by a wooden partition. At the time of the accident witness was shaving a customer, who, when the shock came, wanted to run out of the shop, but fell, and witness, falling over him, cut his left hand with the razor. The left hand was just as important as the right hand in shaving. Witness ran first to a chemist, but as the latter could not stop the bleeding, he went to the Police Surgeon. After that witness was attended for more than a month by Dr. Kruger. Witness did not return to his shop on the day of the accident, but the day after, when he went there, he found the building in charge of the police, who prevented anyone from going in. It was the same on Wednesday and Thursday. On the Friday access was allowed to the place, and witness reopened his shop, and both his assistants were there. The rebuilding had then commenced, and as dust was flying all over the place, no customers came, although witness waited. Besides that, the place was blocked, and nobody could get in. On the Saturday witness again opened, but although that was usually his busy day, he only took 8s. 6d. Before the accident witness's average takings were from £2 to £3 per day. On the Sunday following the accident witness only took 6s., although previously Sunday had also been one of his busy days. One of his assistants then left, but witness opened on Monday with the improver. No customers came, and it was the same on the Tuesday. During the rebuilding the stoep in front of witness's shop was used for stacking bricks, mixing cement, etc. Witness called in Mr. Pearson and a constable, and showed them these ob-

structions, which prevented people from coming in. Witness paid the assistant who left a half-month's salary, viz., £7. In June witness gave his landlord notice that he would leave the premises, as he could do no business under the circumstances. He left at the end of June, and paid £14 rent for the months of May and June. The charges of Dr. Kruger for attending to witness's hand were £5 5s. During January, February, March, and April witness's average takings in his business were between £60 and £80 per month. Witness's own work as a barber would be worth from £25 to £30 per month. He did not do much business in selling cigars, cigarettes, and tobacco. Up to the time of the accident witness had been doing a good paying business, which was gradually increasing. Witness was now working for a friend. He began in July. He estimated his damages at £250.

Cross-examined: On the day after the accident witness instructed his attorneys to write to the defendants claiming £250 damages. On June 3 he saw Dr. St. Leger and Dr. Elliott. The wound on his hand was then healed, but there was still pain in it; he felt a pain in it even now. Witness was cross-examined as to the entries in his cash-book, which he stated was made up by a friend from slips supplied by him. The book was made up every Sunday.

Mr. Schreiner pointed out that it was curious that all the entries for May appeared to have been made with the same pencil, and those for April with a different pencil, and further, that the entries for part of one week were written with one pencil, and the entries for the remainder of the week with another pencil.

Dr. S. J. Kruger deposed that he was plaintiff's medical attendant. On May 14 plaintiff came to him in regard to his hand, on which there was a clean, sharp cut a little over 2 inches long and about $\frac{3}{4}$ of an inch deep. There was a discharge from the wound later on. It was not a wound dangerous to life. Plaintiff came to witness about ten times. At the beginning witness advised plaintiff not to work. When he last saw plaintiff the wound had healed, but the place was still tender, and it was doubtful whether plaintiff could then use the hand in his trade as a barber. Witness did not think he could have recommended him

then straight away to go to work. Witness charged £5 5s. for his attendance on plaintiff in connection with his hand.

George Thomas Hopwood, a sergeant of police, gave evidence as to the police having taken charge of the premises and prevented access thereto after the accident. That was on the first day, but he could not say who was responsible for access being denied on the second and following day. The Sir Lowry-road Police were then in charge.

Thomas Pearson, foreman of Pearson Bros., carrying on business in Caledon-street, said that after the accident he saw some bricks and building refuse lying in front of plaintiff's premises in Harrington-street.

Cross-examined: The plaintiff's shop was closed at the time he referred to.

By the Court: Witness supposed he could have got into the shop by stepping over the debris, but if he were a customer he would not have cared to do so.

P.C. 250 (Michael Riley) deposed that plaintiff asked him on May 29 to see the obstruction in front of his shop. He saw timber and cement in front of the door obstructing the entrance.

Cross-examined: He had never seen the shop open.

Edmund Wm. McLaughlin Thomas, accountant in the employ of Mr. E. R. Syfret, said he had gone into plaintiff's vouchers and documents, and had framed a statement showing the receipts and expenditure, there being a clear profit of £27 11s. 10d. per month.

Eloff Roberts deposed to having kept plaintiff's books from vouchers and slips supplied by plaintiff.

Sir H. Juta closed his case.

Mr. Schreiner called

Dr. A. Y. St. Leger, who said that on the 3rd June last he was acting as assistant medical officer to the Harbour Board, at whose request he examined plaintiff's hand, with Dr. Elliott. Witness found a scar $1\frac{1}{2}$ to $1\frac{3}{4}$ inches wide. It was quite healed, and the action of the thumb was right. There was no permanent injury.

Cross examined by Sir Henry Juta: From the nature of plaintiff's occupation witness thought plaintiff might be incapacitated for a month after the injury. Witness had said he thought plaintiff might claim compensation for employing a substitute for that period. Plaintiff said he had pain.

Dr. Charles Elliott, principal medical officer to the Harbour Board, gave similar evidence. The injury, in witness's opinion, was not such as to cause severe pain after it had healed.

Wm. Adamson, architect, said he examined the premises and found no outward indication of damage to the plaintiff's shop. While the repairs were going on witness saw no obstruction in the vicinity of plaintiff's shop. So far as witness remembered, there was clear access to the shop.

Cross examined by Sir Henry Juta: Witness did not go inside plaintiff's shop. There was a hoarding round the place. Witness did not see building material arrive, and could not say whether plaintiff's place was blocked by this material. If so, it would only be for an hour or so.

Wm. Andrew Callaghan, the builder who effected the repairs, said Levy's shop was not damaged. While the work was being done, the pavement outside plaintiff's shop was not used as a workshop, nor was there any obstruction in front of plaintiff's shop. The shop was never blocked so that people could not get to it.

Charles Lock, builder, gave similar evidence.

Sir H. Juta K.C. (for plaintiff). This is a question of damages. Even the defendant's medical men admit that the plaintiff could not do any work within a month. It is, true that the average wages of a barber's assistant are only £14 a month, but a substitute could not be procured at that rate. Then too the pain and suffering endured by my client must be taken into consideration. Moreover his place of business had to be closed during some days, in consequence of the engine running into his shop. On Saturdays he was accustomed to take about £4 and on other days from £2 to £3. It is clear from the evidence that an obstruction was created in front of the plaintiff's premises. Even the witnesses for the defence admit this and it stands to reason that there must have been serious obstruction in front of premises which it took some 3 months to repair. While this obstruction continued, the evidence shows that practically no business was carried on. Up to that time the business had been good and hence there was no reason for the plaintiff wanting to make the accident an excuse for giving up the business. He paid his rent for the months of May and

June. He had to pay his assistants and I submit that he suffered serious injury and is therefore entitled to substantial damages.

Mr. Schreiner, K.C. (for defendant): The plaintiff chose his own Court and asked for £250 damages. He is trying to recover these damages from a Company reputed to be wealthy, but I would wish to draw attention to the facts (1) that he never attempted to re-open his business and (2) that after the 13th of May he made entries in his books which cannot be relied upon. Then again we have no evidence that he employed an assistant and an "improver." If he did, why were these men not called. As to the wound sustained by the plaintiff, it was by no means serious. There was no necessity for him to see Dr. Kruger. Drs. Elliot and St. Leger deposed that he had not sustained any serious injury. To take the most favourable view of the plaintiff's case he might be entitled to claim for the wages of an assistant for one month: but in point of fact, he never required the services of an assistant. This case should never have been brought into the Supreme Court. The charge of £5. 5s. 0d. is perfectly absurd. No loss of business has been satisfactorily proved and I submit that defendant's tender of £15 was ample. See *Perlstein v. Table Bay Harbour Board* (12, C.T.R., 668).

Sir H. Juta (in reply: Dr. Kruger said he would not have told, plaintiff to come back if his hand had been healed. It was absurd to say that he paid unnecessary visits to his medical adviser in order to pile up damages. He had no interest in getting fees for his doctor.

Buchanan, J.: The plaintiff, in May last carried on business as a barber, in a portion of certain buildings situated at the corner of Harrington and Caledon streets. On the 12th May a traction-engine belonging to the defendant Harbour Board, and driven by their servants, ran into the corner of the building, and destroyed a part of the premises. The shop which was destroyed was not the shop occupied by the plaintiff, but the plaintiff's shop adjoined the damaged portion of the building. The crash which occurred through the engine running into the premises caused a considerable shock throughout the whole building. At the time it happened the plaintiff was actually engaged in shaving a customer, and

the person being shaved fell over, and the plaintiff, who had a razor in his hand, fell over his customer and accidentally cut his hand with the razor. The plaintiff claims £250 as damages. The defendants, in their plea, admit the accident, and admit their responsibility for the injuries done to the plaintiff, but they say that the sum of £15 would amply compensate him for all he suffered. The question we have to decide, therefore, is what amount of damages the plaintiff is entitled to. Is the tender sufficient, or is it not? The Court has always encouraged the making of tenders, and if the tender had been anything like what it ought to have been in this case, the Court would have supported it. Evidence has been given to show that the injury to the plaintiff was such as to render him unable to do his professional work. After the accident he was attended by Dr. Kruger, and on the 4th of June he was also examined by the two Harbour Board doctors, Dr. Elliott and Dr. St. Leger, and the latter say that the sum of £15 would have paid for an assistant for a month, this being the period during which they say the plaintiff would probably have been absent from his work through the injury. The defendants have therefore tendered this £15. In this case we are certainly of opinion that the tender errs on the side of niggardliness rather than on the side of liberality. An assistant might probably have been obtained for the sum of £15, but the tender takes absolutely no account of other damages which plaintiff has suffered, of the doctor's bill, which is shown to be £5. 5s., or of any pain he may have had to undergo. The claim set up by the plaintiff for £250 is altogether out of the question. He was not kept out of occupation of the place more than two or three days. It may be possible that the effects of the engine running into the building may have checked his trade a little, but there was no serious interruption of access to the shop. This, however, we are convinced of: That the plaintiff received a severe personal injury, and that this injury incapacitated him from work for a time. In ordinary cases of damage to property the Court might be able to make a mathematical calculation from the books and accounts of the exact amount of damages suffered, but where it is a matter of personal injury the Court cannot

act on the same principle. The plaintiff's own estimate of the profits of his own labour is from £20 to £30 a month. We think that is a fair estimate, and adding the doctor's bill and considering any little interruption his business may have suffered in consequence of the accident, we think that £35 would be a fair amount to award him. As to the costs, defendants might have escaped liability if they had made a reasonable tender, but the tender seems to us too small altogether, and that plaintiff was forced to come into Court to recover the amount of the real damages he had sustained. The judgment must therefore carry costs. Judgment will be entered for the plaintiff for £35 damages and costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Reid and Nephew.]

RIPEY AND BALFOUR V. PORTER. { 1902.
Aug. 26th.
" 27th.

Sale and purchase—Delivery—

Actio quanti minoris.

This was an action for the recovery of money alleged to be due in connection with a contract for the purchase of certain sheep.

The declaration set forth that the plaintiffs were John Ripley and Frank John Balfour, carrying on business in partnership as live-stock dealers. On May 13 a contract was entered into whereby defendant agreed to purchase from plaintiffs for a period of six months all their consignments of sheep fit for slaughter, not exceeding 1,500 sheep per month, at a purchase price of £1 12s. 6d. each sheep, the defendant to take delivery of such sheep immediately he received notice that they could be delivered. In pursuance of this agreement the plaintiffs on May 24 delivered to defendant 803 sheep, the purchase price of which amounted to £1,304 7s. 6d., while there were Dock dues, which had also to be paid by the defendant, amounting to £10 0s. 9d., making a total of £1,314 8s. 3d. due on that consignment, but this amount the plaintiffs had agreed to reduce by £100.

Buchanan, J., asked what the reduction was for.

Mr. Gardiner (for plaintiffs) said that it was owing to certain representations

made by the defendant that the market was flooded, so that he could not obtain a fair price for his sheep. The defendant, however, said that it was owing to some of the sheep not being in fit condition for slaughter. Defendant said that he did not accept delivery of the remaining 300.

The declaration further alleged that after the consignment above mentioned two other consignments, of 650 and 755 sheep respectively, arrived, and due notice was given to defendant, who, however, refused, to accept delivery. The consequence was that plaintiffs had to sell these sheep elsewhere, with the result that they realised £593 5s. 3d. less than the contract price. Plaintiffs now prayed for judgment for £1,214 8s. 3d., due on the consignment delivered, with interest at the rate of 6 per cent. from May 30, and £593 5s. 3d., as damages for the non-acceptance by defendants of delivery of the other two consignments.

In his plea the defendant stated that the first consignment in dispute consisted of 503 sheep and 300 lambs; that the sheep were diseased, and of inferior quality, and that he never accepted delivery of the lambs. He denied that any notice was ever given him of the other two consignments. He knew nothing about the sale of these two consignments, and said that if the sheep were sold, as alleged by plaintiffs, it was done without his knowledge or consent. He tendered the price of the 503 sheep accepted by him, together with the sum of £10 0s. 9d. for dock dues, and he also tendered delivery of the 300 lambs on payment of £73, costs incurred for the keep of the said lambs for sixty-seven days, and other expenses connected therewith. In reconvention defendant claimed this sum of £73.

The replication denied that the sheep were diseased or of inferior quality, or that there were 300 lambs.

Mr. Gardiner (with him Mr. Bisset) for plaintiffs, Mr. Upington (with him Mr. Russell) for defendant.

Mr. Upington asked for an amendment of the plea. In it the return of the 300 lambs was tendered, but it appeared that nearly all these lambs were now dead. He, therefore, asked that a portion of the plea, where it was said that the defendant "holds at the disposal of the plaintiffs the said lambs," be altered to read that the defendant

had at all times material to this case held the lambs at plaintiffs' disposal. A further amendment would also be required, so as to substitute in the place where the "said lambs" were mentioned in connection with tender the words "such lambs as are now living." Counsel said that according to his instructions, about 250 of the lambs were still alive when the tender was made.

The Court said that the first amendment could be allowed now, and it would be seen later on, when evidence had been led, whether the second amendment was necessary.

Mr. Gardiner called

John Ripley, one of the plaintiffs, who said his firm were importers of live-stock, and on May 13 they entered into the agreement referred to in the pleadings. The first consignment of 671 sheep and 70 lambs arrived, and delivery was accepted and paid for. The second consignment, the first one now in dispute, consisted of 805 sheep, of which two died on board. These were all sheep fit for slaughtering. There were no lambs among them. Defendant's representative took delivery on May 23, and drove the sheep away. Witness had personally given notice to defendant of the arrival of the consignment. When delivery was taken, no objection was made to the condition of the sheep, which, in accordance with the usual custom, were only allowed to land on the Government Veterinary Surgeon's certificate that the sheep were free from disease and fit for slaughtering. On May 30 defendant wrote in regard to the consignment, and in that letter there was no objection taken as to there being lambs in the consignment. Between the date of delivery and the letter no complaint had been made by defendant to witness about the condition of the sheep. The first time witness heard about there being lambs in the consignment was when defendant's representative (Mr. Barsdorf) made a verbal communication as to there being 100 to 150 lambs in the consignment, which witness emphatically denied. Witness sent out Captain Jackson, who was in his employ, to go and see defendant, and then see the sheep. As a matter of fact Captain Jackson did not see the sheep, his cart having broken down. Witness told defendant's representative that every allowance would be made, defen-

dart's representative having said that, owing to the glut in the market, the sheep would not fetch fair prices. About June 13 the next consignment arrived, and witness personally informed defendant of the arrival of the sheep, also telling him that the ship would be docked in the evening. Defendant did not take delivery, although witness waited until nine o'clock, and as he had no place to take them to, he sold the sheep the same evening to Mr. Biden, a broker, for 26s. a head. Witness also paid the dock dues. He sold the sheep at the best price he could. Defendant did not pay half-cash on arrival for any of the consignments.

By the Court: When witness sold the sheep, he did not write to defendant to the effect that he intended to do so. He had no communication with defendant between the time he told him of the arrival of the consignment and the sale.

Examination continued: The next consignment arrived on June 16 by the Abbey Holme, and witness wrote informing defendant. The ship was docked on June 18, and as defendant did not turn up to take delivery, witness sold them to Mr. Biden for 24s. per head, the best price he could obtain. He did not write to defendant saying he would sell the sheep. Witness was not informed as far back as May 24 that there were lambs in the consignment of 803 sheep. The letter put in referred to the first consignment, which was settled. After certain correspondence, summons was issued.

Mr. Upington read a document in the following terms: Mr. Phillip J. Porter, Claremont,—Please deliver eight lambs to our account, and oblige.—June 3, 1902.

The witness said that this document was in his handwriting. The lambs did not come under the contract price. A subsequent agreement was made in regard to these. Witness denied that there were any lambs in the consignment. Mr. Barsdorf did not on or about the 27th May tell witness that the sheep were in poor condition, or that there were lambs amongst them. About ten days later Barsdorf came to witness, and asked him to come out and see the sheep; he said there were from 100 to 150 lambs amongst them. He said he wanted a reduction in the price on account of the number of lambs with the consignment. Witness

told him he could make no reduction; he denied that there were any lambs. Witness then offered to send Captain Jackson, whom he told to make every allowance he possibly could. Captain Jackson made an allowance of £100.

Mr. Upington: How much did you give for these sheep in Buenos Ayres? The witness declined to answer.

[Buchanan, J. It would not affect your liability even if he got them as a present.]

In further cross-examination, witness said that on the day after the Abbeyholme was docked he sent down a man named Duke to notify Mr. Porter. With regard to the Auronia shipment, the sale took place on the day after the ship was docked. The sale was a conditional one, and was made to Mr. Biden. Mr. Porter had not paid for the other sheep, and so witness sold the Auronia shipment conditionally. Witness did not know whether Mr. Porter would take delivery, and in the interests of the firm he was obliged to conditionally accept another buyer's offer. After Mr. Barsdorf said there were a number of lambs in the consignment no one saw the sheep on witness's behalf. Witness made the allowance in order to secure immediate payment.

By the Court: Before delivering the Auronia shipment witness would have insisted upon half payment for the previous supply of sheep to defendant.

Frederick Ayes deposed to seeing the sheep coming off the Eddie. He counted the sheep as they came across the gangway. There were no lambs among them.

Edward H. Stafford, sheep-farmer, said he inspected the stock on the Eddie. There were no lambs. All the sheep were in excellent condition.

Cross-examined: Witness did not look at every pen. He had a general look round. The weight of the sheep was from 75 lb. to 80 lb.

Samuel Robert Mallett, butcher, said he inspected the Eddie consignment. From what witness saw he would say they were all sheep. Witness afterwards saw the sheep in the kraal at Claremont. They were kept in a kraal without a shelter in a wet, swampy place, and witness saw no forage. They were very scabby. This was a month ago. There

was no grazing in the kraal, and the sheep were in poor condition. When he saw them on the Eddie they were in good condition.

Cross-examined: Witness had had a year's experience of sheep. He believed he was able to tell a lamb from a sheep. He judged by the size. Witness understood that the sheep he saw were Porter's. Witness went to buy sheep at Claremont. He was not told that the sheep he saw were Porter's.

John E. Jackson deposed that he went to defendant's place at the request of Mr. Ripley. The trap broke down on the road, and witness was due to sail for East London that afternoon, and had no time to wait until the trap was repaired. Witness told Barsdorf that he knew the market was in a bad way, and that he would take his (Barsdorf's) statement for granted that the sheep were losing in condition. Witness said further that Mr. Ripley had authorised him to make a reduction of £100 if the account were paid that afternoon. Mr. Porter agreed to this. Nothing was said as to the reduction being made on account of there being lambs.

Alfred Biden, broker, said he was broker for De Beers Cold Storage, and he bought the Abbey Holme and Eddie consignments conditionally. The condition was that the people with whom the plaintiffs were treating did not come forward. There was a glut in the market at the time, and witness bought for 26s. and 24s. Witness was absolutely satisfied with the quality.

Cross-examined: Witness sold on account of Ripley and Balfour to De Beers. Plaintiffs, as the sellers, paid his commission. The subsequent shipment after witness bought was sold at 22s. 9d.

Mr. Gardiner closed his case.

For the defence, Mr. Upington called.

Philip John Porter, the defendant, who said he was a broker, and had an office in Claremont. On May 19 he received a letter, saying that the ship Eddie, with a consignment of sheep, would be in on Wednesday. Witness sent his foreman to the Docks, and he brought the sheep next day. Witness did not see the sheep until eight or nine days afterwards, when he noticed that the sheep were rubbing themselves against the walls, and were very small in size. Captain Jackson called at witness's office three times.

He made an appointment to go with witness's manager and inspect the sheep at the kraal, for which purpose the lambs were picked out and separated from the sheep. Afterwards witness met Captain Jackson, and the latter offered, on Mr. Ripley's behalf, to reduce the price by £100, owing to the quality of the sheep. Out of the two shipments witness received—that was, the first one that was settled for and the one now in dispute—478 sheep died. As to the other two shipments in dispute, witness had never received any notice. A consignment had arrived a few days ago, and witness had received notice of that, both in writing and by a messenger. Witness had sold sheep from the two first consignments to various butchers.

Cross-examined: The day after receiving the consignment of sheep now in dispute, witness's manager reported to him about the inferior quality of the sheep, and his manager also saw Mr. Ripley in that connection. It was a verbal agreement between witness and Mr. Ripley that 750 sheep should arrive fortnightly, and not 1,500 all at once. Witness could not resell the sheep from the Eddie owing to their condition. The sheep from the "Abbey Holme" and "Eddie" were mixed in the kraal. There were 1,542 sheep there, but before the "Eddie" lot arrived all the lambs from the "Abbey Holme" had been sold, except five. Witness could not say how many of the thousand sheep he had sold came from the "Eddie" lot. Some of the sheep were in good condition, but not many; about 30 or 40 out of the lot. The sheep had occasionally been given artificial food—lucerne. Witness had made allowance for the weather deteriorating the sheep. He did not hold Mr. Ripley responsible for all the deterioration of the sheep, and he had offered to pay for certain of the sheep. With regard to the second consignment in dispute, Mr. Ripley was in witness's office about his account, and he said there was a further shipment in the Bay, but witness never received any notification as to the vessel being docked. In regard to the third consignment, witness received the letter saying the vessel was in the Bay, but he never got any notice about her being docked. If the sheep had been such that witness could guar-

antee them good, he would have sold them at once.

Re-examined: By the first shipment of all, witness received 70 lambs but all these, with the exception of five, were disposed of before the "Eddie" consignment arrived. The verbal notice witness received of a shipment in the Bay he thought was the same as the one mentioned in the letter. He thought only one shipment had arrived.

James Henry Penfold said he was foreman of defendant's sheep farm. Witness remembered the arrival of the "Eddie" consignment of sheep. Witness went to the Docks on the night of the 23rd May, and there saw Ripley. Witness saw the sheep coming off the vessel. He noticed that they were very inferior, compared to the first shipment, and that there were a number of small sheep. Witness told Ripley there were lambs, and the latter said he would arrange with Mr. Porter. Witness and his men drove the sheep to the kraal. He had to leave seventeen sheep at different points on the way to the kraal, as they could not walk. Witness saw the sheep after they were in the kraal, and noticed them rubbing themselves against the wall of the kraal. Witness killed two of the sheep, and found what appeared to be ulcers. When witness used to go down in the mornings he sometimes found thirty or forty sheep dead. Witness afterwards separated the sheep and the lambs.

Cross examined by Mr. Bisset: Witness did not know much about sheep. He thought there were lambs from the size of some of the animals; he had no other reason for supposing they were lambs.

Frederick Robertson said he was in the defendant's employ in May last. He accompanied the last witness to the Docks to take delivery of the "Eddie" shipment. Witness heard Penfold tell Ripley that the sheep seemed to be inferior, and that there were a lot of small ones or lambs. Witness could not say which term he used.

Cross-examined: Some of the sheep were rather small, and others rather large.

Joseph Richard Lindsay, butcher, Claremont, said that he inspected a lot of sheep the day after they arrived in defendant's kraal. Mr. Barsdorp pointed out the sheep to him. They

were in poor condition, and there was a large proportion of lambs amongst them. There were about 300 lambs altogether. Witness actually weighed some of the sheep which he bought. The average was 42 lb. Witness specially selected two sheep, which he judged to be the best, and the weight of each of these was 52 lb. This was three days after the consignment arrived. From witness's experience, sheep did not lose in condition after a long sea voyage. The sheep witness saw were by no means up to the standard of ordinary imported sheep. Argentine sheep averaged about 65 lb. in weight.

Cross-examined: There were about 1,100 sheep in the kraal. The kraal was a new one, and was provided with shelter. Witness weighed about sixteen sheep. Witness saw the first shipment before the second lot arrived. Witness could discern which sheep belonged to the first and which to the second consignment.

Thomas George Hamilton, butcher, Claremont, said that after the second consignment arrived he went to look at the sheep. He bought 50 at 32s. The weight was supposed to be 60 lb., but witness, on weighing ten of them, discovered the average weight to be 42 lb. He consequently refused to take the other 40. Witness saw lambs in the kraal.

Cross-examined: There were between 200 and 300 lambs and small sheep.

Christian Pintelberry, butcher, gave evidence of a similar nature. He estimated that there were between 200 and 300 lambs.

John Frederick Fraedtas said he bought ten lambs and paid 27s. 6d. for them. He bought some of the sheep, and had to bury some of the meat. Witness helped to separate the lambs from the sheep. At that time the average price of sheep was about 37s. 6d.

Cross-examined: Witness bought about ten lambs and paid 27s. 6d. for them. He paid 35s. 6d. for the sheep, but witness found them in bad condition, and Mr. Porter made a reduction. There were only a few lambs in the first consignment.

Frederick Barsdorp, manager for Mr. Porter, said he saw the sheep the morning after their arrival. He noticed that a great number were lambs. He reported to defendant, and then went to see Mr. Ripley at his house at Mowbray.

Witness told Ripley that the sheep were in bad condition, that 17 had already died, and that there were lambs. Ripley said he had treated Mr. Porter all right over the first consignment, and would treat him the same this time. On the 7th June witness again saw Ripley and told him the lambs and sheep were dying. Ripley said: "I shall do my level best to make you a reduction, and I shall send someone out in the course of a day or two. He told witness to let him know what reduction—whether £100 or £200—he wanted. No agreement was arrived at. When Captain Jackson came out he asked witness if the sheep and the lambs had been divided. The trap in which they were driving broke down, and Jackson did not see the sheep. Jackson agreed to make an allowance on the sheep. The sheep were well looked after. At present three of the lambs were alive. At the time the plea was filed there were about 150 lambs alive. Witness understood the lambs were Ripley's.

Cross examined by Mr. Gardiner: None of the lambs in the second consignment were sold. When Captain Jackson came down, Mr. Porter sent witness for a cheque. This was not paid because Jackson said Ripley would not take the lambs, adding that "everything that ran on four legs was a sheep."

This concluded the evidence for the defendant.

William Duke, called for the plaintiff, deposed that on the 17th June witness was sent out by Mr. Ripley to Mr. Porter with a message to the effect that the Abbey Holme was in the bay. Witness delivered the message to Barsdorf, Porter being out. On the following day witness again went out and saw Mr. Porter, whom he told that the ship was in dock. Mr. Porter said he would attend to it.

Mr. Gardiner closed his case.

After argument on the facts of the case the Court gave judgment on the first claim of plaintiffs declaration and absolution from the Instance on the claim for damages.

Buchanan, J. On the 13th May, 1902, the plaintiffs and the defendant entered into a contract whereby defendant bound himself to purchase from plaintiffs all their consignments of sheep for slaughter for a term of six months, and to pay a price of £1 12s 6d. per head for delivery at the ship's side, the pur-

chaser to pay the Dock dues. Payment was to be made half in cash on receipt of notice of the ship's arrival and the balance two days after delivery of the sheep. There are certain other conditions in the contract limiting the number of sheep to be delivered in one month. One consignment of the sheep was received by the "Gretna Holme" and delivered, and after some correspondence that was paid for, and is therefore out of this case. The second consignment of sheep came by the ship "Eddie," and the price of this consignment constitutes the first claim in the declaration. The "Eddie" arrived and was docked on the 23rd May, and that evening the defendant's servants took the sheep away from the ship's side, but before they were landed they were seen by several witnesses, who say that as the sheep came off the ship one by one they saw that they were in fair condition, and that there were no lambs among them. On the 30th May the defendant wrote to the plaintiffs as to the "Eddie" shipment, saying that he trusted to be in a position to settle the price in the course of a few days, and that plaintiffs must bear with him, as the sheep were coming forward quicker than he expected. A little later communication took place between the plaintiff Ripley and defendant, in which the defendant urged for some allowance to be made to him in consequence of the glut in the market and of the sheep falling off in condition. The defendant says also that he said there were a number of lambs amongst these sheep. Ripley sent out one Jackson to see the sheep and to make some arrangement, but unfortunately Jackson, in consequence of the trap in which he was driving breaking down, did not get to the kraal. He however, had a talk with Barsdorf, defendant's manager, and afterwards plaintiff. Ripley and the defendant agreed to a reduction of £100 on the price of the shipment. Porter says this was to be a reduction on the price of only the sheep in the shipment, and that there were some three hundred lambs in the shipment which he had not agreed to take. Ripley denies any mention of the lambs. Here we have a shipment received at the ship's side, and the defendant taking them away to his own place, and in a letter written a week after there is not the slightest indication of any objection

to this shipment, and no allegation that there were 300 lambs. Indeed only after the matter got into the hands of the attorneys is there any mention in the correspondence of any lambs. Looking at the evidence, it seems to my mind at most a moot question whether there were any lambs at all in the shipment. The question of what were lambs and what sheep seems a matter of opinion between the persons called. Some called the sheep lambs and others called them sheep. Experienced persons who saw the sheep at the ship's side say they were a fair shipment, and that there were no lambs amongst them. If the defendant really repudiated the shipment on account of there being lambs, one would have expected to have found some reference to it in the correspondence. This is not set up in any of the letters, but seven days after delivery the defendant says: "I trust to be in a position to settle in a few days, but you must bear with me." There is no allegation here, and there were only 500 sheep and 300 lambs. I think it is clear under these circumstances that plaintiffs are entitled to recover the purchase price of these sheep. They allowed, on condition of getting immediate payment, £100 off the purchase price, but they have not yet received payment. The contract, no doubt, required one-half of the sum to be paid when the ship arrived in the Bay, and the other half two days after delivery, but the sellers do not seem to have insisted upon this condition of part prepayment before delivery. The case is so clear on this first claim that it is not necessary to go into further details. The plaintiff is entitled to judgment on that claim. But plaintiffs also make a claim for damages in regard to two other shipments which arrived after the Eddie. One was by the "Auronia" and the other by the "Abbey Holme." At the time the "Auronia" arrived the sheep which came by the "Eddie" had not been settled for, and Ripley would seem to have been doubtful whether the defendant could carry out his contract and be able to pay for these sheep. He gave notice that the ship was expected, and he also says he sent notice when the ship had been docked. But it is singular that, before the ship was docked, Ripley had actually arranged with a broker to sell these sheep provisionally in case they were not taken by

defendant. The ship came into dock, and no one being there on behalf of Porter to receive the sheep, they were then and there sold through the broker. Biden to another person. A day or two after Ripley wrote to the defendant, again asking when he intended to pay for the sheep which came by the Eddie, and in that letter he said nothing about the fact of the Auronia having arrived, and of the defendant not having taken delivery, nor of the fact that these sheep had been sold to another purchaser. Now with reference to these sheep, and those which arrived by the Abbey Holme, it seems to me that if the plaintiffs wanted to take advantage of any default on the part of the defendant in not taking delivery, it was their duty to take care that proper notice was given to the defendant, and to make certain that he would not take delivery, and also to give due notice to the defendant of their intention to resell the sheep on his default, so that he might protect his own interests. The sheep which came by the Auronia were re-sold, and no intimation was given to the defendant, and no mention was made of it in the correspondence. In the letter of the 16th June notice was given that 800 sheep had come by the Abbey Holme, then lying in the Bay, and which was hoped to be docked in a day or two. The plaintiffs' witness Duke says that on the 17th June he went out to defendant's place to give notice that the ship was coming into dock that day. He says he did not then see defendant at his office, but he told Barsdorf, and went out next day, saw defendant, and told him that the ship was in dock, when the defendant said he would attend to the matter. The defendant says he has no recollection of any message being received. Plaintiffs had already arranged, through Biden, for a purchaser to take the sheep over on their being landed if the defendant was not present to take delivery. They sold the sheep then and there at the ship's side to this purchaser, and there is no letter or any intimation to the defendant that the sheep had been so sold. The shipment by the Eddie not having been paid for, the plaintiffs put the matter into the hands of their attorneys, and on the 3rd July the attorneys wrote a letter demanding payment, and therein they only make the general statement that their clients had a further claim for damages for breach

of contract, further particulars of which would be given later. Even here they do not say the sheep by the other two steamers had been sold to another party, nor is any intimation given as to how the damages had arisen. I think the plaintiffs' conduct in this case, and the absence of satisfactory evidence of notice having been given to Porter after the arrival of the ship in the dock bars the plaintiffs from recovering the damages in regard to these two shipments. There is no doubt the defendant Porter did not comply with the contract, because he was bound, on receiving notice of the arrival of the Abbey Holme in the Bay, to have gone and paid half the purchase price. He did not do so, and perhaps if he were to try to claim damages for breach of contract on this he would be estopped by his own conduct. This, however, is not sufficient to entitle us to say that plaintiffs acted in such a way that they can now recover the damages which certainly they have suffered through the resale to other people. The sheep had to be paid for under the contract at the rate of £1 12s. 6d. by Porter. It is said, and the evidence of Biden seems to be conclusive on the point, that the market had fallen and that he could only get 26s. for the one lot and 24s. for the other, instead of 32s. 6d. Biden says they were a good lot of sheep, and that these lower prices were not in consequence of any want of quality, but simply in consequence of the fall in the market. Perhaps Porter may congratulate himself that the plaintiffs acted in the way they did, which prevented them from recovering any damages defendant might otherwise have had to pay. However, in consequence of plaintiffs acting in the way they did, we must hold that they cannot now recover damages. Judgment will therefore be given on the first claim for plaintiffs for £1,214 18s. 3d., with interest, with absolution from the instance on the claim for damages, defendant to pay costs. The finding of the Court disposes of the claim in reconvention for the herding and agistment of the lambs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: H. Reid & Nephew. Defendant's Attorney: D Tennant, jun.]

SUPREME COURT

[Before the Hon Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

ABRAHAMSE v. ABRAHAMSE. { 1902.
Aug. 28th.

This was an action brought by the plaintiff against her husband for restitution of conjugal rights, failing which for divorce, plaintiff to have custody of the two children of the marriage, and defendant to forfeit all benefits arising from the marriage in community of property.

Mr. J. E. R. de Villiers appeared for the plaintiff; the defendant appeared in person.

Sarah Abrahamse, the plaintiff, said she was married to defendant on October 12, 1896. After their marriage they lived in Waterkant-street for three months, when defendant left her without cause. He stayed away a few months, and then came back again. A child was born to them, and the defendant left her and stayed away nine months. He then returned, but later on once more deserted witness, and had now been away for a year and nine months. Defendant had said that he would not come back, and that witness could herself see to the two children.

Defendant said he was willing to take his wife and children back, but her people would not let her come. He had gone three times to her mother and father to get plaintiff back. He had a room to which he could take plaintiff. He got £2 a week wages.

Mr. De Villiers submitted that plaintiff was, at any rate, entitled to an order for restitution of conjugal rights, in case the defendant's offer to take her back was not a *bona fide* one.

The Court ordered defendant to restore to plaintiff her conjugal rights on or before September 1, failing which, to show cause why a decree of divorce should not be granted, plaintiff to have the custody of the children of the marriage; rule made returnable on September 12.

Postea September 15. A decree of divorce was granted.

HUTT V. ISAACS.

This was an action for the recovery of the balance of an account.

Mr. Buchanan appeared for the plaintiff.

Mr. Russell appeared on behalf of the defendant, to consent to judgment as prayed, on condition that there was a stay of execution until October 1.

Mr. Buchanan said the claim was for £128 6s., on account of architect's fees for making and drawing up certain plans for building operations, which plans had been adopted by the defendant, who had tendered £63. Plaintiff refused that tender, and accordingly the case had been set down for that morning, when plaintiff had agreed to pay the full amount.

Judgment was given for the amount claimed, with stay of execution as agreed.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ADMISSION.

{ 1902.
{ Aug. 28th.

Mr. Benjamin moved for the admission of Arthur Evans Rigg Wood as an attorney and notary.

Granted, applicant taking the usual oaths.

PROVISIONAL ROLL.

GELB V. ISAACS.

{ 1902.
{ Aug. 28th.

Conditions of Sale—Provisional sentence.

This was an application for provisional sentence on a certain agreement of sale.

The summons called upon the defendant Mohammed Isaacs, of 88, Aspelingsstreet, Cape Town, to render and pay without delay to Abraham Gelb, of Cape Town, the plaintiff, the sum of £1,900 together with interest on portions of the same, viz.: (a) £150 from June 11, 1902, and (b) £1,500 from July 1, 1902, at the rate of 6 per cent. per annum, which he owes to, and unjustly detains from, the

said plaintiff upon and by virtue of a certain written contract of sale and purchase made and entered into by and between plaintiff and defendant on June 11th, 1902, of certain property in Rutgers Street, Cape Town, whereby the defendant undertook and agreed to pay the sum of £150 cash on June 11th, 1902, and to pass a second mortgage bond in favour of the plaintiff for the balance of the purchase price, to wit, the sum of £250, and to take transfer of the said property on the said 1st of July, 1902; the plaintiff hereby tendering, as he has already tendered, transfer of the aforesaid property to the defendant on fulfilment of the above conditions and payment of the costs of transfer aforesaid.

On the motion of Mr. Bisset the Court granted provisional sentence as prayed, with costs.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant in default.]

SHAPIRO V. HOTZ.

Mr. Bisset moved for the final adjudication of the defendant's estate.

Granted.

SCHOLEFIELD V. McDONALD.

This was an application for provisional sentence for the sum of £7,992 5s. 5d. on certain eleven bills of exchange.

Mr. Searle, K.C., for plaintiff; Sir H. Juta, K.C., for defendant.

Sir Henry Juta read an affidavit made by the attorney for defendant, in which it was stated that the defendant acknowledged the debt, and that he had made an offer to pay £5,000, and £500 a month. The defendant had met with difficulties on account of the war and other happenings. All he desired was a reasonable time in which to make arrangements for the settlement of the claim. The judgment and writ sued for might involve the destruction of his business. Sir Henry Juta applied for a stay of execution.

Mr. Searle said he was instructed to oppose this.

De Villiers, C.J.: No sufficient ground has been shown for a stay of execution, and the Court is therefore bound to give judgment as prayed. I would, however, like to point out that in the interests of the plaintiffs themselves it may be advisable for them to grant some indulgence.

SCOTT V. ETHERIDGE.

Mr. P. S. T. Jones moved for the final adjudication of defendant's estate.
Granted.

FEIONART V. AROOMOOGAN.

Mr. De Waal moved for provisional sentence on a mortgage bond for £5,500, and for certain specially hypothecated property to be declared executable.
Granted.

DOMINICUS V. MUSZLAK.

Mr. De Waal moved for provisional sentence for £75 13s. 4d., less £40 paid on account.
Granted.

ALLEN V. ROSENBLATT AND OTHERS.

Mr. Alexander moved for provisional sentence on a mortgage bond for £1,150, and for certain property specially hypothecated to be declared executable.
Granted.

ILLIQUID ROLL.**FERGUSON V. DIMBLEBY.** { 1902.
Aug. 28th.

This was an action in which the plaintiff claimed £47 7s. 11d for work and labour done and performed and material supplied with interest *a tempore morae* and cost of suit.

The summons called upon Charles M. Dimbleby, of the "Peninsula Herald," Claremont, to enter appearance within two days in an action wherein the plaintiff claimed £47 7s. 11d. for work and labour done by the said plaintiff on behalf of the defendant at his special instance and request during March and April, 1902, with interest *a tempore morae*, and costs of suit.

The respondent was in default, and on the motion of Mr. Close, the Court granted an order as prayed, under Rule 319.

[Plaintiff's Attorney: John Ayliff.]

ISAACS V. JAMPER.

Mr. Alexander moved for judgment under Rule 329 for £200, money lent, and £8 14s., money paid on behalf of the defendant.
Granted.

HEDDIE BROTHERS V. O'DRILL.

Mr. Buchanan moved for judgment under Rule 319 for the sum of £53 11s. 9d., being balance of account due by defendant.

Judgment as prayed.

**R. V. VAN REENAN AND (1902.
OTHERS. (Aug. 20th.**

Martial law regulations — Resident Magistrate's Court — Record—Alteration of record.
The accused were charged "in the Court of Resident Magistrate and Deputy Administrator of Martial Law for Malmesbury" with contravention of certain Martial Law Regulations and convicted. Subsequently, the so-called Administrator of Martial Law for the district directed the Chief Constable to alter the record by striking out the words "Court of Resident Magistrate," which was done.

Held, that only an alteration did not affect the right of the accused to have the proceedings quashed on the ground that the Court in which the trial purported to take place had no right to entertain the charges.

This was an application upon a summons commanding Christopher John Sweeny, in his capacity as Acting Resident Magistrate for the District of Malmesbury, on the application of Jan Gerhard van Reenen, of Waterkloof, in the district of Malmesbury, that on August 1, 1902, he, the Magistrate, produce, return and certify to the Justices of the Supreme Court, in Cape Town, the original, or a true copy of the record and proceedings in the case of the King v. the said Jan G. van Reenen, tried on April 24, 1902, before C. W. Broers, in his capacity as Acting Resident Magistrate for the district of Malmesbury, for contravening certain Martial Law Regulations, together with a copy of the said regulations.

The summons further commanded the Honourable Thomas Lynedoch Graham, of Cape Town, in his capacity as His Majesty's Attorney-General of the Colony of the Cape of Good Hope, that he appear before the said justices at Cape Town at the time aforesaid, and at which time an application will be made on behalf of the said Jan G. van Reenen in terms of this summons; and he, the said Attorney-General is to show cause why the judgment, sentence and proceedings in the said case of the King v. van Reenen shall not be reviewed, set aside, or corrected upon the following grounds:

1. That in terms of section 27 of Act 20 of 1856 the sentence is subject to review.

2. Gross irregularity in the proceedings in that the Magistrate trying the case acted also in another capacity described in the record as that of D.A.M.L., and in that no competent evidence was taken at the trial, the accused having been convicted on an affidavit, not made in his presence, and in respect of which he had no opportunity to cross-examine.

3. Incompetency of the Court, the Magistrate having tried the accused for an offence not known to our laws, and having awarded a punishment greater than by the constitution of his Court he had power to award.

The record in the Court below was headed:

MARTIAL LAW.

[A] (9-2-03.)

Ordinary Jurisdiction.

No. 71, 1902.

In the Court of the Resident Magistrate, D.A.M.L., before C. W. Broers, Esquire, Resident Magistrate, D.A.M.L. for the said district, on the 24th day of April, 1902.

Rex versus John Van Reenen,
European Farmer,
Adult.

Charged with the crime of Cont. Reg. 33 (10), Martial Law Regulations, in that, upon or about the 28th March, 1902, and at (or near) Waterkloof, in the said district, the said John van Reenen was wrongfully and unlawfully guilty of an act, conduct, disorder, or neglect, to the prejudice of good order, by removing, or causing two mules to be removed from the district of Malmesbury.

The prisoner pleaded guilty.

Judgment guilty.

Sentence: fourteen days' imprisonment, with hard labour, and to pay a fine of £50.

(Signed), C. W. BROERS,

D.A.M.L.

The affidavit of Jan G. van Reenen stated that, on April 23, 1902, he was arrested on his way from his farm Zoutdam to his homestead at Waterkloof without a warrant by a police-constable named Carstens. The constable did not state the nature of the charge against him, but took him to Malmesbury, and lodged him in the common gaol. The next morning he was brought before the A.R.M., C. W. Broers, who read over the charge to him, to which he pleaded "Guilty." The Magistrate thereupon remarked: "It would have been no use had you pleaded not guilty, as the evidence against you is too strong." No evidence of any sort was adduced at the trial, nor was any affidavit made in deponent's presence. After deponent had pleaded guilty, Broers asked him what he had to say. Deponent was beginning to say something in extenuation, when the Magistrate shouted at him, 'You are a rebel,' and after making other insulting remarks, said he would pass an exemplary sentence.

In his affidavit, Frederick Pritchard, Chief Constable of Malmesbury, admitted striking out the words, "The Resident Magistrate" and "In the Court of the Resident Magistrate" from the record, and stated that he had made these alterations acting under the orders of Captain Kincaid Smith, the Administrator of Martial Law at Malmesbury.

Save as to this tampering with the record, the case was in most respects similar to that of *R. v. Baily van Reenen*, heard on July 7, 1902, and reported (12 Sheil, 557).

The cases of Smit and of Le Roux, the other two present applicants, were similar to that of Van Reenen.

Mr. Burton appeared for the applicants, and Mr. McGregor for the Attorney-General.

A number of telegrams which had passed between the Law Department and Mr. Broers were read and put in.

Mr. McGregor (for the Attorney-General): The information contained in Mr. Broer's telegram is not an affidavit, and I would ask that the matter be postponed that we may be able to obtain his affidavit.

Mr. Burton (for the applicant): The applicant is quite willing to admit Mr. Broer's telegram, and to allow it to stand in the place of an affidavit.

Mr. McGregor: I submit that it would be more regular to have these matters stated on affidavit, but, of course, I am in the hands of the Court.

The Court refused to grant a postponement.

Mr. Burton then read the record of the proceedings in the case of Van Reenen and in the other two cases. He also read an affidavit by a notary to the effect that he made copies of the records immediately after the proceedings, and that the words "Resident Magistrate" were then in the documents. The letters "D.A.M.L." then only appeared after the signature of Mr. Broers, whereas they were now substituted in the place of the words "Resident Magistrate's Court," which had been erased since deponent made the copies. Counsel also read an affidavit by Frederick Pritchard, Chief Constable of Malmesbury, in the following terms: "I drew and made out personally all charges against parties for contravening martial law regulations and all cases under martial law in the division of Malmesbury. All records of cases I made out on form No. G203, Magistrate's Ordinary Jurisdiction, the words, 'In the court of the Resident Magistrate' not being deleted from the records, and the words 'D.A.M.L.' being inserted, not in every case, however, after the words 'Resident Magistrate.' On the 19th July, 1902, I was sent for by the Administrator of Martial Law at Malmesbury, Captain Kincaid Smith, who produced books containing records of the Martial Law cases, and ordered me to strike out the words 'Resident Magistrate' from the records, which I did, and where the words 'D.A.M.L.' were forgotten to be inserted in the records, to insert them in the records, and in these records to strike out the words, 'In the court of the Resident Magistrate.' Martial law was still in force in Malmesbury, and I made the alterations in the records under the instructions of the Administrator, believing at the time that there was no other alternative for me but to implicitly obey the Administrator's instructions. The alterations were made at the Administrator's office at the Town-hall, Malmesbury."

Mr. Burton: In all these cases the applicants are entitled to have the proceedings in the Court below set aside on the ground that these men were tried before the Resident Magistrate for offences not known to our law. These cases are on the same footing with that of *Baily van Reenen* (12, Sheil, 557). There it was held that the mere fact that the words "in the court of the Resident Magistrate" appeared on the record, entitled the applicant to have his conviction quashed. Here the only difference is that the military authorities have tampered with the record. Surely the Court will not allow the applicant to be prejudiced by their unlawful act. I have no wish to go into the details of each of these cases; my contention is that all are quite parallel to that of *Baily van Reenen*, to which I have already alluded.

Mr. McGregor: This is not an application to have the Record in the Court below set aside or amended. We must, therefore, take that Record as it stands, and if we do that, this case is at once differentiated from that of *Baily van Reenen*. In that case the Record was entitled "in the Court of the Resident Magistrate": but here we have *ex facie* a record, not in the Court of the Resident Magistrate, but in that of the Deputy-Administrator of Martial Law. If once we go behind the record we must fall back on the affidavits, and that of Mr. Broers states that he was not acting in his capacity of Resident Magistrate.

[De Villiers, C. J.: Do you say that the Court cannot go behind a record?]

It depends on the circumstances of the case. Here the words "in the Court of the R.M." were struck out by the legal custodian of the record. The affidavit of Mr. Broers shows that he acted as D.A.M.L., and in that case the proceedings in his court are not open to review. There is nothing to show that his court was a court of law. As the appellant appeals on a mere technical point, I feel quite justified in relying upon what may appear to be a technicality. Applicants do not ask to have the record amended. I submit that Van Reenen's case, which has been cited in their favour, is altogether against them, since the principle which underlies it is that the Court will give its decision on the record as it stands.

Mr. Burton was not heard in reply.

De Villiers, C. J.: On July 12 last this Court decided in the case of Bailey van Reenen that proceedings for contravention of martial law regulations cannot be taken before the Court of a Resident Magistrate, and inasmuch as in that case it appeared from the records before the Court that the Magistrate of Malmesbury, in his capacity of Magistrate, and not solely in the capacity of Deputy Administrator of Martial Law, imposed certain sentences, it was ordered that these sentences should be quashed. In the present case, as the record now stands, as altered, the matter does not appear to have been before the Court of the Resident Magistrate, but to have been decided in the Court of the so-called Deputy Administrator of Martial Law. There has, however, been an alteration in the record, and the circumstances under which the alteration was made are stated in the affidavit of the Chief Constable of Malmesbury, who says: "On the 19th July, 1902 (that is seven days after the decision of the Court), I was sent for by the Administrator of Martial Law at Malmesbury, Captain Kincaid Smith, who produced books containing records of martial law cases, and ordered me to strike out the words 'Resident Magistrate' from the records, which I did; and, where the words 'D.A.M.L.' were forgotten to be inserted in the records, to insert them in the records, and, in these records, to strike out the words 'In the Court of the Resident Magistrate.' Martial law was still in force in Malmesbury, and I made the alterations in the records under the instructions of the Administrator, believing at the time that there was no other alternative for me but to implicitly obey the Administrator's instructions. The alterations were made at the Administrator's office at the Town-hall, Malmesbury." Now the Chief Constable may have believed that because martial law was still in existence in the place he was obliged to obey these instructions, but this Court, sitting as a Court of Justice, cannot entertain the same view, and cannot, for one moment, sanction any alteration of records such as has been made in the present case, even if he were ordered by the Administrator of Martial Law, Captain Kincaid Smith. We must treat the

record as it stood, without any words have been struck out by an unauthorised person. That does not in any way alter the nature of the records. The record must be taken as it originally stood, and the fact that there has been an erasion of certain words does not, in my opinion, alter the record in the least. The case therefore stands on exactly the same footing as the case of Bailey van Reenen. The trials purport to take place in the Court of the Resident Magistrate, and he was not justified in entertaining cases of martial law. I may say that in one of these cases there was certainly a complete travesty of justice. The man Le Roux was charged with doing something against law and order. He pleaded not guilty, and was told that he had written an anonymous letter, but there is no evidence at all. The Magistrate may have known the handwriting of some letter before him, but, even in a court administering Martial Law regulations, one would suppose that the letter would be produced and some evidence given on oath that the accused wrote the letter. This I only mention by the way, because it does not affect the case, for even if there had been a clear contravention of martial law regulations, the judgment of the Court would have been the same. The convictions and sentences must be quashed.

Maasdorp, J.: I concur in the judgment. It appears from an affidavit made by one of the applicants in this case that upon the day of the trial he was brought up, as he alleged, before the Acting Resident Magistrate. That seems to have been the impression upon his mind when the case was heard, and upon inspection of the record by his legal advisers this was borne out, because it was clear upon the record that he was actually tried by the Acting Resident Magistrate. The Acting Resident Magistrate seems to have added to his qualifications a further qualification, that of Deputy Administrator of Martial Law, and I think the applicant was perfectly justified, under all the circumstances, in coming to this Court to have these proceedings quashed. That is the position in which the original authorised record stood, and I think it must be taken to be in that position until some person authorised to amend the record had amended it, or until it had been re-

viewed by this Court. The records from the lower Courts come before this Court for review, and if in this case the proceedings had been brought to the notice of the Court in the ordinary way by the record being sent in the ordinary form, I think that the conviction and sentence would have been quashed. I am of opinion that any Court of Justice would hold that the record must now be taken as it originally stood, before being interfered with by some unauthorised person, and that such interference would be regarded as altogether null and void. I do not agree that this is a technical point, because the manner in which an accused person would be able to meet a charge made against him would very much depend upon which Court he was tried in; and in one of these cases, the applicant certainly says he went before a Court which he took to be the Court of the Resident Magistrate.

[Appellant's attorneys, A. J. van Reenen.]

REHABILITATIONS.

Mr. De Waal moved for the discharge from insolvency, under the 117th section of the Insolvent Ordinance, of James Thomas Peddle. The necessary consent of creditors had been obtained.

Order granted as prayed.

Mr. P. S. Jones moved for the rehabilitation of Gabriel Johannes Otto.

Order granted as prayed.

Mr. Buchanan moved for the discharge from insolvency, under section 107 of the Insolvent Ordinance, of James Edward Mears. The Master's certificate was put in showing that the creditors had been paid in full.

Order granted as prayed.

Ex parte MCEWAN.

Insolvency — Rehabilitation — Keeping of proper books.

Mr. M. Bisset moved for the rehabilitation of Robert Ewan. The final order of sequestration in this estate was granted on July 12, 1898. The debts proved in the estate amounted to £9,027, and the assets realised £1,939, leaving a deficiency of £7,088. In his report the trustee said that in making up the statement for the last twelve months of the business

he had had to depend almost entirely upon information supplied by the insolvent personally, the books for that period having been so kept that they were of no use. He pointed out, however, that during this time the insolvent was in Rhodesia carrying on his business there, and the person he had left in charge of his books neglected them. Two dividends had been paid to creditors, of 2s. 8½d. and 10½d. respectively.

De Villiers, C.J.: A merchant engaged in a large business like this should see that proper books were kept, and it is no defence for him to say that he left the bookkeeping to a bookkeeper who neglected his work. He should see that the bookkeeper does his work, and he is responsible for any neglect. He has only been insolvent for four years, and under all the circumstances the Court will now refuse the application, but will give leave to the insolvent to apply again in six months.

Mr. Goch moved for the rehabilitation of Jan Hendrik Basson.

De Villiers, C.J., pointed out that there was no affidavit of service.

Counsel said that it appeared that there was merely a certificate from the attorney, instead of the affidavit, but he asked that the application be granted, subject to the production of the affidavit, the attorney in question having been written to for the necessary document.

De Villiers, C.J.: To ensure regularity in future the Court will refuse to hear the application now. Counsel can mention the matter again when the affidavit of service has been obtained.

The application accordingly stood over.

Ex parte HUYSAMEN AND { 1902.
OTHERS. { Aug. 28th.

Bail—Police supervision.

Where an application was made to the Court for the admission to bail of (amongst others) two minors charged with murder and high treason, and the Crown consented on the condition, inter alia, that the said minors should be placed under police supervision. The

Court refused to make any such order, holding that it had no power to do so.

Mr. Russell moved on the petitions of Johannes Christian Huysamen, Martinus Johannes Prins, Daniel Anthonie Rykheer, Albertus Barend van Schalkwyk, and Theunis Gerhardus van Schalkwyk for their release on bail. The prisoners are at present imprisoned in the gaol at Van Rhyn's Dorp on a charge of treason and murder.

Mr. Nightingale said he appeared on behalf of the Crown to consent to the application, on condition that the petitioners found personal bail each in a sum of £1,000, with further bail for each of two sureties for £500 each, and also that the two last-named prisoners, who were minors, be restricted to the village of Van Rhyn's Dorp, and remain under police supervision.

[De Villiers, C.J.: I do not see how we can do that; we have got no authority to direct police supervision.]

Mr. Nightingale said he had no instructions to depart from that condition.

[De Villiers, C.J.: Then they must just remain in gaol, that is all.]

Mr. Nightingale said that he was instructed that the reason for asking that the two last-mentioned petitioners be placed under police supervision at Van Rhyn's Dorp was that they were hardly more than boys, and that they were not under proper parental control, so that it would be unsafe to allow them to return to their homes.

[De Villiers, C.J.: I don't see how this Court is to make any order as to police supervision. How are we to control the police?]

Mr. Nightingale said that then the only other course he could take would be to ask for an increased bail from the sureties in the case of these two petitioners. Therefore he would ask that, in their case, the bail from the two sureties be increased to £1,000 each.

[De Villiers, C.J.: I don't see how asking for higher bail can make up for the want of parental control.]

Mr. Nightingale said it would make the sureties more careful in seeing that the lads appeared to answer to the charge.

[De Villiers, C.J.: Either they are entitled to their liberty or they are not. I don't understand this half-way condition between liberty and imprisonment.]

Mr. Russell said that his instructions were to agree to these two petitioners remaining in Van Rhyn's Dorp under police supervision.

[De Villiers, C.J.: You may consent, but I do not see how the Court can.]

After consulting with his attorney, Mr. Russell said he was instructed to consent to the application for higher sureties in the case of these two applicants.

The Court then granted an order releasing the petitioners on bail, personally in £1,000 each, with two sureties of £500 each in the cases of the three first-named petitioners, and two sureties of £1,000 each in the cases of the two last-named petitioners.

Applicant's attorneys, Walker and Jacobsohn.

HOLLINGTON BROTHERS V. { 1902.
DYER. { Aug. 28th.

Mr. Benjamin moved for the extension of the return day of the rule nisi restraining respondent from removing the contents of a certain case from certain premises.

The return day was extended until September 12.

Postea (September 12), the rule was made absolute.

HUNT V. STACK.

Mr. Buchanan moved that the rule nisi calling upon the respondent to show cause why certain moneys should not be attached be made absolute. Counsel said it appeared that the notice was not served upon the respondent until August 2, the day after the rule had been made returnable, but he had been informed that since then the respondent had paid about two-thirds of the amount due. Thus he had acknowledged the debt, and it would save further expense if the Court would make the rule absolute, leaving it to respondent to take steps to have it set aside if so advised.

[De Villiers, C.J., said that he did not see how they could make the rule absolute under the circumstances. The proper course would be to make an application for a fresh rule.]

Mr. Buchanan said they might grant such a rule operating as a temporary interdiction.

[De Villiers, C.J.: Yes, if you will pay the costs up to now.]

Mr. Buchanan said that the reason they had not been able to serve this rule in time was that the respondent moved about from district to district. It appeared that he belonged to some irregular corps.

[De Villiers, C.J.: Then he was only doing his duty in moving about and not trying to evade you. He was in the service of his country.]

Mr. Buchanan said that the amount was due under a Magistrate's Court judgment, which it was the duty of respondent to have satisfied.

[De Villiers, C.J.: The debt was only for £16, and the respondent has now paid two-thirds. I think applicant will be very well advised to drop the matter now.]

Mr. Buchanan said that the original debt had of course been increased by costs, and there was about £10 now due.

De Villiers, C.J.: If the applicant wants further relief, he will have to proceed *de novo*, the present proceedings having lapsed. The applicant has got a portion of his money, and it is for him to consider whether, for the sake of the balance still due, he will go further.

No order was made.

HLANGI V. TABATA. { 1902.
Aug. 28th.

This was an application for leave to sue *in forma pauperis* in an action the applicant was bringing against the respondent. He also asked for leave to join respondent's son as co-defendant.

The petitioner's affidavit set forth that he purchased in 1875 a piece of ground in a location in the district of Queen's Town, and farmed the ground until 1886, when he went to the then Orange Free State. He returned about June, 1901, and found the said Tabata in occupation of the ground. The title deeds had been made out in petitioner's name, and respondent refused to deliver these up on being requested to do so, saying that he had bought the ground from petitioner's late father. That was impossible, as petitioner had never given any one authority to dispose of the ground.

It was said that the respondent had paid the quitrent and charges due on the land for the last ten years. Petitioner was bringing an action for the delivery of possession of the land, the giving up of his title deeds, and for damages. As he was not possessed of property, except the land in question, of the value of more than £10, he applied for leave to bring his action *in forma pauperis*.

The respondent, in a replying affidavit, said that he had never used, occupied, or been in possession of any land belonging to the petitioner, but he had been informed that one of his sons had obtained and was now in occupation of the land in dispute.

On behalf of the petitioner, an affidavit made by the headman of the location was read, in which the headman said he was acquainted with the circumstances of the ownership of the land in question. During the absence of petitioner the respondent had for the last ten years given himself out as the possessor of the land, which he had cultivated. During the last two years one of respondent's sons had been in possession, but deponent had considered that the said son resided on the ground on behalf of his father. When a request was made to respondent to give up possession he did not say anything about his not being in possession, but said that he had purchased the ground from petitioner's father. He did not say anything about his son being the possessor.

The Inspector of Native Locations for the district also made an affidavit, in which he said that for the last seven or eight years respondent had always paid him the annual quitrent.

Mr. Bisset, for applicant; Mr. Benjamin, for respondent.

In reply to the Court, Mr. Benjamin said that his client made no claim whatever to the ground.

The Court refused the application, but the Chief Justice said it would be noted on the record that the respondent disclaimed any right or title to the land

Ex parte BUDGE. { 1902.
Aug. 28th

This was an application by respondent's wife to have a *curator ad litem* appointed in certain proceedings instituted with a view to have one G. R. Budge declared incapable of managing his

affairs. The said G. R. Budge was stated to be 81 years of age and of weakened intellect. He was possessed of landed property and moneys in the bank, which latter it was desirable should be invested and so yield some return. Mr. Runciman was suggested as *curator ad litem*.

The Court granted an order as prayed, making the summons returnable on September 12, and appointing Mr. Runciman as *curator ad litem*.

JONES V. RIES.

Mr. Schreiner moved, on behalf of the plaintiff, for the removal of the above trial cause to the ensuing Circuit Court at East London. The action was one for alleged false and malicious statements made concerning the plaintiff by the defendant at a meeting of the East London Town Council. The parties resided at East London, and the witnesses were there. Further, one of the principal witnesses was the Mayor of East London, who could not possibly come to Cape Town.

Mr. Benjamin appeared for the respondent, who opposed the application on the ground that there was a very full criminal roll, including some murder trials, as well as some three civil cases already set down for hearing at the Circuit Court, which only sat for four days, so that it would not be able to dispose of this case.

Mr. Schreiner pointed out that in any case it was impossible to hear this case until next term of the Supreme Court.

The Court granted the application for the removal of the case to the East London Circuit Court.

De Villiers, C.J.: If the case is not removed to the Circuit Court, it will be impossible to hear it until next term of the Supreme Court. It has been stated that there are already several cases set down for hearing at the Circuit Court, but I do not think there are so many that it will be impossible to hear this case. Besides, it is often found possible for the Circuit Court to sit a day longer, and by doing so, it might be possible to hear this case. It is quite clear that the balance of convenience is on the side of hearing the case at East London, and the application will accordingly be granted.

Ex parte ROHLAND.

Mr. Buchanan moved for the appointment of a *curator ad litem* in an application to be made to have petitioner's son declared of unsound mind, and incapable of managing his affairs. Some time ago the petitioner took out in his son's name a licence for a piece of ground, under the Act 37 of 1882, and since then the son had become of unsound mind, and was now confined in Valkenberg Asylum. It was desirable to have the licence transferred to the father, who had cultivated the land, and spent about £700 on improvements on it. The petitioner desired to commute the licence to freehold title, which had to be done before the end of the year, otherwise the land would be forfeited.

Order granted as prayed, Mr. Advocate Benjamin being appointed *curator ad litem*; summons to be returnable on September 12.

Ex parte BOTHA AND OTHERS.

This was an application to have a rule *nisi* made absolute, which had been granted (a) restraining Major McKenzie, the Officer Commanding the troops at Calvinia, from selling or offering for sale any horses, mules, donkeys, carts, sheep, etc., belonging to the petitioners; (b) if such sale has already taken place, restraining Major McKenzie from parting with the proceeds of such sale, and (c) restraining purchasers from parting with such stock or goods.

Mr. Burton, for the applicants; Mr. Searle, K.C., for the military authorities.

Mr. Searle: It would seem that the sale had been held before the Order of Court could be served on the respondents. The whole question, therefore, now only affects the proceeds of the sale. I submit that the whole question can hardly be settled on motion. There are no less than 29 claimants, each of whom has a different case, and I submit that it would be better for them either to bring their respective cases before the Compensation Court or to seek their remedy by action.

[De Villiers, C.J.: These seizures took place after the proclamation of peace?]

Yes.

[De Villiers, C.J.: Then the cattle cannot belong to the enemy.]

I am quite willing to go into the matter on the affidavits if necessary, but I submit that the matter can hardly be settled on motion.

Mr. Burton (for applicants): Some of the purchasers cannot be found, but most of them are employed by the military. There is some conflict of evidence as to the ownership of the cattle, but there can be no doubt that they were taken out of the lawful possession of the applicants by the military. It would be very unfair to leave these people to their uncertain chances of Government compensation. They may get little or nothing.

Mr. Searle: The military have not got any of these cattle in their possession. If the applicants proceed by action, the Imperial Government is certainly good for £4,000 or £5,000.

[De Villiers, C.J.: You cannot sue the Imperial Government, save with their consent.]

Of course, that is so. All we ask is that this matter should be allowed to stand over for arrangement by the commissioners, and that no order should be made as to costs.

Mr. Burton (in reply): We are not bound to prove ownership of the stock. It was certainly in our possession, and if the military have parted with the property, they still have the proceeds, and should be interdicted from parting with them.

The Court made the rule absolute so far as regarded prayer (b) only.

De Villiers, C.J.: I do not think that any interdict in terms of prayer (c) would in any way increase the security of the applicants. The military authorities would be good for the amount, whether there is an interdict or not. The rule, therefore, must be made absolute as to prayer (b). Such interdict will, therefore, be made absolute, pending an action to be brought forthwith; costs of the application to stand over.

[Applicants' attorneys: Van der Byl and Van der Horst. Respondents' attorneys: Van Zyl and Buissinne.]

IN THE MATTER OF THE PETITION OF GERT BOTHA AND OTHERS.

Mr. Benjamin moved to make absolute a rule nisi restraining the sale of certain property.

Granted.

Ex parte KOTZE AND { 1902.
ANOTHER. } Aug. 28th.

Will—Prohibition against alienation.

Where certain testators in a codicil annexed to a mutual will had directed that certain immoveable property should not be sold "during the lifetime of either of us," the Court granted leave to sell the said property to the husband of one of the co-heirs, a consent paper having been filed by the other co-heirs and by the surviving spouse.

This was an application for leave to sell a certain piece of perpetual quitrent land, with a mill erected thereon, situate at Hoetjes Bay, Saldanha Bay, in the division of Malmesbury.

The petition of Dirk Johannes Kotze and Albert E. Anderson, in their capacity as executors testamentary in the estate of the late Dirk J. Kotze, set forth:

That the deceased testator and his surviving spouse made a mutual will, whereby the surviving spouse and the children of the marriage were instituted heirs to the entire joint estate. The survivor was to enjoy the entire usufruct of the estate during his or her lifetime (save in the event of re-marriage), but, as the children attained majority, marriage, or other approved estate, such sum was to be paid out to them as the survivor should conscientiously, and according to the position of the estate find to be due to him or her. The survivor (the wife) had remained a widow. There were two sons and five daughters, children of the said marriage, all being majors. One of the said daughters was a widow (whether with or without issue did not appear from the petition). The second was married in community of property; the fourth out of community; while the fifth was still unmarried. A codicil to the will of the testators directed that the property in question "should not be sold during the lifetime of either of us." The consent of all the heirs had been obtained to the sale of this property to the second petitioner for £3,500, it being valued for Divisional Council purposes at £350.

On the motion of Mr. Currey, the Court granted an order as prayed.

[Applicant's Attorney's: Van der Byl and Van der Horst.]

Re THE INSOLVENT ESTATE OF TODT.

Mr. De Villiers moved for the appointment of a commissioner to take the evidence in this matter.

Granted.

YOUNG V. COLONIAL GOVERNMENT.

Mr. De Villiers moved to fix a day for trial by jury.

Mr. Schreiner, K.C. (with him Mr. Nightingale), appeared for the Government.

The 5th November was fixed.

FILMALTER V. FILMALTER.

Mr. Langenhoven applied for leave for the wife to sue her husband *in forma pauperis* for restitution of conjugal rights.

A rule *nisi* was granted, returnable on the 12th October.

WILEMSE V. THOMAS.

Mr. Benjamin moved that the rule *nisi* granted restraining respondent from any dealing with certain property be made absolute.

Rule made absolute.

LABE AND ANOTHER V. HOTZ.

Mr. P. S. Jones moved that the rule *nisi* for the confirmation of the attachment of certain money by the Deputy-Sheriff of the Paarl be discharged, the matter in dispute having been settled.

Rule discharged.

CLIFFORD V. CLIFFORD.

Mr. Wilkinson moved in this matter, which was a claim by applicant for alimony.

Mr. Benjamin asked that the matter be postponed, as it was necessary for respondent to obtain certain evidence from England.

After hearing counsel, the Court ordered the matter to stand over until October 12.

Re ESTATE OF THE LATE BEALE.

Mr. Benjamin moved for an order restraining the executors in the above estate from dealing with the property, pending an action to be brought during the November term, costs to be costs in the cause.

Mr. Searle said he appeared to consent on the terms mentioned.

Order granted in terms of the consent.

Ex parte WALKER. { 1902.
Aug. 28th.

Mutual will—Freedom of testamentary disposition.

The applicant and his late wife had executed a mutual will, providing that the survivor should enjoy the life usufruct of their joint estate, and that at his or her death the property should be divided equally among the brothers and sisters of the testator and testatrix, the children of predeceased brothers or sisters to succeed by representation. All the brothers and sisters had waived their rights under the will; there were certain minor nephews and nieces, and applicant now asked for an order authorizing him to dispose of the corpus of the inheritance on certain terms. The Court refused to make any order.

The petition of the Rev. Thomas Walker, a professor in the College at Stellenbosch, set forth,

That the petitioner was married in community of property to Margaret Harriet Walker, who died in 1896. That petitioner and his deceased spouse had executed a mutual will providing that the survivor should enjoy the life usufruct of the entire estate, and that on his or her death the property should devolve upon such persons as the testators should by writing under their joint hands appoint. This appointment was never made, and Clause 3 of the will provided that in default of such appointment the

joint estate should, on the death of the survivor, devolve upon the brothers and sisters of the testator and the testatrix in equal shares, the children of a predeceased brother or sister taking in place of their parent. Petitioner's deceased wife left two brothers and two sisters, her surviving, all majors, of whom three have lawful issue. At the date of his wife's death petitioner had two brothers and two sisters living, two of whom have lawful issue. All the said brothers and sisters are still alive. All the children are still minors, save those of one of the sisters of the said deceased wife. The brothers and sisters had waived all claim competent to them under the said will. (The waivers, in writing, were attached to the petition.) The said brothers and sisters of petitioner were prepared to treat with him for a settlement of their interests under the said will, and on such settlement to grant him discharges, which, coupled with the said waivers, would secure to him absolute freedom of testamentary disposition as far as they were concerned. Last year petitioner remarried out of community of property, and obtained the aforesaid waivers, and entered into negotiations with the brothers and sisters of his deceased wife that he might obtain freedom of testamentary disposition, in order to make suitable provision for the support of his present wife. The said will was drawn up hurriedly and in contemplation of a fuller document at a later stage, but petitioner's late wife died suddenly and no such document was drawn up. When petitioner entered into his said second marriage he was under the *bona fide* belief that he would...on settling with the brothers and sisters of his said deceased wife...have full power of testamentary disposition as concerned his half of the joint estate.

Wherefore petitioner prayed for an order that, on his filing with the Master of the Supreme Court the said waivers on the part of his own brothers and sisters and discharges by the brothers and sisters of his said deceased wife and duly settling all succession duty, or other fees payable to the said Master, or to the public Treasury, that thereon he might have and be entitled to exercise freedom of testamentary disposition, or for alternative relief.

The Master reported as follows:...

"If the estate be distributed

now there would be no minors concerned, and I am credibly informed that the brothers and sisters of the deceased would raise no objections in coming to an amicable arrangement with the petitioner.

But the 3rd clause of the will would appear to present the same difficulty as in *Re Zondagh* (11 Sheil, 767) heard on 3rd February, 1902.

Mr. Schreiner, K.C., moved in terms of the petition.

[De Villiers, C.J., said it was a very unusual application, and the Court had no concrete case before it. There was no case in dispute for the Court to decide. Who were the parties between whom the Court had to decide?]

Mr. Schreiner said it was purely an *ex parte* application at present.

[De Villiers, C.J.: And the Court does not sit for the purpose of giving advice as to what parties should do.]

Maasdorp, J.: And even if we gave an opinion, that would not save you hereafter.]

Mr. Schreiner pointed out the difficult position applicant was placed in.

[De Villiers, C.J.: You must take counsel's opinion and act accordingly.]

After further hearing counsel, during which the difficulties that would arise in regard to the claims any children of the brothers and sisters might have were referred to,

[De Villiers, C.J.: No decision by the Court in this application would be of any use whatever. The parties interested in this are not before the Court, and even if they were before the Court, it is doubtful whether the Court would express an opinion upon a general abstract question. However, it is sufficient now to say that the persons who would be interested in the decision of the Court are not before us, and we can, therefore, make no order.

Applicant's attorneys: Walker and Jacobsen.

ESTATE EATON V. BATHGATE.

Mr. P. S. Jones moved for leave to the executors testamentary in the above estate to sue by edictal citation one Bathgate for the recovery of £1,400, lent on security of a mortgage bond, which had become due by reason of the non-payment of interest. It was also asked that the property secured by the bond be attached to found jurisdiction.

An order was granted as prayed, personal service to be effected on defendant, if possible; failing that, personal service on his wife; failing that, one publication in a Cape Town newspaper and one publication in a Rhodesian newspaper; citation to be returnable on October 12.

REID V. TOWN COUNCIL OF OUDT-SHOORN.

This application for leave to the defendants to sign judgment against plaintiff, owing to the latter not having proceeded with his action, was allowed to stand over, a point having arisen as to whether the proper procedure had been followed.

Ex parte BEDFORD.

Presumption of death.

This was a motion for an order authorising the Master to issue letters of administration in favour of petitioner, to enable her to administer the estate of Michael J. Bedford, who is alleged to be dead. It appeared that the petitioner and her husband, Michael J. Bedford, were returning in July last by steamer from England to Mossel Bay, and one morning when the ship was 12 miles off shore, Mr. Bedford left his cabin to go to the bathroom. From that time no trace of him had been found, although the ship had been thoroughly searched, and it was evident that he had fallen overboard and been drowned.

Affidavits from the ship's officer were read, in which it was stated that there was a south-westerly swell on at the time Mr. Bedford disappeared, and it was quite possible for a person to have accidentally fallen overboard.

On the motion of Mr. Schreiner, K.C., the Court granted a rule nisi, calling upon all concerned to show cause why an order should not be granted as prayed, rule to be published once in the "Government Gazette."

Postea (September 12). The rule was made absolute.

Ex parte VOGTS.

Mr. Benjamin moved for leave to mortgage certain property in which her minor child was interested.

Order granted as prayed.

SUPREME COURT

[Before the Hon. Mr. Justice MAAS-DORP.]

Ex parte HARTOGH. { 1902.
Aug. 29th.

Advocate—Admission—Certificate.

An applicant for admission as an advocate of the Supreme Court stated on affidavit that he had been duly admitted as a barrister of the Middle Temple. He produced no certificate of admission, but a member of the Supreme Court Bar deposed on affidavit to having known him as a student of the Middle Temple and to having seen his name in the list of barristers in the English Law List of the current year.

Held, that applicant could not be admitted without production of his certificate.

Mr. Benjamin moved for the admission of Gustav Hartogh as an advocate of the Supreme Court. Counsel said that the papers were not quite in order, there being no certificate annexed to show that applicant had been admitted as a barrister of the Middle Temple. Applicant did not know that such a certificate would be necessary, but he had annexed to his application a certificate showing that he had passed a qualifying examination, and he referred to the fact that his name appears in the Law List. There was also an affidavit by Advocate J. E. R. de Villiers, stating that he knew applicant as a student of the Middle Temple, and had seen his name in the list of barristers in the Law List for 1902. Proceeding, counsel referred to the application in the case of Dr. Michael J. Farelly, reported in 9 *Sheil*, page 110, where the application for admission was granted, subject to the production of the certificate within three months. Counsel further said that he understood that the present applicant was leaving for Kimberley that night, and wished to take the oath before he left.

Mr. Justice Maasdorp said he did not think the applicant could take the oath before he was admitted, and he could not be admitted until his certificate was produced. The applicant could not practise until then, and his lordship did not see any advantage in giving a provisional order, as the certificate would be here before three months, and there was abundance of time to renew the application. No order would be made now, but the matter might be mentioned again.

Ex parte THERON AND OTHERS.

Mr. De Waal moved for the release on bail of J. W. Theron, C. S. Erasmus, and A. J. Nigrini, who were at present detained on a charge of high treason.

Mr. Nightingale appeared on behalf of the Crown to consent to bail being granted, Erasmus and Theron to furnish personal bail to the extent of £2,000 each, and each find two sureties of £1,000 each; Nigrini in personal bail of £1,000 and two sureties of £500 each.

Order granted in terms of consent, petitioners to accept service at Fraserburg.

KOPILOWITZ AND AN THER V. FROST.

Mr. Benjamin moved for judgment, in terms of a consent put in, for plaintiff for £100 and taxed costs in the claim in convention, and for judgment for the plaintiff (defendant in reconvention) in the claim in reconvention, with costs.

Judgment in terms of consent.

BIRD V. BIRD.

This was an action for restitution of conjugal rights, failing which for divorce, brought by the plaintiff against her husband.

Mr. De Waal appeared for the plaintiff; defendant was in default.

Mrs. Bird deposed that she was married to defendant in Wales in July, 1890. They came to this country in 1897, and afterwards paid a visit to England together. After they returned to this country defendant went to Kimberley, where witness joined him after a time. At Kimberley the relations between witness and defendant were unhappy, defendant telling her, with a violent threat, to leave the house. Witness did not want to go, but defendant

forced her to leave, and she came to Cape Town. Since then she had had to support herself and the two little children of the marriage. Two months ago witness issued summons in this action, and then defendant came to see her in Cape Town. He did not want witness to return to him. He offered £5 per month for the maintenance of the children. He had again left Cape Town. He was earning £25 per month.

William White Phillips said he knew the plaintiff and defendant in this case. Defendant came to Cape Town a month ago, and spoke to witness about this case, saying that he would not take plaintiff back on any consideration whatever. He offered, in witness's presence, £5 per month towards the maintenance of the children.

The Court ordered the defendant to restore to plaintiff her conjugal rights on or before October 1, failing which to show cause on the 1st November why a decree of divorce should not be granted, and why the plaintiff should not have custody of the children, and why he should not be ordered to pay £5 per month for the maintenance of the children until the youngest is sixteen years of age.

BENDLE V. BENDLE.

This was an action for separation, brought by the plaintiff against her husband, on the ground of the latter's intemperate habits and his cruelty towards her.

Mr. Russell appeared for the plaintiff; the defendant was in default.

Charles William Henry Smith, clerk in the Colonial Office in charge of the marriage registers, produced the marriage certificate of plaintiff and defendant.

Mrs. Rhoda Bendle said she was married at George Town in September, 1884, to defendant. After their marriage, they lived in George Town for two years. Then they went to Knysna goldfields, and eventually, twelve months ago, they came to Cape Town. Plaintiff and her husband did not live happily together. Defendant used to knock plaintiff about, curse and swear at her, and did not give her enough to live upon. She had to work to support herself and children. Defendant was of drunken habits, coming home drunk every night. He was not very kind

to the three children of the marriage. On February 4, 1899, he turned witness out of the house and nailed up the door. He would not take witness or the children back, and had contributed nothing towards their support.

In answer to the Court, plaintiff said that if defendant would take her back she would go, if he would not drink and carry on, and would provide properly for her, but as he was at present, it would not be safe for her to go back. Proceeding, witness said that defendant had struck her frequently.

The Court granted a decree of separation, plaintiff to have the custody of the three children of the marriage, and defendant to pay £5 per month towards the maintenance of the children.

TOMS V. MEYER. } 1902.
Aug. 29th.

This was an action brought by James Toms against Abraham Meyer for transfer of a certain piece of land near D'Urban-road Railway-station. The declaration alleged that on February 8 the defendant sold, and plaintiff purchased, certain land belonging to the defendant, and situated near D'Urban-road Railway-station, for the sum of £30, payable upon transfer being given. The defendant had absolutely refused to pass transfer, and plaintiff now asked for an order compelling him to do so, plaintiff tendering the purchase price, or in the alternative, the plaintiff claimed £30 as and for damages, together with costs of suit.

The plea said that the plaintiff approached defendant in January last in regard to the purchase of certain land, and thereafter negotiations took place between the parties, but defendant denied that a sale was entered into or concluded between them.

Mr. Buchanan, who appeared for the plaintiff, said that the issue was whether or not these negotiations reached the point of a concluded sale.

Mr. Burton appeared for the defendant.

James Toms, the plaintiff, said that in January of this year his wife saw defendant, who gave her a message, in consequence of which witness saw defendant at his house on February 8. Defendant wanted to sell a certain portion of his farm, but when witness saw him, he said he would not sell that portion he had

spoken to Mrs. Toms about. He mentioned a piece of land he was willing to sell, and pointed out the beacons on his diagrams. After discussion, defendant said that if witness would take the land without a certain strip of ground which had been referred to, he could have it for £30. Witness said he very much wanted that strip of land, but at the same time he would take it without that. They then went over and saw the ground. Here defendant made some remarks, to the effect that witness could fence the land very cheaply now, and offered to bring the wire fencing from town for witness. There was further conversation, showing that defendant looked upon the bargain as completed. A man named Hurtle was the owner of the adjoining farm, and defendant said that Hurtle wanted the land to enable him to square his boundary, and that Hurtle would be angry when he heard it was sold, as he had sent a man to try to buy it. Witness spoke about a survey being necessary, but defendant was certain a resurvey would not be necessary, and said that, if it was, it would come out of his pocket. An appointment was made to meet Meyer, to go into town and settle the matter, but a message was sent to the effect that Meyer could not go to town on that Tuesday, as he was ill. On February 15 witness went with his son and saw defendant, who said he had been ill, and could not keep his appointment. On that occasion defendant again had the deed produced, and spoke of the land. Witness produced a paper he had prepared, stating that defendant had sold witness the land. As witness passed over the paper to defendant, the latter said, "It appears that Mr. Toms is afraid for me." Witness said he was not, but something might happen to defendant, and he (witness) had nothing to show. Defendant said his word was his bond, and ultimately agreed to meet witness on the following Saturday and settle everything. Witness kept the appointment, but defendant did not turn up. The ground was worth more than £30, in witness's opinion. Land had been going up in the neighbourhood, and witness considered that the land was now worth £60 or £70.

Cross-examined by Mr. Burton: Witness had never met the defendant before he went to see

him about the land. Defendant told witness that he was prepared to sell the ground between the three beacons. Witness asked for an extra strip up to the road. There were negotiations about another piece of ground as well, and defendant said he had wanted £50 for the lot, but had changed his mind, and would only sell the one piece. Witness offered £30, and defendant did not then demur. At a subsequent interview he agreed to accept this. It was not true that defendant said he would sell the piece between the three beacons, and would let witness have the extra piece if he paid £60. Witness took a document to defendant for him to sign. He, however, did not do so, saying he could not read English. His wife could read English, and did read the document, but it was before it was read that defendant said he would sign it. Defendant's reason in not signing was because he could not read it, and he said they had better go to an attorney in Cape Town. Defendant did not say he declined to sign because he had not agreed to sell the ground for £30.

Alexander James Toms corroborated his father's evidence as to the conversation between his father and defendant on February 8, and also as to the conversation at defendant's house on February 15, when witness's father took the document from defendant to sign. Defendant did not then object to the price. He said that his word was as good as his bond.

Cross-examined by Mr. Burton: Witness and his father had not spoken much about this sale.

Percival John Toms, another son of the plaintiff, gave similar evidence.

Mr. Buchanan closed his case.

Mr. Burton called

Abraham David Meyer, the defendant, who said he was a farmer of D'Urban-road. He denied having sold the land. He offered to sell land marked on a certain diagram (produced) for £60. This land included the ground between the beacons and up to the road.

Louisa Meyer, defendant's wife, also gave evidence in confirmation of the allegations made in the plea.

Mr. Buchanan (for plaintiff): The ground was duly pointed out to the defendant, as per beacons. Plaintiff waited two hours to see defendant. He was an-

xious to get something in black and white in case defendant might die. Defendant now says that he would not sell under £50, and his whole contention is that plaintiff wanted to get land for £30, which was really worth £50. I submit that the whole evidence goes to show that the purchase price agreed upon was £30, and not £50. That may have been the price originally spoken of, but defendant wanted a certain strip of ground for a road, and in consideration of retaining that agreed to take £30 instead of £50.

Mr. Burton (for defendant): This is a claim for specific performance of a sale of land. No documents have been produced to show that there was any agreement of purchase and sale; but if a man claims specific performance for a transfer of land he must prove to the satisfaction of the Court that a contract has really been concluded. Here, not only is there no written confirmation of the contract, but the only document produced is directly at variance with the plaintiff's contention. I submit that the Court will be very careful before finding that the plaintiff has discharged the onus which rests upon him. The parties to this alleged contract were not *ad idem*, and hence there was no contract. Then as to the evidence: on the one side we have the plaintiff and his wife, and on the other the defendant and his two sons. The whole question is one of the reliability of witnesses. No doubt certain negotiations with a view to a sale did take place between the parties, but the whole point is, was anything determinate decided upon. Counsel for plaintiff has denied that the property was bought for £50. Plaintiff wanted to go as far as the line up to the trees, and defendant said he would sell the whole of that ground for £50. Plaintiff was not prepared to accept defendant's terms. The Koop-brief, again the only piece of outside evidence we have does not support plaintiff's contention. I would submit that plaintiff has not proved that a completed sale ever took place, and that the Court will, therefore, grant absolution for the instance.

Mr. Buchanan was not called upon in reply.

The Court gave judgment for the transfer of the ground, failing which, for damages in the sum of £20, with costs, transfer to be made on or before the 30th September.

[Plaintiff's attorneys: G. Trollip; Defendant's attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice, the Right Hon Sir J H. DE VILLIERS, P.C., K.C.M.G., LL.D.] and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1902.
Aug. 30th.

Mr. Benjamin moved for the admission of Edward Grome Rainsford as an advocate of the Supreme Court.

Order granted and the oath administered.

Mr. M. Bisset moved for the admission of Arthur Jacobsohn as an attorney and notary, the oaths to be taken before the Resident Magistrate of Oudtshoorn.

Order granted as prayed.

PROVISIONAL ROLL.

S.A. MILLING CO. AND OTHERS V. GRAND JUNCTION RAILWAYS.

Mr. Benjamin moved for the postponement *sine die* of the hearing of the application for the final adjudication of defendants' estate.

Mr. Searle, K.C., said that notice had been given the plaintiffs' attorneys that this application would be made, and he understood that a consent paper had been signed by the petitioning creditors. The affidavit said that the consent had been signed by the majority of the creditors in number and value of claims.

Mr. Buchanan said he appeared for sundry other creditors of the Grand Junction Railways, to ask for provisional sentence and judgment, under Rule 329d, on their claims.

De Villiers, C. J.: And so long as this provisional order stands, you cannot obtain provisional sentence or judgment. It is rather hard upon these creditors that they should be prevented from getting their judgment owing to this application being postponed from time to time.

Mr. C. de Villiers said he had also to move for provisional sentence against the

same defendants in several cases which had been put on the roll.

Mr. Searle said that if the petitioning creditors took an undue time in proceeding with their application, then the other creditors could move for the adjudication of the defendants' estate.

Ultimately a postponement of the application until September 12 was granted, and consequently the other applications for provisional sentence and judgments were ordered to stand over until then.

Postea, September 12. The case was ordered to stand over till October 12.

MICHAU V. SCHMAL.

Mr. De Waal moved for provisional sentence for £78 18s. 10d., being certain taxed bill of costs for professional services rendered the defendant by plaintiff.

Provisional sentence granted as prayed.

SMIT V. KESLER.

Mr. Buchanan moved for provisional sentence for £200, due on a mortgage bond. The bond had become due owing to the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

DE VILLIERS V. PRETORIUS.

Mr. C. de Villiers moved for provisional sentence for £175, due on a mortgage bond. The bond had become due owing to the non-payment of interest.

Provisional sentence granted and the property declared executable.

LOCHNER AND OTHERS V. FREDERICKS

Mr. Gardiner moved for provisional sentence for £360, less £100 paid on account, due on certain conditions of sale, and also for £3 12s. for auctioneer's commission and 7s. 6d. for a copy of the conditions of sale. It was further asked that the property be declared executable.

Provisional sentence was granted, but as the property was still in the plaintiff's name no order was made as to the property being declared executable.

LAWRENCE V. REIMAN.

Mr. Close moved for the confirmation of a writ of arrest which had been granted on an affidavit stating that the defendant—who owed the plaintiff £107 19s. 2d.—was about to leave the Colony and proceed to Krugersdorp.

The defendant appeared in person and admitted the debt.

Judgment was accordingly given for the amount of the debt, with costs, but as the defendant denied that he had any intention of leaving the Colony, the writ of arrest was discharged.

HUGHES V. REIMAN.

This was a similar application, the amount of the debt was £16 6s. 7d., due on a judgment of the Resident Magistrate's Court at Wynberg.

Mr. Benjamin moved in this application, and defendant admitted the debt.

Judgment was given for the amount of the debt with costs.

VAN HEERDE V. WORTH.

Mr. Burton moved for provisional sentence for £400, due on a mortgage bond. The bond had become due owing to the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

REHABILITATIONS.

Mr. De Waal moved for the rehabilitation of Jacob Jacobus de Klerk. He stated that the case had been before the Court last term, and that the application was refused, but leave was granted to apply again within three months.

Order granted as prayed.

Mr. Goch moved under section 117 for the discharge from insolvency of Jan Hendrik Basson. It was stated that there was no dividend in this estate for the concurrent creditors, two-thirds of whom had, however, consented to the application.

Order granted as prayed.

GENERAL MOTIONS.

CAMP V. CAMP.

This was an action for divorce by the plaintiff against her husband on the ground of desertion.

The case had previously been before the Court and a rule had been granted against the respondent calling on him to show cause why a decree of divorce should not be granted. The respondent had failed to comply with the order, but he persistently made allegations against his wife. He further stated that his health had been bad, and that he had no means, and he asked the Court not to cast him in costs.

Mr. Schreiner, K.C. (with him Mr. Benjamin), for plaintiff; defendant in default.

Mr. Schreiner said he would not press that point, but otherwise he asked that the rule should be made absolute. The allegations made by the respondent had already been dealt with on the trial day.

[De Villiers, C. J.: He complains that his wife is of a very imperative disposition.]

Mr. Schreiner: So they all are.

In answer to the Chief Justice, Mr. Schreiner said that the plaintiff was a French governess, and that she had been at pains to educate the children of the marriage and to bring them up well. They were now of adult age, well looked after, well educated, and placed. Mr. Schreiner added that they had not the least wish to prevent the respondent from having access to the children at any time. They asked for no order as to custody.

Decree granted as prayed, the defendant to have access to the children at all reasonable times. No order as to costs.

Re ESTATE OF THE LATE KHAN.

Mr. Benjamin applied for the applicant, who sought leave to sell certain property. The late Reuben Khan left estate in Bree-street and Dorp-street to his wife during her widowhood, in trust for his children. Applicant had received a *bona-fide* offer of £1,350 for the Bree-street property, and she desired to take advantage of the rise in value of real estate in Cape Town, and to accept the offer that she had had. The Master recommended that the application should be acceded to.

Order granted as prayed.

Ex parte KOTZE. { 1902.
Aug. 30th.

**Executor—Purchase of Property
—Fair value.**

The mere fact that property in an estate has been purchased by an executor at a public auction does not oblige the Court to grant leave to transfer such property. An affidavit of value should always accompany such applications for leave to transfer.

Mr. C. de Villiers moved for leave to transfer certain property at Green Point, which Pieter J. Kotze, the petitioner had purchased at public auction for £400. The applicant was one of the executors of the estate.

In answer to the Chief Justice, Mr. de Villiers said that they did not produce a certificate as to the value of the property, but the sale was duly advertised and regularly carried out.

De Villiers, C.J.: In these cases it is not enough to say that the property was sold by public auction. There must be something to show that it is a fair value. In the present case the Registrar seems to think that a fair price was paid, and under the circumstances you may take an order, but it must be understood that the mere fact that it is by public auction is no reason why the Court must grant the order. These applications should always be accompanied by some affidavit of value.

Order granted as prayed.

Ex parte VAN ZYL.

Mr. Russell moved for the release of the petitioner on bail. At present the petitioner is confined in the gaol at Van Rhyn's Dorp on a charge of high treason and murder.

Mr. Nightingale appeared on behalf of the Crown to consent to the application on petitioner finding bail himself in £2,000 and two sureties of £1,000 each, and also on his agreeing to accept service of process at the village of Van Rhyn's Dorp.

Mr. Russell said he was instructed to consent to these conditions.

Order granted in terms of the consent.

Re ESTATE OF THE LATE PROBART.
Sale to executor—Auctioneer.

Where certain property had been sold by public auction for a fair price to one of the executors, the Court granted an order to pass transfer though the auctioneer who sold the property was in partnership with the applicant.

Mr. Benjamin moved for an order authorising the Registrar to pass transfer of certain property in the above estate to the petitioner, who was also one of the executors testamentary. The ground had been put up for sale by public auction, and sold to the petitioner for £127. Counsel said there were several circumstances in this case which should be brought to the notice of the Court. The auctioneer, who sold the property, was apparently carrying on business in partnership with the applicant, and further the Divisional Council valuation of the land was £200, and on that amount transfer duty had actually been paid. A certificate was, however, put in from the Acting Civil Commissioner of the district in which the property was situated, stating that he had now personally inspected the property, and was of opinion that £127 was a fair and reasonable price.

Order granted as prayed.

Re THE CAPE TOWN CLUB. { 1902.
Aug. 30th.
Sept. 12th.

**Club—Companies' Act, 1892—
Unregistered company—Winding up.**

A club formed only for social purposes cannot be wound up as an unregistered company under the 216th section of the Companies' Act, 1892, even though one of its regulations provides that the members shall be liable for debts incurred by the committee of the club.

This was an application on notice of motion for an order of Court, directing

that the Cape Town Club should be placed in liquidation under Act 25 of 1892.

The petitioners were Charles Matthews, the chairman, and certain other 13 members of the said club. The petition was as follows: (1) The Cape Town Club is an association formed in 1886 for social purposes, and is subject to certain rules and regulations, a copy whereof, as revised at a general meeting duly held on April 4, 1902, is hereunto annexed, marked A. The number of members is 139. 2. By the second of the said rules the club and all liquors, cigars, and tobacco, sold therein, are the property of the members, who, through the committee, shall be responsible jointly and severally for all debts incurred. 3. On June 27, 1902, a fire occurred, whereby the premises occupied by the club in the South African Mutual Buildings, in Darling-street, Cape Town, together with most of the club's property, situated therein was destroyed. The property of the club in the said building was not insured, owing to a mistake or oversight on the part of the late secretary. 4. A special meeting of the members of the club was held on July 4, 1902, when a special committee was appointed to ascertain the position of the club and to submit a statement to a meeting to be held at a future date. 5. Thereafter the report of the Special Committee was sent in, and an extraordinary general meeting of the club was convened for August 4 inst., for the purpose of receiving the report and to take such action as might be deemed expedient. A copy of the notice convening the meeting is hereunto annexed, marked "B." A copy of the notice was sent to every member, except a few whose addresses could not be ascertained. 6. The said report of the said special committee is hereunto annexed, marked "C." As a fact, the actual liabilities of the club amount to about £1,508 17s. 10d., while the allowance of a discount of £250 cannot be assumed in ascertaining the position. The assets amount to £465 1s. 3d., and there is thus a deficiency of £1,043 16s. 7d. On the 4th August inst. the extraordinary general meeting of the members was held, when it was proposed and carried unanimously that the club should be liquidated, and it was also proposed and carried that Mr. Thomas J. O'Reilly should be appointed liquidator. 8. The club is therefore insolvent, and the lia-

bility will have to be made by means of a call upon the members. Certain of the members are about to leave Cape Town, and there will probably be a difficulty in recovering calls from them. It is desirable that the club should be placed in liquidation under the provisions of part 6 of the Companies Act (No. 25) of 1892, the club being unable to pay its debts, and it being just and equitable that it should be wound up.

Wherefore your petitioners pray that the said association or club may be wound up under the said Act, and that Mr. T. J. O'Reilly may be appointed the official liquidator thereof.

The verifying affidavit of Charles Matthews was annexed.

A number of creditors of the club also prayed that it be placed in liquidation, and that Mr. T. J. O'Reilly be appointed liquidator.

The affidavit of Alfred Hilliard, of Cape Town, stated that he is a member of the Cape Town Club. That by sub-section 2 of section 216 of the Companies' Act of 1892, "no unregistered company shall be wound up under the said Act voluntarily." That the report of the Special Committee referred to in par. 6 of the petition of C. Matthews, recommended that the club go into voluntary liquidation, and that the general meeting of August 4 appointed T. J. O'Reilly as liquidator, but did not define his powers. That the said T. J. O'Reilly has made a call on each of the members of the club of £10, payable at his office on August 15, 1902. Some of the members have responded to this call, and C. Matthews has instructed the club's bankers to transfer the funds of the said club to the name of the said T. J. O'Reilly as liquidator. That the action of the said O'Reilly is wholly illegal, as also his appointment, and that deponent and other members of the club object to his appointment conjointly with G. W. Steytler as liquidators of the said club. T. J. O'Reilly is a member of the club; and the business of the club having been carelessly and negligently conducted, its affairs will require strict and impartial scrutiny by someone altogether unconnected with it. Deponent believes that the club has been practically insolvent for the last three years, but it has, nevertheless, been continued by the committee without calling members together to consider the advisability of winding it up. That if the

club had been wound up when it was first discovered to be unable to pay its debts, and if the insurance premium had been paid when asked for by the company interested, members would not now be called upon to contribute to the same extent as they are likely to be asked to. Deponent has ascertained that the sum at the bank standing to the credit of the club, and transferred to T. J. O'Reilly as liquidator, is £2 0s. 6d., and not, as stated in the report of the Special Committee, £296 17s. 3d. The question as to what has become of the difference will have to be ascertained.

The above affidavit was supported by that of John Scott, another member of the said club.

There was also an affidavit sworn by 19 other members of the club, objecting to the appointment of Mr. O'Reilly as liquidator on the ground that he is a member of the club.

Mr. Schreiner, K.C., appeared for the petitioners (members of the club and creditors); and Mr. Searle, K.C., for certain non-petitioning members.

Mr. Schreiner, K.C. (for applicant): The applicants are a club, but they are also an association. Under the old Companies' Act this club would not have been treated as an association (11 and 12 Vict., 1 45). But see the Companies' Act, part 6, section 216. That Act places no limitation as to the circumstances under which a club of this kind can be wound up. See sections 22 and 23 of the Act. Section 23 allows such clubs to register as associations. The case of the Panmure Club (15 E.D.C. 170) shows that the trustees cannot surrender the estate of the club, but any company which carries on business may be wound up under this Act. Then, again, the rules of this club make all the members jointly and severally liable. That is a very unusual provision. Our own winding up Act No. 25 of 1892 is very wide. Any association existing for a lawful purpose may be wound up under this Act. The fact is that the club cannot pay its debts, and I would suggest that it should be wound up, and Messrs. Steytler and O'Reilly appointed liquidators. In the rules of this club there are no special provisions as to a voluntary winding up, and hence we come to the Court. The majority of the members of the club desire that it should be wound up, and unless the Court consents to this

winding up under Act 25 of 1892 the creditors will be left without remedy. The club cannot be wound up as a trading institution. At present I ask only for a rule nisi returnable on September 12 to show cause against the winding up.

[De Villiers, C. J.: Why do they not wind up voluntarily?]

They cannot do so. Under their rules the liquidator would have no *locus standi in judicio*.

Mr. Searle (for certain members of the club) relied chiefly on the case *re St. James' Club* (2 De G.M. and G., 383), where it was ruled that clubs are not partnerships or associations within the meaning of the provisions of the Joint Stock Companies Winding Up Act, and called special attention to the judgment of S. Leonards, L. Ch.

Mr. Schreiner in reply.

De Villiers, C.J.: It is impossible to express a definite opinion upon this case without carefully reading the rules of the club and the Acts relating to companies, but there appears to be no objection to granting a rule calling upon all concerned to show cause on September 12 why the winding-up shall not be ordered, and why Messrs. O'Reilly and Steytler shall not be appointed liquidators of the club. But it is with the clear understanding that the whole matter shall be open to argument, and that any additional authorities may be adduced on the point.

Mr. Schreiner: I have made careful search for any further authorities, but I have found none.

The Court also directed the publication of the rule in two of the Cape Town newspapers.

Postea September 12.

De Villiers, C.J.: The section of the Companies Act, 1892, under which the application for the winding-up of the Cape Town Club is made, is the 216th. It may be very proper and convenient that the Court should have the power to grant an order for winding-up clubs, but unless the Act gives the power the Court is unable to exercise it. The 216th section should be read and construed as a whole, and when so construed does not, in my opinion, include within its scope the case of a club formed for social purposes, and not for the purpose of carrying on a business of some kind. The section clearly contemplates only the case of associations having a place

of business and carrying on a business of some kind. The fact that by one of the regulations of the Cape Town Club its members are liable for debts incurred by the committee of the club does not bring the club within the definition of a "company," as given in the second section of the Act. The case of the *St. James's Club* was decided under different Acts from our own, but the principles there laid down are none the less applicable. The subsequent case of the *New Athenæum Club* was decided upon the 199th section of the English Companies Act, which is in almost the same terms as the 216th section of our own Act, and the decision would probably have been the same if the section of the English Act had not contained the additional words, which are not contained in the 216th section of our Act. The rule nisi in the present case was granted on the distinct understanding that the whole question should be open to argument on the return of the rule, and the result of the present argument has been to satisfy me that the Legislature did not contemplate the winding up by the Court of clubs like the Cape Town Club. The rule must therefore be discharged.

[Applicant's attorneys: Fairbridge, Arderne, and Lawton.]

ANDERSON V. THE BOARD OF EXECUTORS.

Mr. Burton applied for an order on respondents to pay certain moneys to applicant.

Mr. Schreiner, K.C., appeared for the respondents, and asked that the matter be allowed to stand over until the end of the roll.

The application was allowed to stand over.

Ex parte VERMAAK AND } 1902.
OTHERS. } Aug. 30th.

Codicil—Interpretation.

Where a certain codicil to a mutual will had been drawn up in ambiguous language, and the surviving testator had become unable owing to weakness of mind to explain its meaning: the Court refused to grant an order at the instance of certain of the heirs declaring their rights under the said codicil.

This was an application for a declaration of the rights of the petitioners under a certain will. It appeared that in May, 1855, the petitioners' father and mother executed a mutual will, which, however, was not valid, owing to its not being properly witnessed. A codicil, however, had been drawn up and duly signed and witnessed, and consequently this stood as the last will of the testators. The survivor had the usufruct of the property for life, but the father, who was the survivor, being now too old and weak to work the farm, wished to transfer the property to the said children, in terms of the codicil, which, however, was so peculiarly worded that the petitioners could not come to a mutual agreement as to their respective shares, and accordingly they now approached the Court for a declaration of their rights under the will.

The petition of Alexander Vermaak, Pieter H. Vermaak, and Louisa Muller (born Vermaak) showed:

1. That the petitioners are the children and lawful heirs of Johannes C. Vermaak and Sina P. J. Vermaak (born Kachelhoffer), of the farm Haarhof Kraal, in the Uitenhage district.

2. That our mother, the said Sina P. J. Vermaak, died on October 29, 1898.

3. That on May 30, 1855, our parents, the said Johannes C. Vermaak and Sina P. J. Vermaak, executed a mutual will, and on the same day also a codicil, which they annexed to the said will.

4. That the testators' signatures to the will were never witnessed, and consequently the same is invalid and of no effect.

5. That the said codicil, however, was executed with due and proper formalities, and consequently stands as the testator's last will and testament.

6. That beside the petitioners there are still two brothers, and one sister living, who have not been heard of since the beginning of the war in October, 1899.

7. That petitioner's father, the said Johannes C. Vermaak being too old and weak to attend to his farming any longer, and being anxious to see his children well provided for before his death, now wishes to transfer his property to his children in terms of the said codicil.

8. That the said codicil is very peculiarly worded, and that the petitioners in spite of many attempts have failed to

come to any mutual understanding as to the proper interpretation of the said codicil.

9. That petitioners' father, the said Johannes C. Vermaak, is too old, feeble, and weak minded to interpret the same, or in any way to make known what his intentions were at the time he made the said codicil, as he almost every day gives a new version of the same.

Wherefore your petitioners pray that it may please your lordships to grant an order declaring the rights each of your petitioners, as also each of our absent or deceased brothers and sisters, or their legal representatives has to the estate of our said parents under the said codicil.

There was the usual supporting affidavit.

The codicil in question was as follows:

"Supplement to and continuation of testament, dated May 30, 1855:

"It is furthermore expressly desired and mutually agreed by us, that after the decease of the survivor of us, all movables and immovables, farms, and lands, consisting of the farms called Haarhōp Kraal and Diepkloof, situate in the district of Uitenhage, Great Winterhoek, as well as the farm Kwaga, situate in the district of Humansdorp, Gamtas River, shall be made over and assigned to our children, jointly raised or still to be raised by us in this wedlock, under the following conditions and stipulations: Firstly, that the above-named farms and lands shall remain a perpetual family property as long as the laws of the land shall allow the same to remain as such to be possessed by the male heir born from the testator's children aforesaid. Secondly, should circumstances allow of no male heir being present or alive (by reason of the predecease of one of the said heirs), then all rights and shares in the above-named farms shall cease and revert to the male heirs at that time existing. Thirdly, should anyone of the heirs desire to emigrate, and should he establish a domicile elsewhere, then he shall not be entitled to sell or lease the above-mentioned farms or lands, or his rights thereto, nor to substitute others in his stead; in which case, owing to his or their absence, the usufructuary rights thereto shall accrue to the remaining heirs domiciled there. (Signed), J. C. Vermaak, S. P. J. Vermaak, born Kachelhoffer. Witnesses: (Signed), H.ENZLIN, E. M. GATES.

Mr. Burton appeared for the applicants. [De Villiers, C. J.: This is an extraordinary application.]

Mr. Burton said he might at once say that he did not know whether he could trouble the Court in the matter, as it was somewhat similar to an application which had come before the Court a day or two ago.

[De Villiers, C. J.: Why not have a special case set down?]

Mr. Burton said that that would require opposing parties, and here there were no opposing parties. There was no opposition.

[De Villiers, C. J.: Because you don't know yourself what your rights are. The proper course would be to take counsel's opinion as to the rights of the parties, then act upon that opinion, leaving anyone interested, who considered himself aggrieved to bring his action.]

Mr. Burton pointed out that in this case there were no minors interested.

The Chief Justice suggested that the father might apply for leave to transfer the property.

Mr. Burton said that the difficulty was that the father did not understand the will, and that was why he now asked the Court to interpret it.

No order was made.

[Applicant's attorneys: DENMPERS and VAN RYNEVELD.]

SOUTHALL AND CO. V. CUTHBERT AND CO.

This was an application for an interdict restraining the respondents from having the exclusive use of the trade-mark "Delightful" in class 38, boots and shoes, and also for the removal of the said trade-mark from the Trade Marks' Registry of this colony.

Mr. Searle, K.C., appeared for the applicants; Mr. Schreiner, K.C., appeared for the respondents.

The matter was ordered to stand over.

IN THE MATTER OF THE WORCESTER BUTCHERY CO. (LIMITED).

Mr. Schreiner, K.C., asked that the application to have a rule nisi for the winding up of the above company made absolute stand over until September 12.

The matter was allowed to stand over until September 12.

Ex parte MARNITZ. } 1902.
 { Aug. 30th.

This was an application for leave to the petitioner, as mother and natural guardian of minors interested in the above estate, to receive certain moneys out of the Guardians' Fund for the purpose of improving and thus securing a better return from certain farms in the estate. The petition of Mary Catherine Marnitz, in her capacity as executrix dative of the estate of the late Philip W. Marnitz, stated that certain farms situate in the district of George were transferred to her on August 1, 1895, as mother and natural guardian of her minor daughter Honora M. Marnitz, in trust for the said minor. That a large portion of these farms is unsuitable for agricultural purposes, and a lease rental of £80 per annum was all that could be obtained for them. That they were however well adapted for a wattle bark plantation, and, by the annual expenditure of about £50 per annum for the space of seven years, an annual income of from £400 to £500 might be derived from the bark industry, without diminishing the present lease rent of the said farms. That petitioner was also desirous of erecting a cottage on one of the farms at a cost of about £300, as a suitable place of residence for her daughter. Upwards of £17,000 were standing to the credit of petitioner's said minor daughter in the Guardians' Fund, and she now prayed for an order of Court authorising the Master to pay the above-named sums out of the minor's moneys for the aforesaid purposes.

The Master recommended that the prayer of the petition be granted, but "that amounts of expenditure be submitted to the Master from time to time before any further instalment is issued and subject to a certificate from the Resident Magistrate that he is satisfied that the money has been profitably spent."

On the motion of Mr. Burton, the Court granted an order in terms of the Master's report.

[Applicant's attorney: P. M. Brink.]

Ex parte TURVEY. } 1902.
 { Aug. 30th

This was an application for an order authorising the partial cancellation of a certain bond.

The petition of Harriet Wharton Turvey, born Bell, widow of the late Henry

Albert Turvey, of Queen's Town, showed that the petitioner is the registered owner of certain erven in the town of Queen's Town. That on July 3, 1883, petitioner, duly assisted by her late husband and the trustee under her antenuptial contract, passed before the Registrar of Deeds in Cape Town a mortgage bond for £1,000 to and in favour of one John Leach under special hypothecation of the aforesaid landed property. On October 17, 1884, the said bond was ceded by Leach to Benjamin Sweetman, and on January 21, 1886 by Sweetman to Henry Abrey for himself absolutely to the extent of £550 of the capital sum thereof, and upon trust for the said Sweetman in respect of £450, balance of the capital. On October 30, 1894, Abrey ceded his interest in the bond to the extent of £550 to William M. Staples who, on August 2, 1901, ceded the said interest for a like amount to Charles G. Hope. Petitioner says that on October 30, 1886, she duly paid Sweetman the sum of £50 on account of the balance of £450 of the capital. Thereafter Sweetman ceded his right and title to the remaining £400 to Johanna Meyer, who on November 18, 1895, through her agent, D'Urban Dyason, of Port Elizabeth (now deceased) acknowledged to have received from petitioner the said sum of £400 and all interest due thereon, and consented to the cancellation of the said bond in so far as her interest was concerned. Petitioner, having now sold portions of the properties hypothecated by the said bond, has obtained from the said Charles G. Hope, the present legal holder thereof, a consent to the release of such portions from the operation of the same, but the Registrar of Deeds of Cape Town has refused to act upon such consent, contending that as the formal cession from Sweetman to Rosina J. Meyer is wanting, the consent to release granted by Hope is insufficient. Petitioner has caused inquiries to be made as to the whereabouts of the said Sweetman, but is informed and believes that he died on the 9th of September, 1896, at Lady Frere, in the district of Queen's Town, and that as he practically left no assets, no executor has been appointed, and no death notice filed with the Master.

Wherefore petitioner prays for an order authorising a cancellation of the aforesaid bond to the extent of capital sum of £450 aforesaid, or for alternative relief.

On the motion of Mr. P. S. Jones, the Court granted a rule *nisi*, calling upon all persons interested to show cause on Monday, the 13th October, 1902, why an order shall not be granted as prayed.

Postea (October 14), the rule was made absolute.

[Applicant's attorneys: Fairbridge, Arderne, and Lawton.]

Re ESTATE OF THE LATE } 1902.
VAN VUUREN. { Aug. 30th.

De Communi Dividundo—Minors.

This was an application for leave to partition and sub-divide certain property. The petition of Andries M. J. van Vuuren, of Swanepoel's Kraal, in the division of Uitenhage, set forth:

1. That the petitioner was the father and natural guardian of certain three minor children, issue of his marriage with the late Anna S. Fourie.

2. That the said three minors were part owners in their individual capacity of the farms Kremlin, Swanepoel's Kraal, and Slag Boom, situate in the division of Uitenhage.

3. That they held their shares in the said properties in undivided shares under three deeds of transfer—each dated May 7, 1901.

4. That there were ten other co-proprietors of the properties mentioned in paragraph 2; the said properties were thickly covered with wood, and that the cutting and sale of this wood was one of the sources of livelihood carried on by all the owners of the said properties.

5. Owing to the farms being held in undivided shares, disputes as to trespass in the matter of wood-chopping and grazing constantly arose.

6. All the co-proprietors have agreed to sub-divide the farms, and they have accordingly been surveyed and sub-divided, each proprietor receiving in the sub-division a defined share, equal in extent to the undivided share held by him or her.

7. That the said minor children of petitioner take their defined shares in one block, the value of which is quite equal to, if not greater, than the value of their undivided shares aforesaid.

8. That for reasons above stated, petitioner would be able to work the defined portion of the ground allotted to

his minor children to much greater advantage than he otherwise could, and that the said minors would benefit thereby.

Wherefore petitioner prayed for an order authorising the passing of partition transfers of the said properties, in accordance with the sub-division made and entered into by the joint owners, and duly carried into effect by Mr. Surveyor Restall, and authorising petitioner to assist his said three children in the execution of such documents as might be necessary or requisite, and generally to act on their behalf in the partition of the said properties, or for alternative relief.

The usual verifying affidavit was attached, and the Master recommended that the prayer of the petition be granted.

On the motion of Mr. Buchanan, the Court granted an order as prayed.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller.]

WHITE V. WHITE.

Mr. Buchanan moved for leave to the petitioner to effect substituted service in the above action, which the applicant was bringing against her husband for divorce on the ground of his adultery. It was stated that the defendant had gone up-country to evade service.

Substituted service was allowed, one publication of the summons to be made in the "Government Gazette" and one in a Cape Town newspaper. Leave was also given to serve the declaration in the same manner along with the summons.

COWLING V. COWLING.

Mr. M. Bisset moved for an extension of the return day in the above matter, and also for leave to serve the *intendit* with the citation.

The return day was extended until October 12, and leave given to serve the *intendit* with the citation.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

ESDON V. MAXWELL. } 1902.
 } Sept. 1st.

Mr. Upington, on behalf of the defendant in the above action, asked for a postponement of the trial until the May term next year. The case had not yet been set down for trial, but the application was on similar lines to that in the case of Peabody and Black, made last February.

Mr. Gardiner appeared for the plaintiff, and said that he had been instructed to strongly oppose the application. He stated that it was intended to set down the case for trial during next term, when the plaintiff would be in this country, and able to give evidence.

Mr. Upington said that the defendant Maxwell was a very important witness, and he was about to leave the country for a time. The action was one with regard to the payment of architect's fees, the question being as to whether or not a special arrangement had been entered into.

In reply to the Court, counsel stated that the plaintiff's claim was for a sum of £257 16s., and a certain amount having been tendered, the amount in dispute was about £200.

Buchanan, J., said that the matter might stand over until the February term, but it would not be reasonable to postpone it for a longer period than that. If the defendant would be unable to give evidence during the February term, then an application for a commission to take evidence should be made.

A postponement until the February term was allowed, costs to be costs in the cause.

MCKENZIE V. IRVINE. } 1902.
 } Sept. 1st

Partnership—Retired partner—
Liability—Notice of With-
drawal.

*On being sued by plaintiff as a
member of the firm of D. & Co.,
defendant set up the defence
that at the time the debt in*

*question was contracted by the
said firm he had ceased to be a
member thereof.*

*Held, that even if this were the
case, as he had continued to
hold himself out as a partner
by not having given notice of
his withdrawal to the customers
of the firm, and by allowing
the remaining partner to con-
tinue to use business paper on
which his name appeared, he
was liable in respect of the
partnership debt in question.*

This was an action for the recovery of a sum of £63, claimed by the plaintiff upon a certain acknowledgment of debt.

The declaration set forth that the plaintiff, Thomas R. McKenzie, was the sole surviving executor testamentary in the estate of the late James McKenzie, while the defendant, J. L. Irvine, was a partner in the firm of G. C. Dreyer and Co. On or about September 21, 1901, the said Dreyer and Co., for valuable consideration, entered into an acknowledgment of indebtedness to Willmot and Co., brokers, Cape Town, for a sum of £63, to be payable £31 10s. on November 4 and £31 10s. on December 21. This acknowledgment of debt was duly ceded to the plaintiff by Willmot and Co., whereupon plaintiff became and is now the legal holder of the same. When the amounts became due the defendant refused to pay the same, and on May 1 last the plaintiff obtained provisional sentence, with interest and costs, against defendant and his partner, Dreyer. Against the latter the judgment had become final, but the defendant had entered an appearance in this action. The plaintiff now claimed final judgment against defendant for £63, with interest and costs.

The defendant in his plea said that he was in partnership with Dreyer from February 1 until May 31, 1901, only. On the latter date the said partnership was duly dissolved, and Dreyer thereafter conducted the business for himself alone, and at his sole risk. During the said partnership the defendant never had any transactions with the plaintiff or anyone on his behalf; and if the said

Dreyer did enter into the acknowledgment of debt, he did so at his sole risk and for his sole benefit; and, further, if the said Dreyer did pledge the defendant's credit, which was denied, he did so without authority. After provisional sentence had been granted the defendant paid the amount of the judgment and costs, amounting in all to £77 18s. 1d., under security *de restituculo*; and, in reconvention, he claimed the repayment of that amount, together with £7 6s. 9d., being the amount of certain costs incurred by him in defending the claim for provisional sentence, with costs of suit.

In the replication, plaintiff said that if there was such a dissolution of partnership as alleged, it was not published as by law required, and further that on divers occasions subsequent to the date of the said dissolution, and more particularly in the months of July and September, it was represented that the defendant was a partner in the firm of Dreyer and Co., and liable for its debts, and that it was on such representations that the said Willmot accepted the acknowledgment of debt, and gave credit to Dreyer and Co.

Mr. Upington for plaintiff; Mr. Buchanan (with him Mr. Gardiner) for defendant.

Mr. Upington said he was unable to call the plaintiff, Thomas McGregor, who was at present in England. He would, however, call the person to whom the acknowledgment of debt was in the first place given, viz.,

Philip George Hubert Willmot, who said he was an accountant and broker, carrying on business in Cape Town under the style of Willmot and Co. In June, 1901, he had in hand certain property belonging to the estate of McKenzie, of which the executors were Thomas McKenzie and William Samuel McKenzie. The last-named had since died. Witness was approached by Dreyer and Co. with regard to certain property at Kalk Bay. Mr. Dreyer approached witness, and said that he had a client for the property. Witness had several interviews with Dreyer and finally, on June 28, 1901, Dreyer wrote making a certain offer. That letter was on notepaper, the heading of which set forth the partners of the firm as G. C. Dreyer and J. L. Irvine. There was some furniture which was to be sold along with the property, but ultimately

the property alone was bought by Dreyer's client, and negotiations took place which resulted in the purchase of the furniture by Dreyer and Co. for the sum of £93, of which £30 was paid at once, and the balance was to be paid by two equal instalments within three months. On September 17 witness took round a letter to that effect to Dreyer and Co.'s office. He did not see Dreyer, but Irvine was standing at his desk and took the letter saying, "It is all the same; we are partners." Thereupon witness left the letter with him. On September 21, witness received the acknowledgment of debt now sued upon. This acknowledgment set forth that the furniture had been sold to G. C. Dreyer and Co., and went on: "Herewith we beg to hand you cheque for £30 on account of the furniture. The balance we undertake to pay; £31 10s. on November 4, and a similar amount on December 21 next, this making three months, as agreed." The instalments were not paid when due, and after waiting for some time witness put the matter in the hands of his solicitor, but got no reply, and eventually defendants were sued for the amount. Witness's solicitors at first made a demand upon Mr. Milward, the purchaser of the property, for the amount due for the furniture, but this was done inadvertently. Witness would not have sold the furniture to Dreyer and Co. if he had known that defendant was not a partner in that firm.

Cross-examined: On January 23, last year, witness's solicitors wrote demanding the purchase price of the furniture from Mr. Milward. That arose through inadvertence. Witness had put the papers into the hands of Mr. Walker, who was exceedingly busy at the time, and wrote the letter to Mr. Milward without instructions from witness. Dreyer was the member of the firm with whom witness negotiated. He never saw Irvine in the matter. Dreyer came to his office about the furniture, and was the individual member of the firm with whom he negotiated all through. Plaintiff recognised only the firm, and would not have conducted this business with the firm if he had not thought that Irvine was a partner.

Re-examined: The cheque of £30 was signed by Dreyer and Co., and he would not have given credit to Dreyer alone.

Mr. Upington closed his case,

For the defence, Mr. Buchanan called John L. Irvine, the defendant, who deposed that he was in partnership with Dreyer from February, 1900, to May 31, 1901, when the partnership was dissolved by mutual consent. After the latter date defendant took the adjoining office to Dreyer's, and opened a new banking account at a different bank, and also opened a new set of books. Defendant knew nothing about the present transaction, and had not authorised Dreyer to purchase the furniture on behalf of the firm. He had never told Willmot that he was a partner in the firm, and that the transaction would be all right. When he saw Willmot about this matter, the latter said that he did not know him.

Cross-examined: No notice had been published in the papers regarding the dissolution of partnership. The original account at the bank, in the name of Dreyer and Co., was continued, but only on behalf of Dreyer.

George Casper Dreyer deposed that the partnership was dissolved on the 31st May, in consequence of a disagreement. Previous to that morning witness had not spoken to defendant. The fact that the defendant's name was left on the document sued upon must have been due to an oversight on witness's part. Irvine had nothing to do with the transaction. His name was never mentioned in connection with it. Witness told his customers of the dissolution. Witness bought the furniture, and the debt was his. He was prepared to arrange for payment with Messrs. Willmot and Co. The firm had never speculated in furniture.

Cross-examined: There had not yet been any final settlement of account between witness and Irvine. There were disputed items, and witness was bringing an action against Irvine on these accounts.

Re-examined: After the dissolution, witness opened new books.

John G. Freeman, broker, said that about four months or so ago Dreyer told him he had dissolved with Irvine, and that he was carrying on business on his own account.

[Buchanan, J.: There is no notice of the dissolution of partnership?]

Mr. Buchanan (for defendant): It may be argued for the plaintiff that notice must be given of the dissolution of a part-

nership in order to exempt former partners from liability. No doubt that is so in a sense, but this notice need not necessarily be by public advertisement in a paper. More explicit notice is required in the case of old customers of the firm than in that of persons who have never had any dealings with it prior to the dissolution of partnership. It is true that the English Act (53 and 54, Vict. ; C, 39, Sec. 36) requires that a notice of the dissolution of partnership should be inserted in the "Gazette." We have no such rule, and I submit that in the present case there had been a *bona fide* dissolution of partnership. In June the defendant opened new books; he removed his office, and put up a new sign over his door in Jutta's Chambers. Full notice of the dissolution was given by these acts, and nothing more could have been done save by advertisement in the "Government Gazette" and other papers. Mr. Willmot was a new customer, and it was his duty to find out with whom he was dealing. There is no rule of our law by which a former partner is bound to give notice of dissolution of a partnership to a customer who deals with the firm subsequent to the withdrawal of such former partner. The letter of September 13 ought to have put the plaintiff on inquiry. Dreyer negotiated simply in his individual capacity, and not as Dreyer and Co., and this is the point of my whole case. An outgoing partner is not liable simply because the partner remaining happens to use his name. *Lindley on Partnership* (p. 217, 5th Edition), where *Newsome v. Coles* (2, Camp, 617) is cited. The Partnership Act does not hold a retiring partner liable, unless he consents to the retention of his name as a member of the firm. In this case nobody but an old customer would know anything about Irvine as a member of this company. His name did not appear on Dreyer's notice board, and plaintiff could not have been deceived since he took no notice of the persons with whom he was dealing. See *Story on Partnership* (Sections 151 and 160). The latter as to what constitutes sufficient notice of retirement, and the different position between old customers and new. Willmot was not an old creditor of the firm. A *bona fide* belief on the part of a creditor of the firm that a man is a partner is not sufficient to make him one.

[Maasdorp, J.: A retiring partner is bound to notify old customers at all events, but here the defendant did not even do that.]

A land and commission agent's business deals with a large number of customers, most of whom are not regular customers, and it is impossible to notify them all. Here there was no question of misleading the public. A new customer takes the risk unless he finds out who the partners are with whom he is dealing. *Pothier on Partnership* (Tudor's translation, Sec. 155). All Roman Dutch authorities agree that a retiring partner is not bound to give notice to new customers. It is different in the case of old customers. See *Pothier* (Sec. 157). As to notice of withdrawal, see *Lindley* (p. 228). Then again, a partner is liable for the act of another partner only when acting within the scope of the partnership business. Here the contract was for the purchase of furniture for Dreyer's own use, and not for office use. *Story on Partnership* (par. 334). If a transaction is not within the scope of the partnership business, neither new customers nor old can hold a retired partner liable. *Lindley* (p. 150). In this case the transaction was not in the ordinary course of business. Lastly there is the question of personal representation, made by Irvine to Wilmot. But Wilmot did not know Irvine even by sight, and took it for granted that a man he saw in the office was Irvine. In this he was mistaken, but surely could not bind the defendant by his mistake.

Mr. Upington (for plaintiff) was not called upon.

Buchanan, J.: This is an action originating out of an acknowledgment of debt given by Dreyer and Co. to Willmot and Co., on the 21st September of last year. The acknowledgment of debt is written on the business paper of Dreyer and Co., and on this business paper is printed the names of the partners of Dreyer and Co., G. C. Dreyer and J. L. Irvine. The document is signed "Dreyer and Co.," and reads as follows: "Herewith we beg to hand you cheque for £30 on account; the balance we undertake to pay—£31 10s. on the 4th November, and a similar amount on the 21st December next, thus making three months, as agreed." The defendant Dreyer acknowledges his liability, and does not contest this case,

but the defendant Irvine comes into court, and says that when this document was given he was no longer a partner in Dreyer and Co., and he denies having given any authority for this document or that he has any liability in regard to it. This document on the face of it clearly represents a debt due by the partnership and hence, when the case came on provisionally, judgment was given against defendants. The defence set up by Irvine is that in the previous May the partnership which had existed between himself and Dreyer was dissolved by mutual consent, and he says that he informed the customers of the firm that a dissolution had taken place, and that Wilmot and Co. never before had any dealings with Dreyer and Co. I have very great hesitation in coming to the conclusion that any such dissolution took place on the 31st May, as alleged. The two most cogent grounds for such a doubt arise from the evidence of the defendant himself. He says, in the first place, that he informed his customers of the dissolution at the time it took place. Only one of these customers has been called, and he says that he was told of the dissolution some four months ago, or it might have been six. Now, the dissolution set up in this case is supposed to have taken place fourteen or fifteen months ago. The other fact is that Dreyer and Co. banked with the African Banking Corporation, and we find that on the 13th November—that it, after this obligation had in part matured—the two partners wrote to the manager of the bank, saying: "The partnership hitherto existing between us has been dissolved by mutual consent. The account with your bank will be continued by the second undersigned, and all cheques will be signed by him for 'Dreyer and Co.'" There is no allegation here that the partnership had been dissolved six months earlier, as is now alleged. Reading this letter, and coupling it with the evidence given by the only customer of the firm who has been called, and who says that he had frequent transactions with the firm, I have considerable difficulty in coming to the conclusion that there was a dissolution of partnership on the 31st May. But whether or not there was a dissolution previous to this transaction, I take it that in this case there has been a distinct holding out to Willmot and Co. of the defendant as a partner in

this firm. The dissolution of partnership was never publicly notified by advertisement, as is usual among business men. It is quite true that the advertising of a dissolution is not required by our law. What is required is notice to the customers that they cannot look upon the partnership formerly existing as being any longer a partnership, and also that there shall be no holding out of a partnership by a retiring partner. Irvine says there was a lot of business paper in the office bearing the names of the partners, and he admits that he allowed Dreyer to continue to use this paper. Then he frequented the office of the firm, and on one occasion when Wilmot called there on the business out of which this very liability arose, Irvine informed Wilmot he was a partner in the firm. Here is a distinct holding out of himself as partner to a customer to whom letters were written on the business paper of the partnership. That there has been a partnership is not denied and under the circumstances disclosed. I am not clear that there was a dissolution, such as has been alleged, especially in view of Dreyer's evidence that no final statements of accounts between the partners had taken place, and in view of the defendant Irvine's action in regard to the proceedings in the Magistrate's Court. But whether or not there was a dissolution, as alleged, there is ample evidence to justify the Court in coming to the conclusion that Irvine continued to hold himself out as a partner and that he did so at the time this obligation was entered into. There is a further defence that this document entered into was for a debt not within the scope of the partnership. But there is sufficient evidence to justify the Court in holding that it arises out of a transaction which was fully within the scope of the partnership. There had been a sale of a house and also of the furniture. Shortly after Dreyer told Wilmot there had been a re-sale, and the purchase price of the house was paid and transfer taken, and Dreyer and Co. took upon themselves the liability for the price of the furniture. I am therefore of opinion that the defence fails; and that, even if there had been a dissolution of partnership, there was a distinct holding out by defendant that he was a partner, which was sufficient to induce Wilmot to give credit on the strength of the fact that Irvine was a partner. Wilmot states that he would

not have given such credit to Dreyer alone. The judgment of the Court must therefore be for the plaintiff.

After hearing counsel on the question of costs, the Court gave judgment as prayed, with costs.

[Plaintiff's attorneys: Walker and Jacobsohn; Defendant's attorneys: J. F. Bernard.]

GENERAL MOTIONS.

ANDERSON V. THE BOARD OF EXECUTORS. 1902.
(Sept. 1st.)

Executors—Duties—Foreign heirs.

A testator who died within this Colony directed that his executors should upon his death pay the whole of the available funds in their hands to any one of his brothers for distribution among testator's heirs resident in Sweden, and that the receipt given by such brother should be a sufficient discharge of the executors. The testator appointed the Board of Executors as executors and administrators of the estate.

Held, that as it was the duty of the executors to ascertain the heirs and to apportion the estate, and also to provide for the payment of succession duty, they could not comply with the above provision of the will until they had performed these duties.

This was an application on behalf of August Andersson, lately of Berggvara and Soderakra, in the county of Kalmar, Sweden, at present in Cape Town, for an order compelling the Board of Executors, Cape Town, in its capacity as the executors testamentary of the estate of the late Carl Anderson, to carry out the will of the said deceased by paying out to the aforesaid applicant the balance of all moneys accruing to the heirs by inheritance, in terms of the said will, amounting to £12,454 7s. 2d., now in their possession, as per

account annexed. Applicant also asked for costs out of the estate.

The affidavit of August Anderson stated that the deceased, who died within this colony on April 12, 1892, was his brother. Two other brothers and two sisters (both married) were still surviving. The two brothers were in America, and the two married sisters were resident in Sweden. The will of the deceased, with reference to the appointment of his heirs, read as follows: "I hereby declare to nominate and appoint all my brothers and sisters, and in case of the predecease of one or more of them, his, her, or their children by representation, to be the sole and universal heirs of the whole of my estate and effects which shall be left by me after my death. After payment of the foregoing bequests, nothing excepted, I direct that my executors shall, upon my death, be bound to pay the whole of the moneys becoming payable under this disposition to one or other of my brothers, who will, with proper credentials, apply to the Colonial executor, such brother to be for all purposes the executor in Sweden, and the person charged with the distribution to the heirs, there resident, and his receipt to the Colonial executor will in every respect be considered sufficient."

Deponent further stated that the Board of Executors of Cape Town was duly appointed the executor of the said will and administration of the estate and effects. Applicant had applied to the said Board to carry out the directions of the said will by paying out £12,454 7s. 2d., the balance of the moneys accruing to the heirs by inheritance, but that they state that they are advised by counsel to refuse to do so without an order of Court, although they are satisfied with deponent's credentials.

The affidavit of Johannes H. N. Roos, secretary to the Board of Executors, Cape Town, admitted that according to the liquidation account framed by the Board in the said estate, the sum of £12,454 7s. 2d. was available for distribution among the heirs. The Board did not deny the *bona fides* of the applicant, but submitted that the certificate produced by applicant did not constitute sufficient proof that he and the persons mentioned in his affidavit were the heirs under the will of the testator. The Board were not in a position to determine therefrom who the heirs might

be, or to award them their portions, or otherwise to carry out the statutory duties of executors in this estate. The Board were advised that they could not legally give effect to the will by handing over to one of the brothers domiciled in Sweden the portions of the heirs there resident for distribution among the same, unless under the authority of an order of Court.

Mr. Schreiner, K.C. (for respondents): All the parties concerned are not before the Court. Act 5 of 1864 requires us to be satisfied that all the beneficiaries under the will have been ascertained, in order that we may deduct the succession duty from their legacies. Thus a brother or sister of the testator has to pay 2 per cent. on the value of the bequest; a son, or daughter of a brother or sister, 3 per cent., etc. (See Section 2.) We cannot do our duty unless we know something about the descendants of the deceased children. Then, again, the administrator is bound to send in his account to the Master, and render an account of his award.

Mr. Burton (for applicant): We contend that, as soon as one of the applicants comes to the Board of Executors, they are justified in handing over the money to him on getting his receipt for it. I quite admit the difficulty of meeting the dispositions of the testator, but he provides for these difficulties in a measure by directing that whenever any of the heirs appears, the executor shall be bound to pay over the money to him. He clearly meant that the executor should pay over the whole sum to any one brother who should claim it, and prove that he was a brother of the testator.

[Maasdorp, J.: What is the meaning of the term "proper credentials" in this connection?]

Credentials of identity.

[Buchanan, J.: Credentials to show that he is a brother residing in Sweden.]

I submit not; but here the applicant has a power of attorney from all the heirs resident in Sweden. As to the other heirs, no provision is made in the will for payment to them. The money was to be paid to any heir resident in Sweden, and distributed by him among the other heirs, in accordance with the terms of the will.

Mr. Schreiner (for respondents): The administrator is bound by the terms of

the will to pay all the money to heirs coming under this disposition. Clearly, Mr. Anderson has no power to act for any of the heirs, save those resident in Sweden, unless he has a power of attorney from them. A man cannot say that he means his estate to go to A, B, C, and D, but that it must be handed over to any one of them in a foreign country.

Mr. Burton (in reply): One of the deceased brothers died when still a boy. Another died before marriage; while a third married, but had no issue.

Mr. Schreiner: We are quite satisfied that the executors wish to do their duty, and have no wish to put unnecessary obstacles in their way.

Buchanan, J.: This is an application calling upon the respondent the Board of Executors to carry out the terms of the will of the late Carl Anderson by paying out to the applicant the balance of all monies accruing from the estate by inheritance. The late Mr. Carl Anderson, who died this year, appointed the Board of Executors executors testamentary to his estate. The executors have done their duty so far as to realise the property, and have now brought up a liquidation account, but they have not gone further than to award the legacies stated in the will. The applicant in this case is a brother of the late Carl Anderson, and as such comes under the will as one of the executors, but he wishes now to have the amount due to the brothers and sisters of the testator paid over to him, that he may take it away and distribute it himself. Now, this clause of the will cannot, I think, be acted upon at present until the executors have gone further. The executors must first ascertain who are the heirs, and award to each heir the amount of the inheritance. The object of this is twofold. The first object is to ascertain who should receive the moneys, and the second is to provide for the payment of the succession duty. They must of course ascertain that a person to whom they pay money is entitled to receive it, and can give them a proper discharge. It seems from the awards in the will that there are persons who claim portions of the estate who are resident in Sweden, and there are other persons who are not resident in that country. The respondents are execu-

tors in many estates, and know their duties. They know that they must satisfy themselves as to the powers of the attorney present. In the present case it is not now possible to make any order. The executors must proceed further and make a plan of distribution, and as soon as the awards are made then the applicant can come in and get what he is entitled to. If there had been any unnecessary delay then the applicant would be entitled to an order. But there has been no such delay, and at present the Court is not in a position to make any order. Costs will come out of the estate.

[Applicant's Attorneys: Dempers and Van Ryneveld; Respondents: Van der Byl and Van der Horst.]

STOCKHAM AND OTHERS V. COLONIAL BUILDING CORPORATION. { 1902.
Sept. 1st.
" 2nd.

Companies' Act No. 25, 1892,
Table A—Unstamped proxies.

A joint-stock company had adopted the regulations for management contained in Table A in the schedule to the Companies' Act, 1892. These regulations required seven days' notice at least to be given of general meetings. Regulation No. 94 allowed notice to be given by letter through the post, and regulation No. 96 provided that posted notices should be deemed to have been served at the time when the letter would be delivered in the ordinary course of business. At a general meeting of shareholders called after more than seven days' notice a resolution to wind up voluntarily was framed, which was confirmed at a subsequent meeting. Application was now made to set aside the resolution on the ground that shareholders in England had not received notice, but the Court refused to interfere.

Unstamped proxies tendered after the proper time had been rejected at the meeting.

Held, that the applicants could not compel the acceptance of such incomplete proxies.

This was an application by Horatio William Stockham and 34 other co-applicants, calling upon Henry R. Arderne, John Yeoman, and J. H. Banisford, as the directors of the Colonial Building Corporation, and Henry R. Arderne, J. Yeoman, and Alfred T. Hennessy, the appointed liquidators of the Colonial Building Corporation, to show cause, if any, why the proceedings of the meeting of the above company of July 30 should not be set aside, and why the said respondents should not be ordered to pay the costs of the present application.

Applicants' petition was as follows:

1. Your petitioners are shareholders in the Colonial Building Corporation, a joint stock company, registered in this Colony, with limited liability, under the Companies Act of 1892.

2. The memorandum and articles of association (annexed) show that the company adopted Table "A" in the 3rd schedule of the Companies' Act of 1892, save as excepted in the said articles.

3. On July 30 a meeting was held, for the purpose of obtaining the consent of the shareholders to the voluntary liquidation of the company. Notice of this meeting was sent on July 21, 1902, i.e., nine days before the meeting was held.

4. The founders of the company are resident in England.

5. The shareholders holding the largest number of shares are also resident in England.

6. By section 181 of the Companies' Act, notice of any special resolution must be given by advertisement in the *Government Gazette*. This was done, but the notice appeared only on July 22, 1902, viz., eight days before the meeting was held.

7. By section 94 of Table A of the 3rd schedule of the Act, a notice may be served by sending it through the post, and by section 96 a notice served by post would be deemed to be served when the letter would be delivered in the ordinary course of the post.

8. By section 123 of the Companies' Act, any documents to be served by post

shall be posted in such time as to admit of their being delivered in due course of delivery within the period prescribed for the service thereof.

9. The notices calling the meeting together were, therefore, not served on the shareholders in England in time for them to attend the meeting, or to make proper provision for sending proxies.

10. Many proxies were rejected, because they were signed in England and bore an English stamp.

11. The company is in a perfectly sound condition, as will be seen from the balance-sheet annexed, marked "B," which shows that for the half year ending December 31, 1901, the net profits amounted to £770 15s. 1d., out of which the directors paid an interim dividend at the rate of 15 per cent. for the half year, absorbing the sum of £417 1s. 11d., and leaving a balance of £353 13s. 2d., available to carry forward to the next account.

12. At the first meeting, which was held at 133, Longmarket-street, it was pointed out to some of the directors that the Board showing the registered office of the company, was still at the old offices in Church-square. This board was changed only after the meeting of July 30, and even now it is not affixed in a sufficiently conspicuous place, but is lying on the floor of the office.

13. At the next meeting, confirming what had been done at the meeting of July 30, 1902, very many proxies were rejected, owing to their being filed with the acting secretary 25 minutes after the appointed time. This stringent application of the rule was unnecessary, as though the proxies were filed 25 minutes late, they were filed 69 hours and 35 minutes before holding the meeting.

14. The two shareholders who have been informed by cable of the proceedings of this meeting have sent out the annexed cablegram marked "C."

Wherefore your petitioners pray that your lordships may be pleased to set aside the proceedings of the meeting of the above company of the 30th ult.

The cablegram marked C was partly in cipher. The following is a translation:

"Resolution passed to wind up in liquidation Building Company. Repugnant shareholder interest, and must be set aside; reason is, notice to large body not duly given; obtain injunction re-

strain further proceedings. Repeat cable each director."

The affidavit of Alfred T. Hennessy, of Cape Town, acting secretary of the Colonial Building Society, stated: I considered that the notice that was given of the meeting to be held on July 30, 190, was sufficient, inasmuch as most of the shareholders in this colony reside near Cape Town, and all are within postal communication. I did not consider that it was necessary to give such notice as would enable a shareholder in whatever part of the world he might be to take part in the proceedings. Notice, as a fact, was posted to every shareholder, and every shareholder in South Africa would have had 7 clear days' notice. The only persons disclosed on the record as being parties to these proceedings are Horatio William Stockham, Harold Goddard Chamberlain, and one Samson, whose name appears in the cablegram, referred to in par. 14 of the petition. I believe this Samson to be either the late general manager and secretary of the company, who resigned May 29, 1902, or his wife. H. W. Stockham resides in Cape Town, though he is temporarily in England. He signed a proxy in England, which was invalid by reason of not being properly stamped. H. G. Chamberlain is, and has been, in Cape Town since the notice in question was given. The registered address of G. G. Samson is Norwood Chambers, Cape Town. He has assigned his estate for the benefit of his creditors. The registered address of his wife is in England, but a proxy was produced on her behalf, which was not in order, and was, therefore, rejected. Before G. G. Samson left for England he knew that the directors considered it was desirable to liquidate the company, and could therefore have communicated with the principal shareholders in England, and obtained proxies from them. As to the allusion in par. 4 of the petition to "the founders of the company," out of 6,514 shares, 3,940 are held in South Africa. No proxies were rejected because they were signed in England and bore an English stamp, but those of H. W. Stockham (200 shares), Agnes Samson (500), A. L. M. Leveilly (110), Margaret Samson (72), and E. M. Samson (12), were rejected because they were not stamped in this Colony in terms of Section 5, Act 20, of 1884. Other

proxies were rejected, either because they were attested by H. G. Chamberlain, who was appointed jointly with one Alfred Drake to act under the said proxies, or because alterations which had not been initialled occurred therein, or because they had been cancelled previous to the said meeting. The directors and the majority of the shareholders who have been consulted are of opinion that it is in the best interests of the shareholders that the company should now be wound up, and it is hoped and believed that a refund of more than 20s. a share will be returned to the shareholders. Notice of the change of the Company's office was duly given to the Registrar in terms of the Companies Act of 1892, and was also published in the "Cape Times" for six days.

There were supporting affidavits from Henry R. Arderne, of Cape Town, and John Carmichael, of Cape Town, and a replying affidavit from H. G. Chamberlain.

Mr. Schreiner, K.C. (for applicants): A large number of the shareholders reside in England. The notices of the meeting for winding up were sent out on July 21 for a meeting on the 30th July. Section 96 of Act 25 of 1892 provides that notices sent by post must be sent in time for members to attend the said meeting, or to send proxies. The company was stable, and in a good financial condition. A company cannot be wound up without such notice to the shareholders as the law provides. Clause 94 of the schedule to the articles of Association provides for sending notice to the shareholders by post. Section 96 says that notice shall be deemed to be served when the letters posted will in ordinary course reach the person to whom they are addressed. Here the letters were posted on the 21st July, calling a meeting for the 30th. There have been cases in which time has been given for a letter to be delivered in England, but no time given for a reply, save by cable. Sec. 110 of Act 25 of 1892 shows in what manner a special resolution is to be carried, and Rule 34 lays down as a general principle that each member must have at least seven days' clear notice of the meeting. As to the stamping of these proxies, see Act 20 of 1884. Schedule 2. There is no provision which renders it necessary that these proxies should be stamped in the Colony. As to

the notice required, see *The Union Hill Silver Co., Ltd.* (22 L.T.N.S., 400), a case almost on all fours with the present case. See also *The British Sugar Refining Co.* (3, K. and J., 408).

Mr. Gardiner (for respondents): [The Court intimated that they did not wish to hear him on the question of stamps.]

The proxies were rejected because they were not tendered within the time specified in the notice. It would be absolutely impossible to carry on the business of a company if the company were bound to give notice to every shareholder in time to admit of his attending a general meeting, irrespective of the part of the world in which he might be resident. Suppose, *e.g.*, he were at Klondyke?

Mr. Schreiner, in reply,

The application was refused, with costs.

Buchanan, J., in giving judgment, said that a meeting of shareholders of the Colonial Building Corporation was held, after more than seven days' notice had been given, at which meeting a number of shareholders attended, and a resolution was proposed and seconded that the company be voluntarily liquidated and wound up. A lengthy amendment was proposed in favour of the issue of fresh debentures and the raising of fresh capital for carrying on the business. The amendment was defeated by 14 votes to 4, and the original motion was carried by 13 votes to 4. A poll was demanded, but this was afterwards withdrawn, as far as the minutes showed, and at a subsequent meeting the resolution was at a subsequent general meeting confirmed on a show of hands. After these proceedings had taken place, notice of motion was served on behalf of the applicants, Stockham and certain other thirty-four shareholders, to set aside this resolution. The notice of motion gave no grounds; but when the matter came into court, two grounds were stated. The one was that sufficient notice was not given to absent shareholders, and the other was that certain proxies which were tendered were not received and counted in the voting. With reference to the proxies, there were two objections to receiving them. The one was that they were received too late, and Mr. Schreiner, on behalf of the applicants, was prepared to admit that that was a fatal objection. The other objection was that the proxies had not been stamped as required by the

Stamp Act. There is no doubt a difference between the English Act as to proxies and the Cape Act. The English Act made the proxies null and void unless they were stamped at the time they were executed, but there is no such provision in the Cape Act. It might well be that by our law the proxies might remain valid, although not stamped, but the question is whether or not a person is bound to receive them until they are put in order. It is hardly necessary to decide that question now, but if I had to do so, in my opinion, nobody was required to receive a document which required to be stamped, until it was put in order by being properly stamped, and therefore the applicants could not claim that these informal proxies should be acted upon until they were in order. But the more important objection in this case is as to the notice upon which the meeting was called. This company had adopted the regulations for its management contained in the third schedule of the Companies' Act, known as Table A. The provisions of that table which are relevant to the case were the 34th, the 94th, and the 96th. Regulation No. 34 required that seven days' notice at least should be given of the place of meeting. Regulation No. 94 allowed notice to be served either personally or through the post; while Regulation No. 96 provided that any notice, if served by post, should be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post. As some of the shareholders were resident in England, if these words were to be construed as meaning that seven days' notice must be given after the letters reached England, then sufficient notice has not been given. But these regulations have been copied verbatim from the English Table, and have received judicial interpretation in the English courts, and such an interpretation may fairly be considered in this court. Table A makes express provision as to a service of notices on a shareholder who is resident abroad. The English decisions, however, show that it does not follow that such a shareholder would, in the absence of such a provision, be entitled to notice. It was laid down by Mallins, V.C., in the case cited of the *Union Hill Silver Co.*, that to require such notice would be intolerable, and

The plaintiffs claim:

(a) The sum of £329 5s., with interest *a tempore morae*.

(b) Alternative relief.

(c) Costs of suit.

To this declaration defendants pleaded as follows:

1. Defendants admit the allegations in paragraphs 1 and 2, of the declaration, save that they deny that plaintiffs incurred certain expenses, as alleged in the latter paragraph.

2. They say that plaintiffs undertook to land and place in trucks at the Cape Town Docks, and did so land and place in trucks certain goods consigned to defendants per S.S. Bloemfontein.

3. It was agreed between the parties that in respect of packages, not exceeding 2,000 lb. in weight, the charge for so doing should be 2s. per ton, where no wagon hire was incurred; and 3s. per ton where it was incurred, but in respect of packages exceeding 2,000 lb. in weight, no special agreement was made.

4. They say that a fair and reasonable remuneration for the work done as aforesaid by plaintiffs in the sum of £62 18s., being at the rate of 3s. per ton in respect of 51 tons of packages each under one ton in weight, and 10s. per ton, in respect of 110½ tons of packages, each exceeding one ton in weight.

5. Defendants have tendered to plaintiffs the aforesaid sum of £62 18s., together with taxed costs to date of tender, and herein again repeat the said tender.

6. Defendants admit that they have refused to pay any greater sum than the aforesaid tender, but otherwise, save as is hereinbefore admitted, they deny the allegations admitted in paragraphs 3, 4, and 5 of the declaration.

Wherefore they pray that, except in so far as regards the foregoing tender, plaintiff's claim may be dismissed with costs.

The replication was general.

The annexure A referred to in the declaration was as follows:

Castle Chambers, 31, Castle-street,
Cape Town, December, 1901.

Messrs. Sir John Jackson (Limited). Dr.
to Tunnell, Duncan and Co.

To landing and loading,
ex Bloemfontein, 165 tons,
at 3s. £24 15 0

To landing heavy lifts, 34
packages, equal to 116
tons, at 30s. 174 0 0

To detention of trailers:

Three trailers, each four-
teen days, equal to 42
days, at 30s. 63 0 0

Three trailers, each six
equal to 18 days, at 30s. 27 0 0

£288 15 0

The annexure B was as follows:

Castle Chambers,
December, 1901.

Messrs. Sir John Jackson (Limited). Dr.
to Tunnell, Duncan and Co.

To labour and cartage in
Docks £40 10 0

Mr. Searle, K.C. (with him Mr. Gar-
diner), for plaintiffs; Mr. Schreiner,
K.C. (with him Mr. Benjamin), for de-
fendants.

John Henry Duncan said that in October he was a member of the firm of Tunnell, Duncan and Co. The work in dispute was done in connection with the delivery of plant, engine, timber, rails, etc., from the ship Bloemfontein. In April there were negotiations in regard to witness's firm landing and delivering the consignment. Witness wrote in May, stating terms. Witness went down to Simon's Town after certain correspondence, and before the vessel was docked. He saw Mr. Stockman, and said his firm would undertake the work of taking the shipment and putting it into trucks. Mr. Stockman said that there would be no trouble or delay about the trucks, as he had made arrangements with the Railway Department. Mr. Stockman asked for a quotation, and said he had already had a quotation from McKenzie's. Witness said he would require to consider the matter, but that the firm would do the work as cheaply as McKenzie's. Mr. Stockman then said the firm could do the work. The vessel was berthed at the North Quay. On starting, witness found that trucks for the defendants were not more plentiful than for anyone else. The firm worked over a week at the consignment, and made disbursements amounting to £40. Witness then obtained Mr. Stockman's permission to McKenzie taking over the work, providing it did not cost more. He (witness) gave the work over to McKenzie's, who

sent in an account, which witness forwarded to the defendants. Witness did his best to get trucks, and applied to railway officials at the Docks. On the 16th September, plaintiffs wrote asking for a list of the weights, in order to check the landing charges. A list was sent (produced). A considerable amount of correspondence followed. Witness had paid McKenzie £288, less an allowance of £5. The light weights and the heavy weights were taken from the ship's manifest, and the account was made accordingly. Thirty shillings a ton was a very reasonable charge for the heavy weights. The charge for the detention of trailers was, in witness's opinion, reasonable. The stuff was very difficult to handle. At the time there was a block at the Docks, and a great scarcity of trucks. The material had to be taken from the North to the East Quay. The detention of the trailers was in consequence of the delay in getting trucks. Witness took no responsibility in regard to getting trucks.

Cross-examined by Mr. Schreiner: Witness was quite positive that he went to interview Mr. Stockman before the ship was docked. When witness saw Mr. Stockman on the second occasion to get his permission to hand the work over to McKenzie's, Mr. Stockman did not tell him that McKenzie's quotation was 3s. a ton. Witness had day after day tried to get trucks. With regard to the claim for detention of trailers, witness's firm had no trailers. The trailers belonged to McKenzie and Co., and that firm made a charge against witness's firm for detention of trailers.

John Peter Roos, a partner in the plaintiff firm, said that he did not see Mr. Stockman about this matter until the account was in dispute about March this year. Witness then saw Mr. Stockman and the latter said that Mr. Duncan had agreed to the charge of 3s. per ton for all the work. He said that that was the price quoted by McKenzie for the work. Witness said he would abide by that if he could show a quotation for that particular ship, but the only answer he got was, "I am not going to argue with you." Witness's firm had paid £267 odd to McKenzie on this account. With regard to the heavy lifts they took his own figures.

Cross-examined: The Harbour Board charged more than 30s. for such work.

Witness had seen an account the previous day in which the Harbour Board had charged 25s. per ton for lifting an eight-ton lift from the ground into a truck.

John Percy Leibbrandt, in the employ of Messrs. A. R. McKenzie and Co., said that he had charge of the work now in dispute, and he thought the charge made of 30s. a very reasonable charge, and far less than the Harbour Board now charged for such work since it had taken it over. Taking into consideration all the different charges he was of opinion that the account was a very reasonable one, considering that the Board charged 25s. a ton for lifting from the ground and placing into trucks alone.

Cross-examined: They had charged witness's firm 25s. per ton for lifting goods from the ground to the trucks. As an instance he mentioned the Tintagel Castle on May 16 last, when that charge was made in regard to eight packages, weighing eight tons altogether. Witness had in the case in dispute seen six or seven pieces over a ton. There was great difficulty about trucks, witness making inquiries every morning as to trucks. He saw the Dock Superintendent in that connection. With regard to the truck detention an account had been sent in to Tunnell, Duncan, and Co. He did not know where that account was now, but he supposed his firm would have a copy of it. Witness's firm did all the discharging. The account of detention rendered was a correct account. Witness had himself drawn up an account, but the original data from which that account had been made up had been destroyed long ago. He only sent up a rough copy to the town office, where the account was made out.

Re-examined: Tunnell, Duncan, and Co. may have done work in carting these goods in the docks before witness's firm took it over, in fact, they must have done considerable work.

By the Court: If they had done work before witness's firm started that would be included in the charge of 3s.

William Henry Cowle said he was manager for A. R. Mackenzie and Co. up to the end of October last year. In the February before the work now in dispute was undertaken witness's firm, in reply to a communication from Sir John Jackson, Limited, offered to do certain work at 3s. per ton dock scale. That letter had no reference whatever to this

shipment of machinery, which, according to the Harbour Board scale, would be at special rates. It was office goods they were dealing with, and measurement goods according to dock scale. In regard to the matter now in dispute witness's firm undertook it for plaintiffs, who had not the plant for dealing with it. Witness considered the charge of 30s. per ton reasonable. He had twenty-two years' experience with McKenzie, and, knowing the weight of some of the packages, he would not undertake the work for 30s.

By the Court: Dock scale meant according to the list fixed by the Harbour Board as to the different ways in which the weight was calculated.

Examination continued: Taking the one thing with the other he thought 30s. per ton was a very reasonable charge. If there had been no detention charge and the goods had instead been taken to the depositing grounds, and then taken on again from there, the charge would have been much heavier. Witness thought the account rendered a reasonable one.

Cross-examined: Witness could get a copy of the first account from the office. He could not remember whether it was earlier than September 4 last year, but he knew two accounts had been rendered. Witness was not at the docks himself, and the evidence he gave as to the work there was from the returns furnished him from the docks.

By the Court: He could not say whether the boats were put in as heavy or light goods. His firm had landed many boats, and they had always taken them by measurement.

Tobias Spengler, dock agent, said he had had experience of dock work for twenty-four years. He considered that the charge of 30s. for the heavy machinery in this case was very reasonable. Witness thought the taking of machinery off the ship and putting it on the depositing ground would cost more than detaining the trailers. The charge of 30s. a day for trailers in June last was reasonable in his opinion.

Wessel Jacobus Pretorius, manager for Skead and Co., dock agents, and military dock contractors, gave similar evidence.

Cross-examined: Witness did not know whether anyone had ever paid 50s. a day for trailers.

Mr. Searle closed his case.

Mr. Schreiner called

Edmund Wm. Sheel, chief engineer for Sir John Jackson (Limited), who said that Mr. Stockman, former manager, had died recently by accident. The actual weight (Cape) of the machinery in question was 322,167 lb. There were 434 cubic feet of timber, weighing 7 tons.

[By Buchanan, J.: By cubic measurement, this would come to about 10 tons.]

By Mr. Schreiner: No item in regard to this weighed a ton. The manifest differed from the exact measurement of the consignment. The freight had not been paid; it was still under adjustment. The boats were 2,080 feet, or 52 tons. Witness considered that the tender of 10s. a ton all round was a fair and reasonable one.

Cross-examined: Witness had been in this country for two years. He based his estimate of 10s. a ton on his experience in other countries and at the works at Simon's Town. Cargoes were lightered from the ship at Simon's Town. The defendant firm paid expenses at Simon's Town from the time the goods were put from the ship on to the lighter. The defendants had not weighed the machinery.

The witness, in answer to the Court, said he had taken weights and measurements according to the shipping documents. The total weight was 183 tons. This did not include the boats, which came to 52 tons. The boats had been included in the large weights at 3½ tons. There were 107½ tons heavy weight, and the rest was light weight.

John Emerson, chief mechanical engineer to Sir John Jackson (Limited), said that in June Mr. Duncan came down, and Mr. Stockman told him that he was prepared to allow the plaintiffs to hand over the work to McKenzies, providing it did not cost more. Mr. Stockman mentioned that McKenzie's quotation was 3s. a ton. The heavy lifts were not mentioned.

Cross-examined: Mr. Stockman said it was not to cost more than McKenzies would charge.

Walter B. Barnes, accountant in the employ of defendants, said that defendants paid for 314,507 lb. (157½ tons) to the Railway Department for the carriage to Simon's Town of the Bloemfontein consignment. There were only three sleepers short delivered. The boats were charged by weight.

Thomas Frederick Metcalf, goods traffic superintendent at the docks, said that in June he was acting superintendent at the Cape Town goods station and at the docks. The Railway Department made charges on weight only. For the Bloemfontein consignment witness had special instructions to give facilities in regard to trucks. Witness was never asked for trucks. He was able at that time to give sufficient trucks. On representations that trucks were being delayed witness made a report on the 9th July. He reported that trucks were sent down and that his opinion was that the agents had used the trucks for other purposes and were alone to blame.

Cross-examined: Mr. Leibbrandt may have come to witness about trucks, but not for this particular consignment. These particular trucks were not used by the military. They were non-automatic trucks, which could not be used on the main line. The military could not therefore use them. These trucks could not go on the main line. The military might have used one or two. This description of truck had been used for military traffic to D'Urban-road. Witness had seen trucks sent down for rails and used by McKenzie for another purpose. He had not seen this in regard to this particular consignment. The inspector at the docks was now away. At that time there was no scarcity of trucks for the Wynberg line.

Edward Henry Jones said he was in charge of the distribution of rolling stock in the traffic manager's office. Witness had turned up the return at the end of May and early part of June. There was then no dearth of trucks and no applications were made at the office of the traffic manager for trucks.

Cross-examined: At that time there was absolutely no delay in getting goods up from the docks.

Frank Robb, assistant general manager and secretary of the Harbour Board, said he was the secretary of the Board in June, 1901. Witness produced certain correspondence relating to the Bloemfontein consignment. For heavy lifts, there was no specific charge in the regulations. The Board fixed a charge if appealed to. In April last there was an appeal to the Board in connection with this dispute. On May 17 two letters in identical terms were written on behalf of the Board, the one to Sir John Jack-

son (Limited), and the other to Tunnell, Duncan and Co., in which it was said that the remuneration for the services, as allowed in the maximum dock agents' tariff in existence at that time, would be: Landing and loading 165 tons at 2s. per ton, £16 10s.; 116 tons at 10s. per ton, £58; detention of trailers, £60—making a total of £134 10s. A letter was then received from Tunnell, Duncan and Co., pointing out that they had paid McKenzie and Co. more than that, and also pointing out that there was a dispute as to the weight. Further correspondence passed, in which the matter of the difficulty of getting trucks was referred to. With regard to the Board's estimate of the value of the work done, witness considered that the charges of 2s. per ton for small parcels and 10s. per ton for parcels over one ton were fair charges. The Board could not make any extra charge when they had to put the goods first on to a wagon, and from there on to the trucks, instead of taking the goods direct from the ship's slings on to the trucks, but the Board could not expect the dock agents to do that for nothing. For goods over 5 tons there was a special charge made. In this case there were three articles between 5 and 6 tons in weight. When the Board made the estimate, they simply took the ship's manifest as correct, and did not go into the disparity between that and the figures supplied by Sir John Jackson (Limited).

By the Court: Dock agents did not have to pay for the use of the hand cranes, but for the use of the steam crane on the East Quay they paid 2s. 6d. a ton, and for the shearlegs, 5s. per ton up to 10 tons, and in each case there was a reduction of 25 per cent. on each lift after the first one, with a minimum charge of £2.

Cross-examined: The Board did not know that the plaintiffs had to take the goods from the North Quay to another part of the Docks three-quarters of a mile from there. What was before the Board when the estimate was made was what the plaintiffs ought to have done, not what they did do. The plaintiffs ought to have got the trucks up to the back of the North Quay, and loaded the goods on to them there with one of their own jib, or crane engines. Witness did not think the steam cranes were used by plaintiffs. Before the

Board took over the work, that crane had been a sort of white elephant to them, as the dock agents did not use it. The Board received nothing for that crane.

Mr. Searle: It is rather a reckless statement to say that you received nothing for the crane.

Witness: I mean that we made nothing out of the crane. We had a dead loss on it.

Mr. Searle: Everything seems to be a dead loss to your Board.

Witness: That is a more reckless statement than mine, Mr. Searle.

Mr. Searle: Well, I am referring to your accounts, which show a loss of £80,000.

Witness: You are referring to a portion of the accounts only.

Cross-examination continued: The Harbour Board charged for detention of trailers, but then it was their duty to find trucks, and that caused the detention, they could not charge anything at all.

Re-examined: The Board had in view, in fixing the charge at 10s., the use of the dock agents' own crane engines.

Mr. Schreiner closed his case.

Mr. Searle, K.C. (for plaintiffs): Four points were originally in dispute: (1) The charge per ton; (2) the charge for heavy packages; (3) what is to be allowed for detention; (4) the question of the charge of £40 10s. With regard to the last point, I do not wish to press it. Hence three points are left for me to discuss. As to (1), viz., the charge of £8 15s.: The question is what was the work done, and how was it done? After McKenzie had stated his terms, the defendants entered into arrangements with plaintiffs. Duncan went to Simon's Town, and arranged the whole matter. Summons was issued by the plaintiffs on March 15, and it was only on March 22 that defendants made a tender. This tender was at the rate of 3s. per ton. Defendant knew that McKenzie was doing the work for plaintiffs, and evidently had confidence in McKenzie. He sent in his account on September 4, after completing the work for £8 15s., and this is the account now sued upon. It is quite true that subsequently another account was sent in, showing higher charges for trailers' detention. As to these charges, we charged 3s. per ton on 165 tons, amounting to £24 15s. The weights are in dispute,

and this would give a difference of £7 10s., but the dock weights are always accepted by traders. They say that there was a shortage of 20 tons, but it now turns out that the weight was less than they had supposed, and they wish to fall back on the railway weights. There is no evidence to show that the Railway Department ever weighed the goods at all. As to the second point (viz., the charge for heavy parcels), the chief men in Cape Town accustomed to this class of work all say that 30s. per ton is a reasonable charge; and against their evidence we have only that of Sheel; but, then, he can only speak as to Simon's Town, where the conditions are widely different from those which obtain at the Cape Town Docks. The defendants contend that the work was done in a very unbusinesslike manner, but Mr. Leibbrandt was not cross-examined on this point. Mr. Robb did not say that the goods could be taken from the boat, and entrained at the North Quay, but some 25 truck loads had to be carried about a mile before they could be handed over to the Railway Department for carriage. For this service we have to pay the Harbour Board. Mr. Robb admits that dock agents would not work for this tariff, and in point of fact only last month the Board charged 25s. per ton for lifting a boiler. The tariff is not very specific, but section 28 should be read with section 29. I submit that for heavy weights, 30s. per ton is a very reasonable charge. Thirdly, as to the detention of trailers: Plaintiffs never guaranteed to get trucks, and the detention was entirely owing to the want of trucks. Defendants' witnesses now say that there was no block at the Docks, but this notoriously was not the case. Cowell and Duncan both say that they did their best to get trucks, and the Court will not assume that McKenzie and Co. made no attempt to get trucks. The Harbour Board charges would have been 20s. per ton instead of the 30s. which we now charge. The real point is, what value do the Harbour Board put upon their trailers? They charge 6s. per hour, and this would amount to £3 12s., whereas we charge only £1 10s. The Harbour Board witnesses were mistaken as to the distance these goods had to be carried. I submit that the tender of £60 is wholly insufficient, in view of the services rendered.

[Buchanan, J.: Mr. Sheel's weights are contradicted by the other witnesses. The whole cargo seems to have been 107 tons.]

Mr. Schreiner, K.C. (for defendants): There are no *prima facie* grounds for taking the manifest of cargo as our guide as to weight. It is contradicted by Sheel's evidence, and by other evidence. Jackson and Co. are no parties to that manifest, and therefore cannot be bound by it. Suppose the case of a dispute between a consignee and a dock agent. The consignee says that he has not received the weight for which the dock agent charges him. Surely the manifest would not be evidence against the consignee. The tally of what came ashore is the real test. See *Holt and Holt v. Union-Castle Company* (11 Sheil, 36). The manifest is evidence against the ship, but not against the consignee. Sheel's evidence shows that in no case can we account for more than 201 tons. We must go either by dead weight or by measure right through. We cannot take weight for some things and measure for others. We have taken dead weight right through, and I submit we were right. Plaintiff's own correspondence showed that they were thinking of weight and not of measurement. There were 161½ tons in all. When McKenzie quoted 2s. per ton as his charge, or 3s. with wagons, he was thinking only of weight and not of measurement. I submit that our tender of 10s. per ton is quite reasonable. Interested persons may talk about 30s. per ton, but they might just as well say 40s. or 50s. Of course, everybody in the service of the Harbour Board is interested in putting the charges as high as possible. The Dock Regulations, however, only allow 10s. per ton, and all that can be said against this is that on one particular occasion the Harbour Board charged an excessive sum for lifting a particularly heavy article, and hence they ask more now than their legal tariff warrants. But this can be no guide in settling claims between agent and principal. Tunnell, Duncan and Co. were our agents, and it was their duty to send in monthly accounts. They never did so; we did not know what they were doing, and their claim is inflated. Sheel's evidence shows that 10s. per ton is a very remunerative charge.

Mr. Searle (in reply): Rule 31 of the Harbour Board regulations provides that

boats much be charged by measurement. The employees of the Harbour Board are not interested persons, as they no longer undertake this kind of work.

The Court gave judgment for the plaintiffs for £125 15s. and costs.

Buchanan, J.: The defendants in this case, having a quantity of goods arriving by the steamer Bloemfontein in May last, employed the plaintiffs as landing agents to land from the ship, place these goods on trucks, and consign them to the defendants at Simon's Town. For this work, which was admittedly done, the plaintiffs sent in two accounts, one for £288 15s., and a second account for £40 10s. With regard to this second account for £40 10s., Mr. Searle admits that it cannot be enforced, because if it were allowed it would really be a double charge for the same work. Therefore we have to deal only with the first account. This consists of three items. One is for landing and loading 165 tons at 3s. a ton; the second is for landing 116 tons of heavy lifts at 30s. a ton, and the third item is for detention of trailers, £90. The plea to this claim is that instead of the 281 tons which the plaintiffs say was landed and forwarded by them, the whole amount received was only 161 tons. The plaintiffs get their 281 tons from the ship's manifest; defendants get their 161 tons from the shipping documents in their possession. But when we come to examine these shipping documents, and when they are examined by the defendants' own manager, Mr. Sheel, we find that, if the goods are taken as vessels take goods, that is, either by measurement or by weight, whichever is the more favourable to the ship, or as the Harbour Board themselves under their regulations take goods—either by measurement or by weight, whichever is the more favourable to the Board—the total is 232 tons. In this case we have nothing to do with any dispute between the shippers and the vessel. In the absence of other evidence, the Court would be justified in taking the tonnage stated in the manifest, but it is not necessarily conclusive on the point. The other evidence produced satisfies me that 281 tons is an over-estimate of the weight of the goods, and that 232 tons is the correct amount. I am inclined to take this for two reasons. We have the

shipping documents, which show the weight at 161 tons, and that is supported by the railway accounts, which show nearly the same weight as that stated in the shipping documents, I think the details given in the shipping documents, corroborated as they are by the account sent in by the Railway Department, should be accepted as correct. If we are guided by the shipping documents, and take the goods forwarded by measurement, or by weight, whichever is more favourable to the plaintiffs, 232 tons is the amount we have to deal with. It may be noticed that the Harbour Board Regulations adopt this way of dealing with goods landed, and authorise landing agents to take either weight or measurement, according to the nature of the goods themselves. Therefore the contention that the plaintiffs must adopt either one mode or the other for their estimate is not well founded. In the Harbour Board regulations a certain tariff is given for landing goods—ordinary merchandise—but a note to the tariff says the tariff is exclusive of certain things which are subject to special arrangements, and there is no doubt that heavy packages would be subject to this special rate. In this case it is common cause that the plaintiffs were to charge 3s. a ton for light goods landed, but there was no special agreement as to the heavy lifts. The proportion of heavy goods is to be found only in the details supplied by defendants. They make this 110½ tons. But they include 3½ tons for boats, which it is clear should be taken by measurement. If, therefore, we take 107 tons as the weight of the heavy packages, this leaves 125 tons for what we may call light packages, for which plaintiffs are entitled to 3s. per ton. They have claimed for 165 tons; we think they are only entitled to claim 3s. per ton on 125 tons, which comes to the sum of £18 15s. As to the 107 tons heavy weight, the plaintiffs have claimed 30s. per ton. They have led evidence of other landing agents to show that this is a reasonable charge. Defendants have offered 10s. per ton, and they have given the evidence of Mr. Robb, the secretary of the Harbour Board, to the effect that this is the amount which the Harbour Board considers reasonable. In this conflict, we have to assess a reasonable charge. Under the Dock Regula-

tions, when a dispute arises, the matter may be referred to the Board for adjudication. Here both the plaintiffs and the defendants sent their statements of the matter to the Board, and the latter, without taking evidence but after estimating what they think to be reasonable, have fixed the sum of 10s. per ton for the heavy goods. However, neither party accepted the decision of the Harbour Board, so it does not dispose of the question, and we can only look upon it as evidence of what may be considered fair remuneration. Mr. Robb, who has been called, is the only witness who supports this estimate, and I think, from his evidence, that it is clear that he has not taken into account work which was necessarily done by the plaintiffs in sending these goods away. The estimate of 10s. was not arrived at, I think, on full information, and is not a fair amount to allow in this case. We think, however, that 30s. is too high an estimate, and looking at what the Harbour Board themselves now charge, we think that a fair amount to allow for the heavy goods will be the sum of 20s. per ton; that on 107 tons would give £107. These two items together come to £125 15s. The third item in the account is for the detention of trailers. As far as I can gather from the evidence, the alleged detention is due to the fact that these goods were too heavy to be taken out of the ship, and placed at once on railway trucks. There was no line of railway which ran alongside the ship, and consequently the goods could not be taken from the ship into trucks, but had, in the first instance, to be put on to wagons and then removed from these wagons to the railway trucks. From the correspondence and the evidence, it is clear that there were trucks ready at any time when the landing agents were waiting them. The plaintiffs say that the defendants did not do their duty in supplying trucks, and kept the trailers waiting—six for 14 days and three for 16 days—for trucks. On this point I think the evidence totally fails to show that there was any neglect or any delay on the part of the defendants which renders them liable for such alleged detention of the trailers. It seems to me to be questionable whether a landing agent who undertakes to take goods from the ship and place them on trucks is entitled to charge for any delay to the trailers, unless he can

prove that it was due to the default of the defendants, or, at least, to circumstances beyond their control. It is a question, in my mind, whether such detention could be charged for under any circumstances, but even if it could be charged under special circumstances this cannot be held to be a case in which there are such circumstances. Therefore I see no grounds upon which any allowance for this can be given in this case. This disposes of all the claims in this action, and we think that a fair and just amount to award, in the absence of any special agreement as to heavy goods would be £125 15s. If this amount had been anything near the amount tendered, we might have supported the contention that the plaintiffs were not entitled to costs, but as this is nearly double the amount of the tender, we think the ordinary rule should apply, and that the judgment for £125 15s. should carry costs. Judgment will therefore be given for the plaintiffs for £125 15s., with costs.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Scanlen and Syfret; Defendants' Attorneys: J. and H. Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

REVIEW.

REX V. CARL. { 1902.
Sept. 4th.

Ordinary jurisdiction of Resident Magistrate.

De Villiers, C. J., said that a case had come before him, as judge of the week, from Walfish Bay, where a Hottentot had been charged before the Acting Resident Magistrate with breaking into a box, the property of one Martinus, and stealing therefrom the sum of £3. The accused was found guilty, and there was no doubt as to his guilt, but the sentence imposed, six months' imprisonment with hard labour, was quite beyond the ordinary jurisdiction of the

court, and therefore the sentence must be reduced to one of three months' imprisonment with hard labour.

COLONIAL GOVERNMENT V. { 1902.
COATON AND LOUW. { Sept. 4th.
Colonial produce—Railway charges.

This was an action for the recovery of an amount alleged to be due by the defendants to the Government on the carriage of certain produce over the Government railway lines.

The plaintiff's declaration was as follows:

1. The plaintiff is the Honourable Arthur Douglass in his capacity as the Commissioner of Public Works, and so representing the Colonial Government, which by its Railway Department owns and works the public system of railways known as the Cape Government Railways, and hereinafter referred to as the Railways.

2. The defendants carry on business at Wellington as millers and otherwise, under the style or firm of Coaton and Louw.

3. In accordance with regulations in force during the years 1898, 1899, 1900, and 1901, in connection with the carriage of goods upon the railways, flour, meal, bran, and other products from and of wheat or grain exclusively grown in South Africa or Cape Colony, were entitled to carriage at a lower rate than flour, meal, bran, and other products from and of wheat or grain not so exclusively grown.

4. During the said years, and more particularly between the 4th day of January, 1898, and the 30th day of November, 1901, the defendants consigned *inter alia* for carriage by rail by the plaintiff upon the railways, very many consignments of flour, meal, bran, and other products from and of wheat or grain not exclusively grown in South Africa or Cape Colony.

5. Particulars of all the consignments specially referred to in the last paragraph are set out in the statement hereto annexed, marked "A," to which the plaintiff craves leave to refer this honourable court.

6. The said consignments were in each instance accompanied by a certificate or declaration, signed by one or other of the defendants, or by one or other of the officers or employees being in their em-

ploy, and duly authorised to represent and act for them in that behalf.

7. The certificates or declarations so signed as aforesaid by one or other of the aforesaid persons, were substantially and in effect in one or other of the following forms: (a) I hereby certify that the produce above-mentioned has been manufactured exclusively from or consists exclusively of South African grown wheat, and I request that the same may be conveyed at the South African grain and produce rate; or (b) I hereby certify that the produce above-mentioned has been manufactured exclusively from or consists exclusively of grain grown in the Cape Colony. In each of the cases (a) and (b) the words "produce above-mentioned" refer to the produce then and there being so consigned as aforesaid.

8. By each of the said certificates or declarations the defendants wrongfully, unlawfully, falsely, and fraudulently represented to the plaintiff that the flour, meal, bran, or other product to which such certificate or endorsement referred was from or of wheat or grain exclusively grown in South Africa or Cape Colony, and entitled to be carried on the railways at the lower rate aforesaid, whereas in truth, and, in fact, the flour, meal, bran, and other products so referred to in the said certificates were, as before mentioned, from, or of wheat or grain not exclusively grown in South Africa or in Cape Colony, and not entitled to be carried at such lower rate.

9. By means of the false and fraudulent representations aforesaid, which were made with intent to defraud the plaintiff, the defendants fraudulently procured the carriage of the flour, meal, bran, and other products aforesaid at the said lower rate of carriage, and thereby defrauded the plaintiff of the sum of £16,449 3s. 3d.

10. Particulars of the said sum were furnished to the defendants in a statement similar to that hereto annexed, and lawful demand has been made by the plaintiff for payment of the said sum, but the defendants have neglected and refused to pay the said sum.

Wherefore the plaintiff prays for judgment for the sum of £16,449 3s. 3d., or for such further or other relief as to this honourable court may seem meet together, with interest *a tempore morae* and costs of suit.

The plea of the defendant Coaton, carrying on business under the style or firm of Coaton and Louw, was as follows:

1. Paragraphs 1 and 3 are admitted.

2. As to paragraph 2, the defendant Coaton admits that he carries on the said business at Wellington under the said style or firm, but denies that the defendant Louw is, or was at any time, material to this case a partner of the said firm of Coaton and Louw, or that the said Louw carries on business as therein set forth. Save as above the defendant Coaton denies the allegations in the said paragraph.

3. During the years 1898, 1899, 1900, and 1901, the defendant Coaton, trading under the style or firm of Coaton and Louw, consigned for carriage by rail upon the said railways large quantities of flour, meal, bran, and other foodstuffs certified or declared to consist or to be manufactured of or from wheat or grain grown exclusively in South Africa or the Cape Colony upon which the said lower rate of carriage was paid.

4. Of the said consignments, a certain portion was erroneously so certified and declared, and the defendant admits that the higher rate of carriage was payable upon the said portion.

5. The defendant denies specially that he wrongfully, unlawfully, falsely, and fraudulently represented to the plaintiff that the consignments set forth in the statement annexed to the declaration were of or from wheat or grain exclusively grown in South Africa or in Cape Colony, or that the said representations were made with intent to defraud the plaintiff, or that he (the defendant) fraudulently procured the carriage of the said consignments at the lower rate of carriage, or that he has defrauded the plaintiff of the said sum of £16,449 3s. 3d., or any portion thereof.

6. The defendant denies the accuracy of the statement A, annexed to the declaration, and, save as above, all the allegations contained in paragraphs 4, 5, 6, 7, 8, 9, and 10.

7. The defendant Coaton (so carrying on business as aforesaid) hereby tenders to pay to the plaintiff the sum of £4,784 7s. 5d., being the difference between the lower rate so paid and the higher rate payable on the portion erroneously declared as aforesaid, together with taxed costs to date.

Wherefore, subject to the above tender, the defendant prays that the plaintiffs' claim may be dismissed, with costs.

Annexed to the pleadings were voluminous documents, among them 37 printed pages of accounts.

Mr. Schreiner, K.C. (with him Mr. McGregor), for the Colonial Government; Mr. Searle, K.C. (with him Mr. Uppington), for the defendant Coaton. Louw did not appear.

On the reading of the pleadings, the Court intimated that it would be necessary to refer the matter to an accountant to go into the figures.

Counsel said that it might be necessary for the Court to decide whether or not the grain had been mixed as alleged.

Mr. Schreiner called

William Floyd, who stated that he was a miller, and was now in the employ of the S.A. Milling Company, at Port Elizabeth. He came to this country under engagement to Messrs. Coaton and Louw in October, 1897, and was with them until the end of March this year. He came out under a three years' engagement in the first instance, which was afterwards renewed for eighteen months. Witness knew Mr. Coaton and the other members of the defendant firm. While he was in their employ he had instructions from Mr. Coaton personally as to how he should mill. His instructions were to mix the imported and Colonial wheat and make a satisfactory product all round. He had to mix the wheats in such quantities as he thought was needed. Witness was an experienced miller, and he was defendant's only miller during the entire period covered by the declaration. He never made grist of purely Colonial or South African grain. It was always a mixture in varying proportions. On one occasion he made grist of imported grain alone. In August or September, 1900, they were short of Colonial grain, and he milled about 3,019 bags of imported wheat unmixed with any Colonial or imported. They imported the produce from Thesen and Co., in ordinary meal bags marked "imported," and it was then put into Coaton and Louw's bags marked "South African," and sent on, some by rail and some disposed of locally. Witness attended to the re-bagging under Mr. Coaton's instructions. Witness did not keep a grist book, which would show the amounts mixed; Mr. Coaton said a grist

book was not necessary. Witness had never signed a certificate for the railway. The bags sent from the mill to the railway were invariably marked "South African," whatever they contained.

Cross-examined by Mr. Searle: Witness had a "row" with young Mr. Coaton in connection with the bakery in about January, 1901. Witness's engagement could be terminated by three months' notice after three years. Everyone in the establishment knew of the mixing of Colonial and imported wheat. The wheat was not mixed by a man named Harry Jonker. This person was not employed at the hoppers.

Mr. Searle: You were a party to the fraud?

Witness: No. I was not.

You knew very well of this wheat going away at Colonial rates?—Being a servant, I had to obey orders.

You knew, at any rate, that fraud was being committed?—Yes.

In further cross-examination, witness denied having told Jonker that if he would come and give evidence in support of what he (Floyd) was going to say he would give him double pay.

In answer to the Court, Mr. Searle said that a large amount of wheat had been sent over the railway by plaintiffs at imported rates.

Replying to the Court, witness said that he saw no bags marked "imported" being sent from the defendant's mill.

[Buchanan, J.: And yet they paid imported rates]

Witness: I know nothing about that.

Cross-examination continued: Witness gave instructions for the bags to be marked "South African" in pursuance of orders. Witness denied having on one occasion admonished a man for having put a bag of imported wheat into the hopper with colonial wheat. He did not give the men instructions not to mix the wheat. Witness thought he could tell colonial wheat from imported wheat.

At this point a number of glass jars containing wheat were handed to the witness, who was asked to say what description of wheat was contained in each.

Mr. Searle said that the witness described three of the samples wrongly.

In answer to further questions by Mr. Searle, the witness said he had never

seen any bags at Coaton and Louw's, which were not marked "South African."

Mr. Searle: You said nothing about all this until you left the employ of the company.

Witness: I did.

Did you volunteer your evidence to the Government after you left Coaton and Louw?—No.

[De Villiers, C. J.: Then can you tell us how the Government discovered that there had been this fraud.]

Witness: The Railway Department sent to me asking me to come and see Mr. Steel. I did not know what Mr. Steel wanted to see me about.

You had not communicated with them?—No; I went to see Mr. Steel, who said I would have to give evidence in Court. I thought it best to tell him what I knew.

Mr. Searle: After you gave this information did you continue in the employ of Messrs. Coaton and Louw?

Witness: Yes.

How long did you remain?—Six months.

And you carried on just as before and said nothing?—Yes.

Oscar Steel, Inspector of Produce in the Railway Department, said he had been investigating this case. Witness sent for Floyde, who had previous to this given no information. Witness had checked the account put in. The items agreed with the figures shown on the invoice. For some of the items there were no notes produced. Search had been made for them, but they could not be found. There were some consignments for which there were consignment notes, but the accompanying certificates could not be found. Some of the consignment notes had the word "Colonial" written across them. Witness had prepared statements showing the wheat received by defendants by rail during certain periods. During the four years defendants had paid for 264,498 lbs. at imported rates. Excepting in a few instances these consignments were carried for short distances. If taken long distances the charges for imported wheat were greatly increased. The total amount of the wheat consigned during the whole period was 14,168,998 lbs. This comprised Colonial and imported wheat. Of the amount claimed there was a sum of £8,063 in respect to wheat, for which there were neither consignment notes nor declarations. There

was a certain amount for which there were consignment notes but no declarations.

Cross-examined: For wheat in connection with part of the claim the consignors were not Coaton and Louw, but other people. This wheat, however, came from the defendants' mill.

Mr. Searle: Who gave you the information upon which you acted?

Witness: I would rather not disclose my informant's name, because I promised him I would not. I might tell you it was not Mr. Floyde.

Mr. Searle said that the defendants alleged that Floyde and some other person had conspired against Mr. Coaton. He had certain enemies, and it was alleged that the whole thing was a trumped-up charge against the defendants.

De Villiers, C.J., said that under the circumstances the court thought the witness should answer the question.

Witness said he had a confidential letter from Mr. Difford, traffic manager. Mr. Jordan, of Wellington, was the person to whom he made the promise not to disclose his name.

Frederick J. Hull said that he was clerk at Wellington Station, and had to do with the consignment notes in connection with the matter now in dispute. Mr. Louw generally signed the declarations, but he thought Mr. John Coaton signed some. Witness used to keep these notes for a time, and then they would be sent to a certain room, where they were kept. He had nothing to do with them after that. They would be in the room referred to when witness left Wellington in March, 1899.

Cross-examined: Witness thought there were always declaration notes made out, since that form came into use some time before 1898. He could not swear that declaration notes were always made out. He did not know anything about where the declaration notes were now. He knew that on these notes the consignor was often made out in other names than those of Coaton and Louw. The names of the latter would be crossed out on the consignments, and the other names inserted. In those cases witness took it that the parties whose names appeared were the consignors, and they would be entered as such in the books.

By the Court: The freight would be paid by Coaton and Louw.

Cross-examination continued: If a Mr. Coaton signed the declarations it would be Mr. John Coaton. He could not say that defendant ever signed any declarations.

Thomas B. Kerr said he succeeded last witness as goods clerk at Wellington Station, remaining there until 1901. Witness gave evidence as to the signatures on the declarations. In the case of consignments coming from defendant, but forwarded in other persons' names, there would still have to be a declaration, which would be signed by someone in defendants' employ. If there was no certificate there was no reduced charge made.

James Kirby, assistant produce inspector in the Railway Department, said that the items on the account produced were correct. He had checked the account for Colonial produce with the amounts which would be due under the imported produce scale, and the difference was shown. Where the notes and certificates were available they were all in court. The invoices agreed with the ledger account. Accounts were rendered to defendants from time to time, upon which payments had been made.

Cross-examined: If the weights were incorrect, it would make a difference in the account. Witness had only done the mechanical work of calculating the difference between the Colonial and imported rates.

Mr. Schreiner, having put in certain correspondence, closed his case.

[Buchanan, J.: The referee will have to consider whether the secondary evidence as to the documents is satisfactory or not. The whole question will go to the referee, and if he lays down certain principles which are bad the Court can always be applied to.]

Mr. Searle called

John Frederick Pentz, an auctioneer and general agent, practising at Wellington, who deposed to going to Mr. Coaton's place of business at Hermon, and taking out the samples of grain produced. He also took out some samples (produced) at Wellington. Those he took at Hermon were Colonial wheat. Witness took those at Hermon from the bags in the presence of Mr. Coaton. Those he took at Wellington were imported wheat. The samples had never left witness's possession since. Witness had sent Colonial produce from Welling-

ton and Hermon, and had never had to sign a declaration.

Cross-examined: Witness had done so during the past twelve months, and before that also. It was marked Colonial produce. Witness did not go to the station at Wellington personally, but he had gone himself to Hermon, and he had never had to sign a declaration. He had never been asked to do so, and he did not know it was necessary to sign any such declaration or certificate until he heard it stated in court to-day.

John Henry Coaton, defendant, said he had been in business in Wellington for 40 years. The mill was built in 1897. Witness was formerly partner with Mr. A. W. Louw, but the partnership was dissolved in 1896. Witness's chief clerk was Mr. F. W. Louw, and the manager was Mr. A. B. Coaton, witness's brother. There were two hoppers on the ground floor of the mill, one of which was connected with an elevator, and the other with a lean-to. The miller had assistance, and some dozen people were employed about the mill. During the last five or six years a considerable number of people had worked there. A man named Harry Jonker was in charge of the work of putting the wheat into the hoppers. Mr. Louw received the stuff from the farmers, and Jonker packed it up under his directions. The imported and Colonial wheat were kept in separate places. Witness had given strict instructions not to mix imported and Colonial grain for flour. If it were mixed it must be done in the hoppers. Witness had always given these instructions. What Mr. Floyde had said in regard to the mixing did not contain a word of truth. Witness never gave Floyde instructions to mix according to his judgment. Witness reserved the imported stuff for the local trade. On an average the imported wheat was 1s. cheaper than Colonial, and witness had to compete with Cape Town millers in regard to imported wheat. The carriage over the railway for Colonial wheat was much less costly than for imported wheat, and witness therefore preferred to send, and did send Colonial wheat long distances. Witness blended two kinds of Colonial wheat—the red and the white. With reference to the bags, the fine flour bags were marked in England with the firm's name; the other bags were invariably marked

on the stoep under the direction of Mr. Louw. Witness had no knowledge whatever of any irregularity until he got the letter of demand for £16,000 from the Government in February last. A man named Jordan had been in witness's employ, but had been dismissed for incompetence.

By the Court: The man had a bitter ill-will against witness.

Examination continued: Printed notices were now on the walls of witness's mills, showing where Colonial and imported grain was to be placed, but witness could not say whether or not these notices had been put up recently by the new miller. With reference to the consignments sent in the name of Lawrence and Co. and other firms, witness paid the railway charge, but it was repaid by the firms concerned, who were the real consignees, witness's firm just paying the freight, etc., for convenience. The customers were charged just what witness's firm paid. Witness did not make a single penny on the railway rates. The profits of the mill during the past four years were £3,500.

Mr. Schreiner objected to this evidence as inadmissible.

Mr. Searle contended that it was admissible. The declaration alleged fraud on defendant's part, and the statement as to the amount of profits clearly showed that the defendant had not, as might be insinuated, been making great sums out of the railway rates.

Examination continued: The man Jonker was miller before Floyde came, and subsequently after Floyde came, he was for a time the night miller.

Cross-examined: Never on any occasion, to witness's knowledge or with his instructions, were Colonial and imported wheat milled together. If it was ever done it was contrary to his instructions. Witness instructed Floyde to keep the Colonial and imported wheat separate in milling, in view of the railway regulations. What Floyde had said about his instructions was untrue. He also denied that Floyde had ever spoken to him about a grist book. Such a book had never been kept, and witness never knew it was necessary to do so. A certain quantity of imported wheat had gone forward as Colonial wheat. Witness could not say who made false statements in regard to the imported wheat. Witness never told Floyde that he should

sign the declarations. Floyde was the miller, and had nothing whatever to do with the declarations. If Colonial had been mixed with imported wheat witness must have known it, because he was constantly in and out of the mill. He could not say whether Colonial and imported wheat, or its product, made a very good mixture for the trade. Witness had never sent forward imported wheat as Colonial to his knowledge. Witness had only had ten bags from Thesen and Co. in September, 1900. The books would show the transactions with Thesen and Co. over the whole period of four years. Jonker was the miller before Floyde. There was a miller named Peter Eycke at the same time Jonker was miller; these men took turns. Witness first knew of the fact that imported wheat had been sent as Colonial when he received the detailed account from the Government.

Arthur Baker Coaton, brother of the defendant, said he was manager of the business. He was in and out of the mill all day long, and had never witnessed any mixing of Colonial and imported wheat. He had heard his brother give Floyde instructions not to mix the wheat, and had himself given such orders to Floyde. Witness had seen the men feeding the hopper, and had never seen the imported and Colonial wheats mixed. The Colonial wheats were frequently blended. Floyde would be upstairs, and if not looking after the machinery he would be in his office. Witness opened all the correspondence, and would note the orders from the customers. Witness might have made out some consignment notes, but he did not think he had made out many. It was not his usual work, but if there was no one else there witness might make them out. Jonker would be the man who would know most about what was put into the hopper. He would be under Mr. Louw's instructions. Witness never made a declaration to the effect that certain produce was Colonial when he knew it to be imported. Witness knew nothing about any mixing. He could not say who had made out the false declarations. Louw, Malherbe, and Smith had no interest in the business. He could not say who signed the notes for the £4,700 worth of grain as shown by the tender. It must have been due to carelessness,

but witness could not say who made the mistake. Witness thought that Floydé had been "over-persuaded" by some one.

The Court intimated that the further hearing of the case would be adjourned. Meanwhile the Court would like to hear any suggestion as to the appointment of a referee.

In reply to a question put by counsel as to the evidence with regard to the mixing of the wheats, Sir John Buchanan said he thought Floydé was making some mistake in saying there had been such mixing.

Counsel consented to Mr. Maynard Nash being appointed, and

The Court directed that Mr. Nash be appointed as referee, to try and to report to the Court the amount of the difference between the carriage paid by the defendant Coaton, trading as Coaton and Louw, at Colonial produce rates, on produce consigned by the defendant and forwarded by rail, between the 4th January, 1898, and the 3rd November, 1901, and the proper amount payable on such produce as was not the product of wheat or grain exclusively grown in South Africa or the Cape Colony.

[Plaintiff's attorneys: Reid and Nephew. Defendant's attorneys: Van Zyl and Buissinne.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS.

{ 1902.
Sept. 5th.

Mr. Schreiner, Q.C., moved for the admission of Mr. Green as an attorney.

Order granted and the oath administered.

Mr. Benjamin moved for the admission of Mr. J. Wege as a conveyancer.

Order granted and the oath administered.

KIMBERLEY WATER WORKS { 1902.
CO. V. KIMBERLEY BOR- } Sept. 5th.
OUGH COUNCIL.

Municipal Council—Waterworks

— *Ultra vires* — Interdict —
Application to Parliament.

The Municipal Council of K. had power to grant leave to any company to lay down pipes or to execute any other like works for supplying the inhabitants with water.

Held, that it was not ultra vires of the Council to give a monopoly for the supply of water to the inhabitants for a period of twenty-five years to a company undertaking, in consideration of such monopoly, to construct the necessary waterworks, but that it would be ultra vires for the Council to bind itself to take no steps for supplying water to the inhabitants after the expiration of twenty-five years until the Council shall have purchased from the company the works constructed by the company.

Held further, that a public body cannot be interdicted from applying to Parliament for power to construct works for the benefit of the inhabitants.

This was an action for an interdict restraining the Borough Council of Kimberley from constructing certain waterworks.

The plaintiff's declaration was as follows:

1. The plaintiff is the Kimberley Waterworks Company, Limited, a company duly incorporated under the English Companies' Acts, 1862 to 1879, and having its registered office in London; the said company is empowered under Ordinance No. 12, 1880, of the province of Griqualand West. The defendants are the Mayor, Councillors and Burgesses of the Borough of Kimberley, a body incorporated under Act No. 11 of 1883.

2. On or about May 20th, 1880, an agreement was entered into between the Mayor, Councillors, and ratepayers of

Kimberley of the first part, and one Thomas Lynch, for and on behalf of the Griqualand West Railway and Waterworks Company, Limited, of the second part, whereunder it was agreed that the parties of the second part should construct certain works for the supply of water to the township of Kimberley, and should supply such water on certain terms and under certain conditions more fully set forth in the said agreement, and to which it craves leave to refer.

3. Thereafter by agreement, dated October 25th, 1880, the Griqualand West Railway and Waterworks Company ceded, made over and assigned to the plaintiff all its rights and obligations under the agreement in paragraph 2 set forth; the defendant council now represents the parties of the first part in the said last mentioned agreement, and is bound by all the conditions therein; the said works were completed in or about the year 1883, the undertaking has been in full working order since that date, and the said agreement of May 20th, 1880, is of full force and effect.

4. Under the said agreement of May 20th, 1880, it was agreed that the parties of the second part (now represented by the plaintiff) should have the sole and exclusive right and privilege to supply the township of Kimberley with the water brought in by them from the Vaal River, or any other rivers, for a period of twenty-five years reckoned from the date of the agreement.

5. Under Clause 4 of the said agreement it was provided that the parties of the first part (now represented by defendant Council) should be authorised to purchase and take over the works to be constructed by the parties of the second part for the above purpose, at any time after the completion of the same, at a price to be mutually agreed upon, provided that six months' notice of their intention so to do be given by the parties of the first part.

6. Under Clause 6 of the said agreement it was provided as follows: "The parties of the first part (now represented by the defendant Council) bind themselves and their successors in office during the subsistence of this contract and until the works shall be purchased and paid for by them, under the provisions of Clause 4, not to construct or promote or assist in the construction or promotion

of waterworks, or permit any other waterworks having for its object the introduction or supply of water to the township of Kimberley and neighbourhoods from the Vaal River or other rivers in this province."

7. The defendant Council has not purchased, or taken over the works constructed under the aforesaid agreement of the 20th May, 1880, nor has the defendant council given any notice of intention so to do.

8. On or about November 1st, 1901, the Mayor of the defendant Council caused a public notice to be inserted in the "Diamond Fields Advertiser," a paper circulating in Kimberley and the province of Griqualand West, calling a public meeting in order to adopt the necessary steps to obtain authority by a Private Bill or otherwise to construct waterworks; to obtain water by means of water pipes, sluits, cuttings, reservoirs, or otherwise from the Vaal River, and to supply water to consumers within the municipality of Kimberley, and between the Vaal River and the boundary of the municipality, and for other purposes connected with the said scheme; the said meeting was held on March 7th, 1902, and the burgesses attending thereat authorised the council to take the necessary steps to obtain water as aforesaid.

9. For the purposes set forth in the last paragraph the defendant Council has recently secured from the owners of the farms Nooitgedacht and Wildebeestekuil, in the district of Kimberley, concessions which will enable the said council to obtain the requisite supply of water from the Vaal River to Kimberley.

10. The said Council has further decided on proceeding with the said scheme and with the construction of waterworks, with the least possible delay, and has taken steps for the above purpose, and the private Bill with plans and specifications has been lodged with the Civil Commissioner as required by law.

11. The plaintiff company has in all respects carried out all the obligations imposed on the Griqualand West Railway and Waterworks Company, Limited, under the said agreement of May 20th, 1880, and submits that the acts and conduct of the defendant council as above set forth constitute a breach of the agreement of May 20th, 1880, more especially of Clause 6 thereof, and that it is entitled to an order restraining the de-

defendant council from constructing such waterworks or proceeding in any way with the said scheme or with any other scheme having similar objects, or from promoting or assisting in the same during the subsistence of the said agreement, and until the works aforesaid shall be purchased and paid for by the said Council.

12. Great and irreparable damage will be caused to the plaintiff company should the said scheme be proceeded with by the defendant Council.

Wherefore the plaintiff company claims: (a) A declaration that during the subsistence of the agreement of May 20th 1880, and until the works constructed thereunder shall be purchased and paid for by the defendant Council, it is unlawful for the said Council to construct or promote or assist in the construction or promotion of waterworks or permit any other waterworks having for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal River or other rivers in the province of Griqualand West; (b) an interdict restraining the defendant Council from proceeding with the waterworks scheme referred to above in paragraphs 8, 9, and 10, or with any other scheme having similar objects during the subsistence of the contract of May 20th, 1880, and until it has purchased and paid for the works constructed by the plaintiff company; (c) such alternative relief as to this Hon. Court may seem meet; and (d) costs of suit.

The defendants' plea is as follows:

1. The defendants admit the allegations in paragraph 1 of the declaration, and say that the Act No. 11 of 1883 is amended by the Act No. 30 of 1884.

2. As to paragraphs 2, 3, 4, 5, and 6 the defendants admit that the two agreements therein alleged were entered into on the stated dates and that the Kimberley Borough Council now represents the parties of the first part mentioned in the agreement dated the 20th May, 1880, but begs for greater certainty to refer to all the terms of said agreements when the originals are produced.

3. They admit that the works referred to in paragraph 3 were completed in or about the year 1883, and that water has been continuously since that date supplied by the plaintiff company under the said agreements to the inhabitants of Kimberley.

4. With further reference to paragraph 3 if plaintiff company's construction of the agreement dated the 20th May, 1880, be correct, which defendants deny, they say that they are now bound by all the conditions contained in the said agreement, and say that the agreement is not of full force and effect in all respects, as will hereafter more fully appear.

5. With reference to paragraph 7 they admit that the Kimberley Borough Council has not purchased or taken over the works constructed under the said agreement of the 20th May, 1880.

6. With further reference to paragraph 7 they say that in and after January, 1901, the said Council entered into negotiations with the plaintiff company with a view to arriving at a mutual agreement for the purchase of the works referred to in clause 4 of the said agreement, but no mutual agreement was arrived at because the plaintiff company demanded an excessive price, and because the plaintiff company had without the consent of the said Council thereto entered into certain written agreements for the supply to De Beers Consolidated Mines, Limited, and the Municipality of Beaconsfield of water derived from and through the said works for periods far exceeding the period of 25 years referred to in the agreement of the 20th May, 1880, and the plaintiff company in breach of the said agreement of the 20th May, 1880, refused to sell the aforesaid undertaking if the aforesaid works were purchased by it, to take over and perform the said agreements with De Beers Consolidated Mines, Limited, and the municipality of Beaconsfield, which said breach precludes the plaintiff company from founding any claim upon the non-purchase of the said works by defendants, and releases defendants from the condition precedent contended for by the plaintiff company but denied by defendants.

7. As to paragraph 8 the defendants crave to refer for greater certainty to the terms of the notice therein referred to and also of a notice lawfully published on the 12th February, 1902, pursuant to which the meeting referred to was held as alleged on the 7th March, 1902.

8. They admit the allegations in paragraphs 9 and 10 save that they say that the said council has no intention of supplying water to any of the inhabitants of Kimberley until after the expiration of

the aforesaid period of twenty-five years.

9. They deny the allegations and contentions of the plaintiff company in paragraph 11

10. According to the true construction of the said agreement of the 20th May, 1880, the steps taken by the said council to seek to obtain extended borrowing powers and other powers and authorities by Act of Parliament necessary to enable it to provide for carrying out a scheme for supplying water to the inhabitants of the said borough and certain other consumers after the expiration of the aforementioned period of 25 years are lawful steps against which the plaintiff company has no right to complain, and the plaintiff company is not entitled to obtain the orders asked for in this suit.

11. According to the plaintiff company's construction of the said agreement the said council would be perpetually bound unless or until the plaintiff company should agree with it upon a price for the aforesaid works, to take no steps at any time to provide a supply of water for the inhabitants of Kimberley, and upon the said construction of the said agreement the defendants specially plead that the said agreement would be *ultra vires* of the Mayor, councillors, and ratepayers who executed the same on the 20th May, 1880, would be bad in law and in conflict with the Act. No. 11 of 1883 as amended by the Act. No. 30 of 1884, and would not be binding on the defendants or the present Borough Council of Kimberley, and they beg to refer this honourable court to the provisions of the Ordinance of 1879, in force on the 20th May, 1880, under which the municipality of Kimberley and its municipal government was regulated and defined wherein and whereby no powers to enter into such an agreement as is contended for by the plaintiff company is created or conferred.

12. The defendants further submit that the plaintiff company is not entitled to obtain an order interdicting them from approaching Parliament for such powers as are referred to in paragraph 10 hereof.

Wherefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

The replication was general.

Sir H. Juta, K.C. (with him Mr. Searle, K.C., and Mr. Phear), for the plaintiffs. Mr. Schreiner, K.C. (with

him Mr. Buchanan and Mr. Burton), for the defendants.

Before evidence was led, the Chief Justice asked if there was necessity for evidence, as it appeared to be simply a question of the construction of the agreement.

Sir Henry Juta said that it would be seen by the pleadings that the defendants said that the plaintiffs had not performed all their obligations, and, further, that the question of *ultra vires* had been raised. The question might be raised as to whether in entering into the original agreement by the Council, the exercise of the power was reasonable or not, in which case there would be some evidence taken as to what was the condition of Kimberley in those days.

The Chief Justice said that on the matter of *ultra vires* the question might be whether the Corporation had not placed itself in such a position that it would be forced to accept any terms offered by the Waterworks Company.

Sir Henry Juta then called

Frank S. Lynch, who said that he was a civil engineer by profession, and was manager of the plaintiff company. He entered the company's service in 1884, and had been with it ever since. He knew Kimberley in 1883. The plaintiff company had carried out all the terms of the agreement with the Corporation. The works were completed in 1883, and had been in full working order ever since. The works were very elaborate, and cost approximately £370,000. Witness had gone into the question of the supply of water to Kimberley from other sources, and had found that water could be obtained from the Modder River at a point outside the province of Griqualand West. He had gone into the scheme with Mr. Olive and Mr. McLelland, and was prepared to state as an engineer that it was perfectly feasible. It would also be possible to obtain water from the Vaal River at a point outside Griqualand West.

Cross-examined: He had not formed an estimate of the cost of bringing water from the Modder River or the Vaal River outside Griqualand West.

William Olive, a civil engineer practising in Cape Town, also gave evidence as to the feasibility of taking water to Kimberley from the Modder River at a point outside Griqualand West.

Cross-examined: The distance from the point he referred to on the Modder River to Kimberley would be $17\frac{1}{2}$ miles as the crow flies. He had not made an estimate of the cost of the scheme. He had taken only one gauging. That was in August during the dry season, and the gauging then showed a flow of $17\frac{1}{2}$ million gallons per day.

H. P. McLelland also gave evidence as to the feasibility of the Corporation obtaining water from the Modder or Vaal Rivers outside Griqualand West if they desired to do so.

This was all the evidence called for the plaintiffs.

Mr. Schreiner called

William Henry Foley, Mayor of Kimberley, who stated that there was no intention whatever on the part of the council to supply Kimberley with water during the period of twenty-five years referred to. Whatever negotiations were entered into were with a view to the supply of water to Kimberley when the present agreement expired on May 20th, 1905. The negotiations between the Council and the plaintiffs had wound up with the latter offering to sell their works for £360,000, or, in the alternative, to take an extension for twenty-five years and reduce the charge for water from 1s. 3d. per 100 gallons to 9d. Those terms did not seem reasonable to the Council and they were not accepted.

Cross-examined: Witness knew nothing about the price the plaintiffs were charging De Beers and Beaconsfield for water until he had to go into the matter owing to the negotiations referred to.

Re-examined: Before they got copies of the agreements he had no idea that the agreements with these parties existed for a period of $8\frac{1}{2}$ years beyond the period of the agreement with the Kimberley Council.

Thomas Stewart, hydraulic engineer, stated that he had had considerable experience in South Africa in connection with water supply to municipalities. He was called in by the Kimberley Council to prepare their scheme for bringing water from the Vaal River. In round figures he estimated that the cost would be £200,000. He was prepared to say that for that sum the municipality could be supplied.

This concluded the evidence.

Sir H. Juta, K.C. (for the plaintiffs): The powers of the Council to enter into

this agreement with the Waterworks Company are provided for in section 41 of Ordinance 17 of Griqualand W. of 1879. This is confirmed by section 49 of Act 11 of 1883. What, then, is the construction of this contract? In the first place, as to the obligations of the company. They were to supply water, to construct dams, to lay pipes, etc. The Council were bound to allow the company to open streets, to repair valves, etc. The fact that a monopoly was given to the company for a certain number of years does not put an end to this agreement on the expiration of the monopoly. The whole question seems to turn upon whether "and until, etc.," in clause 6 of the agreement means "or until, etc." The contract did not come to an end after 25 years. Section 2 of the agreement is quite inconsistent with any such view. We had to undertake extensive works, the construction of filtering beds, etc., which would never have paid had we not had a monopoly for some years, and, therefore, we stipulated for the 25 years monopoly. But section 6 of the agreement clearly shows that it was in the contemplation of the parties that the contract should continue after the monopoly terminated.

[De Villiers, C.J.: For what purposes?]

To supply water, and this we were still to be bound to do. But obligations must be reciprocal, and if our obligations remained after the 25 years had elapsed, so must those of the Town Council. The Town Council contemplated constructing waterworks, and section 6 was intended to prevent them from entering into competition with the company. Then again it must be remembered that the Vaal River within Griqualand West is not the only source of water supply. The Town Council are quite at liberty to construct water works if they take the water from a source outside Griqualand West (*e.g.*, from the Modder River or even from that portion of the Vaal, which is outside the province. *Non constat* that the company could have fulfilled their obligation if Kimberley had increased very much.

[Buchanan, J.: Your argument is that the contract proves itself?]

Yes. Section 2 of the agreement shows that other works were contemplated beside the supplying of Kimberley. See also the preamble to Act 11 of 1883. The bargain between the Council and the company was that first of all Kimberley

had to be supplied with water, and then the company could dispose of the surplus water as they pleased. If the Town Council had wished only to debar themselves from constructing works during the 25 years, it would have been very easy to have said so, but they engage not to construct any works during the subsistence of the contract. Either we have the right after May, 1905, to come into the streets, and open them up or not. If we have, how are we to interpret the contract? If not, what becomes of our concession? The Council could not tell us at the end of 25 years to take up our pipes and cease to supply water. The proposed Municipal Act does not prevent the Municipality from supplying water within the 25 years.

[De Villiers, C.J.: Then what use would an order be to you? We cannot restrain the Council from going to Parliament.]

We do not ask for that, but for an order prohibiting them from carrying out a water scheme and constructing works.

[De Villiers, C.J.: They do you no harm by constructing works.]

No, but we must not lie by until they begin to supply water.

[De Villiers, C.J.: Mr. Schreiner, what is your position with regard to the powers of the company to supply water after the lapse of 25 years?]

Mr. Schreiner, K.C. (for defendant Council): We do not wish to deprive the company of any of their powers under Ord. 12 of 1880. We only wish to put an end to their monopoly. See Sec. 4 of the Ordinance, and Act 38 of 1888. Under Ord. of 1879 all the Municipality could do, was to grant leave to lay down pipes; to grant a monopoly was *ultra vires*. The judgment in the former case of *Kimberley Town Council v. Kimberley Waterworks* (12, C.T.R., 32) shows that the words "during the subsistence of the contract" refer to the 25 years. The correspondence shows that the company had contracted to supply De Beers Co. and also Beaconsfield until 1907, and they would not sell to the Corporation for less than £45,000. A corporation may not put it out of its power to do its duty. See *Bryce on Ultra Vires* (pp. 196, 170, and 111). It was one of the duties of the Town Council to provide a good supply of water, but under

our agreement, we could not go, say, a few feet into the Orange River Colony and take our water there. That would be a fraud, and we should be interdicted at once. See *Fry on Specific Performance* (Sec. 1,605) and cases there cited; *Lancaster and Carlisle Railway Co.* (2 K and J, 293), *Steel v. North Metropolitan Railway Co.* (2 Ch., Ap., 237). We have no intention to interfere with the rights of the company, as our Bill shows, and hence this is not a case for an interdict.

Sir H. Juta (in reply): The agreement made between the company and the Town Council in May cannot be interpreted by an Ordinance published in July following. All we have to find out is "what was in the minds of the contracting parties when this agreement was made?" I submit they did not mean that the contract was to determine in 25 years. As to *ultra vires*, of course a municipality cannot put it out of its power to perform its public duties. But that has not been done in this case. If this dictum be interpreted, as counsel for the defence has explained, no monopoly could ever be granted. Suppose a municipality has not sufficient funds to carry out certain works of great public utility, surely they can grant a concession. The Town Council, moreover, had a perfect right under the agreement to go out of the province of Griqualand West, and get as much water as they liked.

De Villiers, C.J.: It is not necessary for me to add many remarks to those which I made on the occasion of the appeal by the present defendants against a judgment of the High Court of Griqualand. This Court then held that the legal effect of the 6th clause of the contract in suit, read by the light of the remaining clauses and more especially the 4th and 6th, was to prohibit the defendants from introducing or supplying water to Kimberley and its neighbourhood during the subsistence of the contract, and not to prohibit the construction of works, the object of which was to introduce and supply such water after the monopoly created by the contract shall have ceased to exist. The fourth clause empowers the defendants at any time after six months' notice to purchase the waterworks from the plaintiffs at a price to be mutually agreed upon. In case of no such purchase being effected, the fifth clause confers on the plaintiffs "the sole and exclusive right and privi-

lege to supply the township of Kimberley with the water brought in by them from the Vaal River or any other rivers for a period of twenty-five years. The sixth clause then proceeds as follows: "The parties of the first part bind themselves and their successors in office, during the subsistence of this contract, and until the works shall be purchased and paid for by them, under the provisions of clause 4, not to construct or promote or assist in the construction or promotion of waterworks, or permit any other waterworks, having for its object the introduction or supply of water to the township of Kimberley and neighbourhood from the Vaal River, or other rivers in this province." The plaintiffs contend that the effect of this clause is not only to prevent the defendants from supplying water to the inhabitants of Kimberley from the Vaal River, or other rivers in the Province, until the expiration of the twenty-five years fixed by the contract, but also to prevent the defendants from applying to the Legislature during the subsistence of the contract, and until the existing works shall have been purchased, for the requisite powers to enable them to supply such water after the expiration of the twenty-five years. The result of this construction would be that the defendants, by demanding a price which it would be impossible for the plaintiffs to pay, or by importing conditions which it would be impossible for the plaintiffs to accept, would have it in their power to extend their monopoly for the supply of water from the Vaal River and other rivers in the province to an indefinite time. One of the absurdities of such an interpretation is that the construction of waterworks would only be permitted after a purchase has been effected when the construction of works would no longer be necessary, but the clause is certainly liable to such an interpretation. On the other hand, a more rational interpretation is given to the clause by holding that the words "during the subsistence of the contract" were intended to govern the concluding words, which relate to the supply of water to the township of Kimberley and its neighbourhood. This is no doubt a somewhat strained interpretation of the 5th clause, when read by itself, but it makes the clause perfectly consistent with the rest of the contract and more especially with the 5th clause.

Assuming, however, that the interpretation contended for by the plaintiffs is the correct one, I am of opinion that the defendants had no authority in law to deprive themselves for an indefinite period of the right or power to take steps to provide a supply of water for the inhabitants of Kimberley from any available sources. They owed a duty to the inhabitants to obtain for them the best available water at the lowest cost, and, in the performance of that duty, they were quite justified in granting to the plaintiffs the free and exclusive right of providing the supply for a limited period. Without such a reasonable privilege no company or individual would have gone to the trouble and expense of constructing the requisite waterworks, but the privilege would become wholly unreasonable if the company or individual were practically invested with the power of extending it for an indefinite time. Treating of stipulations entered into by corporations in conducting their business, Brice, in his treatise on "*Ultra Vires*" (S 72), remarks that if such stipulations turn out to be impolitic, they will be binding, but if unreasonable upon the face of them, they are *ultra vires*. "If," he adds, "the word 'reasonable' be taken in the wide sense of needlessly risking the corporate assets, then it would seem to be correct only when applied to public corporations, and trust corporations, and those of a like description. These bodies are called into existence, not so much for the benefit of the members composing them as of the public, and their powers, whether of contracting or otherwise, ought to be utilised for the public advantage. If, however, 'unreasonable' be restricted to such stipulations as not merely jeopardise the corporation and give an undue advantage to the other side, but go beyond this, and impose such liabilities upon the corporation, and give such an excessive advantage to its adversary, as either to amount practically to a failure of consideration, or to be a needless restraint of trade, then it seems that such stipulations will be *ultra vires*, and, therefore, not enforceable, whether the corporation contracting be commercial or non-commercial." Similar principles have repeatedly been acted upon in this court. The ordinance No. 7 of 1877, which created the Council, and under which the defendant's predecessors entered into the contract, defined

the duties and limited the powers of the body thus created, and the subsequent amending statutes in no way increased those powers. The Council was authorised "to excavate, construct, and lay water-courses, water-pipes, conduits, sluices, dams, reservoirs, aqueducts, and other works for supplying the Municipality with water, and to keep the same in repair, or to grant leave to any person or company of persons to lay down pipes or to execute any other like works." It would be quite reasonable to allow a company undertaking such works to enjoy the profit arising from the exclusive right to supply the water to the inhabitants for a limited period; but it would, on the face of it, be improper and unreasonable for the Council to consent to a stipulation that it is not to commence the construction of any works during such limited period, even although its only object is to supply the water to the inhabitants after the expiration of the period agreed upon. Such a stipulation would give an excessive advantage to the company, and, so far from being of any advantage to the inhabitants for whose benefit the Council was called into existence, it would, for an indefinite period, place the control and cost of their water supply in the hands of an irresponsible commercial company. The unreasonableness of such a stipulation becomes still more apparent where, as in the present case, the company refuses to sell the works unless the Council would undertake to perform certain agreements made by the company with other public bodies, the performance of which agreements does not fall within the ordinary duties of the Council. The fact that it would be possible for the defendants to supply water from rivers outside the province of Griqualand does not, in my opinion, make the stipulation more proper or reasonable. At the date of the contract the Province of Griqualand West had not been incorporated with this colony, and it could not have been contemplated that the Town Council would go outside the province for the purpose of obtaining its water supply. But even if the province had then already been incorporated with this colony, it was the duty of the Council to obtain its water supply from the best available sources, which apparently are the same as those from which the plaintiffs obtained their supply. A stipu-

lation that the defendants shall not take any preliminary steps for the purpose of enabling them, at the proper time, to avail themselves of those sources of supply appears to me to be wholly unreasonable. It has not been suggested that the defendants, if allowed to construct waterworks, will supply water to the inhabitants during the subsistence of the plaintiff's exclusive right. In order to be able to supply such water at the expiration of that period it is necessary for the defendants forthwith to apply to Parliament for certain statutory powers, but the plaintiffs object to such an application being made, and to any other preliminary steps being taken until the works are purchased. For the reasons already given, I am of opinion that the plaintiffs are not entitled to a declaration of rights, the effect of which would be to prevent them from holding themselves in readiness for the time when it will be lawful and proper for them to supply the inhabitants of Kimberley with water from the best available sources.

In regard to the claim for an interdict, I am of opinion that it ought not to be granted even if the 6th clause, as construed by the plaintiffs, were not *ultra vires* of the powers of the Town Council. The interdict asked for is practically to restrain the defendants from adopting the necessary steps to obtain authority, by a private Bill, for the construction of the necessary waterworks. I adhere to the view which I expressed in the appeal case between the same parties, that courts of law in this colony should not interfere with the undoubted right of public corporations to apply to Parliament for an extension or modification of their rights and powers. It is open to any person who would be injured by the granting of such applications to oppose them in Parliament, but this Court would usurp the authority properly belonging to Parliament if it were to assume jurisdiction to restrain such applications. There are *dicta* of some English judges to the effect that the English Courts would have the power, should a fit occasion arise for such interference, to prevent improper applications to Parliament, but it does not appear that any such fit occasion has ever arisen. In some of the cases, indeed, which were referred to in the appeal case between the present parties, the Courts refused to interfere

even where applications were made to Parliament for enactments to relieve corporations from express agreements entered into by them. In the present case I am clearly of opinion that no case for interference has been established, and that the judgment of the Court must be for the defendants, with costs.

Buchanan, J., concurred. He said that the question raised in this action was brought before the Court on a previous application. The matter was then fully discussed, and judgment was given by the whole Court on the point. It had now been re-argued, but nothing had been set forth in argument to induce his lordship to change his opinion. He would therefore simply say that he concurred in the judgment of the Court being the same to-day as on the previous occasion. The only new point raised was the question of *ultra vires*, and he fully agreed with what his lordship the Chief Justice had said in regard to this.

Plaintiffs' attorneys: Van Zyl and Luissinné; Defendant's attorneys: Scanlen and Syfret.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

SALT RIVER CEMENT WORKS, } 1902.
LTD., V. RABBICK. } Sept. 9th.

Lease of quarry.

This was an action brought by the Salt River Cement Works, Limited, against Richard Rabbick, for a perpetual interdict in terms of a provisional interdict granted on May 15 last. The defendant prayed that the provisional interdict might be discharged and in reconvention claimed damages and a declaration of rights.

The declaration stated that the plaintiff is a company duly registered in this colony, and having its head office in Cape Town, and the defendant is a contractor residing in Cape Town. In the month of November, 1901, and prior thereto, the plaintiff company was the lessee of certain land belonging to the Glencairn Estates, Limited, situated at Elsjes Bay, in the Cape division. Upon this land there was situated a stone

quarry, and the land consisted chiefly of sand hills, villa ground, and land fit and intended to be used for building purposes, which facts were known to the defendant. Prior to the month of November, 1901, the plaintiff company bought from the Glencairn Estates, Limited, a part of the building ground, and resold a portion by public auction for building purposes to the knowledge of the defendant. On or about the 27th of November, 1901, the plaintiff and defendant entered into a written lease, by which the plaintiff agreed to let, and the defendant to hire, the stone quarry and a certain sand hill, both which were known to and pointed out to the defendant when the said lease was entered into, the quarry having actually been worked and having a trolley line running therefrom to the Cape Government Railway line. At various times during the months of January, February, March, April, and May of this year the defendant, in breach of his said contract of lease, removed large quantities of stone from the plaintiff's land, leased and sold to them by the Glencairn Estates, from parts other than the quarry, and wrongfully and unlawfully trespassed upon the land other than the quarry and sand hill, and entered and trespassed upon the building land, and took possession of part thereof to the loss, damage, and injury of the plaintiff company; and the defendant claimed to do these things as a matter of right, and claimed to be entitled under the lease to quarry and take stone from any part of the land so hired and bought by the plaintiff company, and to take sand from any part thereof, and for that purpose to enter and come upon any portion of the land. The plaintiff company denied this right, and said that the defendant was entitled to remove stone only from the quarry and sand from the sand hill. On the 15th May, 1902, the Supreme Court, at the suit of the plaintiff, granted a provisional interdict restraining the defendant from entering upon property leased by the plaintiff from the Glencairn Estates, Limited, and from removing stone therefrom save as regards the rights granted to him to remove stone from the quarry and sand from the sand hill, in terms of the lease, the plaintiff company to bring an action to make the interdict perpetual. The plaintiff company therefore claimed: (a) A perpetual

interdict, in terms of the said provisional interdict, and an interdict restraining the defendant from entering upon and removing sand or stone from the said building ground. (b) Alternative relief. (c) Costs of suit and provisional interdict.

The defendant's plea stated that the boundaries of the property leased were pointed out to the defendant by Robert Arbuthnot Mitchell, who, together with John Cran, both directors of the plaintiff company, went over the property on behalf of the plaintiff with the defendant before the execution of the lease. The plaintiff company, or their lessees, worked stone not only at the spot in the declaration referred to as the quarry, but at other spots on the property leased, and Mitchell consented and agreed to the boundaries so pointed out to the defendant. The spot with which the trolley line was then connected was certainly a quarry, but its limits were not in any way defined, and the only boundaries at any time agreed upon between the parties were those pointed out as aforesaid to the defendant. Within the boundaries as he lawfully might, the defendant worked at will, selecting suitable spots for the purpose of quarrying stone, and taking sand from a sandhill which is upon the property leased by him, and he at no time nor in any respect wrongfully and unlawfully, as was alleged in the declaration, removed stone or trespassed upon any other land not included within the said boundaries. The defendant admitted that the plaintiff had leased certain land from the Glencairn Estates (Limited), being land in turn let to him for the purposes of his written lease, but he did not admit that the land was correctly described in the declaration. He denied the allegations of knowledge on his part, and referred the Court to such proof as the plaintiff might adduce as to the purchase and resale of portion of the land for building purposes, with special reference to the dates of the alleged transactions. He admitted that what he had done he claimed to have done as a matter of right, and that he claimed to be entitled under his lease to quarry and take stone and sand from any part of the land pointed out to him as aforesaid, and that plaintiff denied his rights. He admitted that a provisional interdict was granted by the Court at the suit of the plaintiff on May 15, 1902, but he denied the con-

struction put upon the order of Court in the declaration. Wherefore he prayed that the provisional interdict might be discharged, and the plaintiffs' claim in this suit be dismissed with costs.

For a claim in reconvention, the defendant (now plaintiff) said that he had obeyed the order of the Court, but had sustained great damage by reason of stoppage of and loss of business, and inability to execute orders in consequence of the interdict, and by reason of interference with his plant, and violation of his rights by a glass manufacturing company, which had been authorised by the plaintiff company (now defendant company in reconvention)) as its tenant, to enter upon portion of the land in regard to which the defendant (now plaintiff in reconvention) had the right conferred by his lease. The damages so sustained defendant put at £400. Under the lease the defendant claimed that he was entitled to exercise a certain option of extension by giving notice not later than August 1, 1902, which period was extended in terms of the Court's order to August 31, 1902, but in the event of this case not being decided on or before August 15, as contemplated by the Court, the defendant submitted that he was entitled to an extension of time for the exercise of his said option for a week after the decision of this cause. The defendant claimed that he was entitled to a declaration of his rights under the lease, and to a definition of the boundaries of the property leased thereby in accordance with the boundaries so pointed out to him as aforesaid, with such amendments, if any, of the terms of the said issue as might be necessary. Wherefore he prayed for: (a) Judgment for £400 as and for damages; (b) a declaration of his rights under the said lease, defining the boundaries of the property leased to him as aforesaid; (c) an order extending the period for the exercise of his option to a date to be fixed by this hon. Court in its discretion; or (d) that he may have such further or other relief as may seem meet, together with costs of suit, including the costs of the motion for an interdict, which were reserved.

In their replication the plaintiffs said that nothing was pointed out to the defendant except the quarry and the sandhill. They denied that they authorised the Glass Company to interfere with the defendants' rights, but admitted that

they sold a certain portion of land to that Glass Company. They admitted the claim for an extension of the time for the option.

Sir H. Juta, K.C. (with him Mr. Russell), for plaintiffs; Mr. Gardiner, for defendant.

Sir Henry Juta called

Thomas N. Roberts, a Government land surveyer practising in Cape Town, who deposed to the correctness of plan of ground in question prepared by him and now put in. Proceeding, witness deposed as to the position of the trolley lines. The nature of the ground was sand and boulders, and a certain portion was laid out as building lots.

Cross-examined: Witness would say that the Glass Company's ground formed part of the sand hill.

John Cran, a clerk in the firm of Reid and Co., contractors, said that in November last year he was one of the directors of the plaintiff company, but had no interest in it now. He knew that before November the company had done certain work on the ground in quarrying stone, etc. In November witness, Mr. Mitchell, and defendant went down to see the quarry and sandhill. There was a trolley line from a little below the shed to the sandhill. The rails were down, and it was well-defined. They took an inventory of the tools, etc. At that time there was certain land which had been reserved by the company for building lots. There were cottages on that land at the time. Witness never pointed out the boundaries of the property to the defendant. He could not do so because he did not then know the boundaries himself, and he did not know them now. Therefore it would have been useless to send him down for the purpose of pointing out the boundaries. A certain shed on the ground had been leased to the defendant.

Buchanan, J, pointed out that that shed was shown on the plan put in as being on Government ground.

Examination continued: Witness knew something about stone, and he thought that working in the ordinary way there was enough stone in the quarry to last for fifty years or more.

Cross-examined: Witness belonged to the plaintiff company when the dispute arose. They objected to the defendant taking sand from the building ground. Defendant had stopped working the

quarry and started gathering stone from different parts of the estate. The land sold to the Glass Company did not form part of the sand hill. The ground was sold to the Glass Company after the lease. Witness went out with Mr. Mitchell in November. Mr. Rabbick did not ask them to point out the boundaries. Witness could not remember. Mr. Rabbick asking whether anyone had the right to come on the land. Witness did not disclose to Rabbick the fact that in the lease the Glencairn Company reserved the right to go on any of this land and take sand from it. Witness could not say whether objection was first raised after the land was sold.

Robert A. Mitchell, builder and a director of the plaintiff company, gave similar evidence. Rabbick had placed the tramway higher up than it was when witness and Mr. Cran pointed it out to him. The cottages upon the building ground could be seen. The boundaries were not pointed out. Witness did not know the boundaries.

Cross-examined: Rabbick did not tell witness of his plan to shift the rails, and witness did not say he thought it a good idea. The stone in the quarry was good for building.

George Alexander, builder and contractor, said he supervised the work preparatory to opening a quarry for the plaintiff company. The tramway ran about 700 yards. Witness had taken purchasers around the property to show them the building land. Rabbick knew of this. Rabbick shifted the tram line in February. He then stopped working the quarry and began taking boulders from all over the property. He put up a shed, and in May he shifted it on to the building land. He had been doing work on the quarry since the interdict was granted. There was a lot of stone in the quarry.

Thomas Masterton, secretary and director of the plaintiff company, said the company spent a lot of money in locating the best site for a quarry on the ground. Afterwards an advertisement was inserted in the "Cape Times" inviting tenders for a lease of the quarry. Mr. Rabbick answered this advertisement. The Saturday before Mr. Rabbick saw the draft lease, there had been a sale of building ground on the property. Rabbick knew of this. Defendant agreed to the draft lease. Rabbick was

to pay the company royalties. The property was leased in order that the quarry should be developed. The Glencairn Company sold to the Glass Company in December. Rabbick had told witness several times that the sand did not pay him. The Cement Company had authorised no interference with Rabbick's rights.

Cross-examined: It was not because more had been sold to the Glass Company than should have been that the plaintiffs tried to interdict Rabbick. Witness never thought of such a thing. Witness objected to Rabbick using the line over the building ground. The first objection made to Rabbick taking boulders was in March. Before this the plaintiff company had broken up boulders which lay on the surface of the ground, but they had not made any holes in the ground.

Re-examined: As soon as witness heard of boulders being taken, he objected. No authority whatever had been given to the Glass Company to interfere.

John Forrest, chairman of the plaintiff company, said defendant had been taking very little sand. There were buildings on the ground before the lease was entered into. Witness took intending purchasers over the ground, and Rabbick did not object. When the ground was sold by the Glencairn Company to the Glass Company, the lease was the subject of consideration. No authority was given to the Glass Company to interfere with Rabbick.

Sir H. Juta closed his case.

Mr. Gardiner called

Richard Rabbick, the defendant, who said he was a contractor, and had some 30 years' experience in regard to stone material. He saw the advertisement, and saw Mr. Masterton, who referred him to Mr. Forrest. Witness saw the quarry, and on returning told Masterton the quarry would not do for him. The stone in the quarry was soft, and rotten. Masterton said it was not only the quarry, but that there were other rights. He said there was a sand-hill. Witness made a tender the following day. Witness afterwards went out with Messrs. Mitchell and Cran for the purpose of taking over the plant, and to be shown the ground. While at the quarry, witness asked

to be shown the boundaries. Mitchell said he could not say exactly where the beacons were, but he indicated their approximate positions. The ground witness had been working came within the beacons so pointed out. Witness asked if anyone else had a right to come on the ground and remove sand or stone, and Mr. Mitchell replied "Certainly not." Nothing was said about building ground. Mr. Cran drew witness's attention to boulders, and said they made good marketable stone. Witness said he was going to shift the tram line, and told Mr. Mitchell of his intention. Witness had worked over the whole workings; he had taken stone from places which had been previously worked. The Glass Company were using witness's lines and trucks. Had witness been allowed to work since the 15th May, he estimated he could have made £40 a month. The Glass Company had been using stone off the ground where witness had been working. The rails had been damaged to the extent of from £20 to £30.

Cross-examined. Witness did not take his lease to his solicitor. It was agreed in Masterton's office that Cran and Mitchell should go down with witness and show him the boundaries.

Alexander Stewart, quarryman, said he had taken out boulders, some of which had been supplied to the plaintiff company. The old line was very inconvenient, and it was expensive to bring sand by that.

John Stefman said that before Mr. Rabbick took over the property he worked some of the ground for the plaintiff company. The company used the line now used, and worked at the sandhill. Witness afterwards worked on the ground for a man named McPherson, who only worked in two places on the ground.

George Alembi, a coloured man, said he was working for defendant. The Glass Company broke the line to pieces, and was still using the pieces.

Mr. Gardiner closed his case, and counsel were then heard in argument on the facts.

Buchanan, J.: The plaintiffs in this case, the Salt River Cement Works (Ltd.), leased from the Glencairn Estates (Limited) a certain piece of ground, 116 morgen in extent, for a period of 25

years, having the right, among other things, to take stone or sand from any part of this land, and also certain water rights and certain other privileges. The plaintiff company, after the execution of this lease, went to considerable expense in endeavouring to develop the land for the purpose of getting stone. They opened up a quarry on a portion of this land, they built a tramway from the quarry to the railway sidings, and they also placed a tramway from the railway sidings to the sandhill, for the purpose of taking away sand. After having gone to this expense, and wishing in their own interests to develop the quarry, to which they looked forward to become a valuable asset, they advertised that this quarry was open to be leased. They advertised for tenders, and the advertisement led to negotiations being entered into with the defendant in this case. The defendant approached them, and was taken to the property, shown the quarry, shown the tramway leading to the quarry, shown the tramway leading to the sandhill, before he entered into the lease. After this inspection, a lease was drafted and submitted to the defendant. He took away the draft, and fully considered it, and after consideration came back and signed it. When we come to look at this lease, which was so signed, we find that it limits the defendant's rights to the lease of the quarry and sandhill then leased by the plaintiff company and worked by them on certain conditions. All through this lease there is no grant to the defendant of anything more than the right to work this quarry and to take sand from the sandhill mentioned. Defendant said that when he inspected the property he saw that the quarry contained stone which was useless for building purposes, and that he would not have taken this lease had he not been assured that he could take the surface stone from other parts of the property. Now, there is nothing in this lease which gives any such right. The plaintiffs say that their object was not to give a general right to the defendant, but simply to enable him to work and develop this quarry. The lease was entered into on the 27th November, and on the 21st December the defendant writes: "The quarry so far has turned out a complete failure as regards good building stone." In reply to this, the secretary of the

plaintiff company on the 23rd December wrote: "It is distinctly understood that the quarry development is a condition of your lease." When we look at the lease this is borne out, because the defendant bound himself to load from the quarry not less than 16 trucks of six tons each per week. Nowhere in the correspondence is there an allegation that the defendant had any rights beyond that of taking stone from the quarry and sand from the sandhill. Finding that the quarry did not pay he began to take surface stone, and the plaintiff company applied for an interdict. They obtained a provisional interdict against him, and this action is now brought to make the provisional interdict absolute. The defence set up by the defendant is that before he entered into the lease he had the whole extent of the property leased by the plaintiff company from the Glencairn Company pointed out to him as the extent over which he could work. The two directors of the plaintiff company who acted in this matter, and who inspected the locality with the defendant, deny any such pointing out, and in the absence of any writing of any kind: I am forced to come back to the lease, and to find that there is no justification for the defence set up; and that there was no such leasing of anything more than the quarry and sandhill in this case. The defendant has failed to prove any such right as he has set up. He has certainly no such right in the lease, and he has failed to set up this right in the correspondence. When this allegation of the defendant goes by the board, the claim in reconvention for damages for having been forbidden to take stone from anywhere else on the property also fails. There is, however, one matter in the claim in reconvention which the Court should deal with. That is in regard to the clause in the lease, which gives the defendant the right to renew, for a period of two years, provided he gives notice in writing not later than the 1st August. In consequence of the delay in this case, that date has passed, but I understand that the plaintiffs will not offer any objection on this point. Therefore, while giving judgment for the plaintiff, the court will reserve leave to the defendant to exercise the option reserved to him in the 11th clause of the lease before the 13th September. The plaintiffs in this case applied for an interim interdict on

the ground that the property which they leased from the Glencairn Company was being most materially injured by the defendant making excavations. It is clear that great injury would have resulted to the property by allowing the defendant to go on working in this way, and, therefore, I think the plaintiff company were quite justified in coming into Court and asking for an interdict. When the matter came before the Court on the matter of the interdict, an expression of opinion fell from the court which should have enabled the defendant to have avoided further costs. Plaintiffs have succeeded all along the line, and they are entitled to judgment. Defendant has failed, and the judgment of the Court must be for the plaintiffs with costs. There is one other question. The defendant still has the right to work the quarry, and to work the sand hill. At the time he took the lease the plaintiff company had laid down tramways. I do not think it is a material question whether this line may or may not be shifted more to the north or to the south, so as to make the gradients a little more easy, so long as it is not shifted to go across the building land. After an expression of opinion as to what he may do, I do not think the plaintiffs will object to allow the shifting of the line so as to give greater convenience. Judgment must be given in terms of the application with costs.

[Plaintiffs' attorneys: Godlonton and Low. Defendant's attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

JOHNS V. NORTH BRITISH
AND MERCANTILE INSUR-
ANCE CO. { 1902.
Sept. 10th.

Fire insurance — Policy — War-
ranty—Condition.

The plaintiff, on applying to the defendant company for an insurance on goods, left unanswered a question in the pro-

posal form whether any risk of his had been declined or cancelled by any other company. In the body of the policy issued to and accepted by him were the words, in conspicuous letters, "not insured in or declined by any other company."

Held, that these words constitute a warranty binding on the plaintiff, notwithstanding that he was a foreigner not well versed in the English language, and that, on proof by the defendant company that another company had shortly before the date of the policy declined to insure the same goods, the plaintiff was not entitled to recover for the destruction of the goods by fire.

This was an action brought by the plaintiff to recover from the defendant the sum of £500, alleged to be due on a fire insurance policy.

The declaration stated that the plaintiff was a fruiterer and general dealer, residing in Cape Town, and the defendants carried on business in this colony as an Insurance Company by their duly appointed agents, the South African Association. On May 3, 1901, the defendants, by their said agents, entered into contract with the plaintiff in terms of a fire policy No. 3,224,308, whereby—after reciting that the plaintiff had paid the defendants £1 17s. 6d., for insuring against loss or damage by fire, viz., £400 on merchandise, consisting of the stock-in-trade of a fruiterer and general dealer, whilst contained in the shop in plaintiff's occupation in a block of buildings situated at 39, Sir Lowry-road, Cape Town, and £100 on shop furniture and fittings therein—the defendants agreed with the plaintiff that if the said property or any part thereof should be destroyed or damaged by fire at any time between April 17, 1901, and April 17, 1902, the defendants would pay or make good to plaintiff all such loss or damage to an amount not exceeding the sums so insured. The insurance premium was duly paid, and

on March 23 and 24 last, whilst the policy was in full force and effect, the said merchandise, stock-in-trade, and shop furniture and fixtures, whilst contained in plaintiff's shop, were burned and destroyed by fire, in consequence of which plaintiff suffered loss to the amount insured. The defendants refused to pay the amount, and plaintiff therefore claimed (a) £500; (b) alternative relief; (c) costs of suit.

The plea admitted the policy and the fire, and also that the merchandise, fixtures, etc., were destroyed, with the exception of property to the value of £6 10s. 6d., saved and removed by plaintiff. It denied that the defendants were liable to pay the sum claimed, and said that the policy contained the clause or condition warranted by the insured that proper stock books or any such proper books of accounts and records of purchases and sales as would enable the value of the contents of the shop at the date of the fire or at any given date thereto to be correctly ascertained should be kept. The policy contained the further clause or condition "not insured in or declined by any other company," but the plaintiff did not, in breach of the said warranty or condition, disclose to the defendants that the insurance had been declined by another company in Cape Town, viz., the Commercial Union Assurance Company (Limited). By reason of these breaches of warranty and condition the defendants claimed that the plaintiff had wholly forfeited his right to claim the sum of £500, or any sum, from the defendants. It was therefore prayed that the plaintiff's claim be dismissed with costs.

The replication was general.

Mr. Schreiner, K.C. (with him Mr. Wilkinson), for the plaintiff; Mr. Searle, K.C. (with him Mr. Burton), for defendants.

Mr. Schreiner called

Barry H. Heatlie, a broker and commission agent, who stated that he was the agent of the proprietor of the building occupied by plaintiff, and had always regarded plaintiff as one of their best tenants. Witness was the agent for the defendants. There was a conversation with plaintiff about insurance, and witness filled up the answers in the original proposal form. Plain-

tiff did not then mention any other company. Witness told plaintiff that he would insure the property for him. Witness filled up the form as far as he knew the particulars. Plaintiff did not tell him anything about the dispute about oil he had had with the other company. He did not say anything about dealings with another company. Witness had no idea of plaintiff having been previously insured elsewhere. Witness was familiar with the premises, and filled up the answers from his own knowledge.

Cross-examined: Witness understood that plaintiff's goods had not been previously insured. It was a surprise to him to learn that they had been. Plaintiff must have known about the oil clause at any rate, because he came and wanted leave to keep a larger stock of oil on his premises. Some other person might have read that portion of the policy for him. Witness thought that the furniture of the place would be worth nearer £50 than £100.

Re-examined: Witness did not mean that the plaintiff had intentionally misled him in regard to insurance in another company.

George John, the plaintiff, said that he carried on business at 39, Sir Lowry-road, where he had a lease of the premises for five years. Two years ago he was insured in another company. He had paid that company the premium, and got the policy. Afterwards witness had some paraffine in the shop, and an agent of the company came in and said there was more there than there should be. Witness explained that that quantity of paraffine was in the shop owing to alterations being made in the yard. Witness told the agent he could take his policy back and pay the premium. The policy was taken back, and witness received a refund of half the premium. Some time afterwards witness had a conversation with Mr. Heatlie, to whom he went regularly to pay his rent. The result was that a couple of days later a form was given to witness by Mr. Heatlie, and witness signed that form. He did not fill in the form, and was never asked to do so. Afterwards witness got the consent of the company to keep 40 gallons of oil on the premises. Witness never read the policy. He just took the policy as it was given, and put it away in the box. Witness's clerk had written up a book for him

at the time of the insurance. That book showed all the stock witness had at that time. He also put in the cash-book. That showed all the receipts as witness's was a cash business. Witness reckoned his profit at 25 per cent. on most articles he sold. At the beginning of this year Mr. Berman opened a new set of books for witness. When the fire occurred all these books were in the safe, and the company had had all the books. In February, 1901, witness took stock, and again last February. On the last occasion he was assisted by Mr. Berman and Mr. Carmilus. The stock was carefully and properly taken. The stock list given in the new set of books was correct. Since then witness had bought stock from other people. These stocks were shown by the invoices. He purchased to the amount of £60 6s. 8d. in February and March, and in addition, he made cash purchases from the market, etc., to the amount of about £40. Witness saw that all his sales were properly entered in his books, Mr. Berman entering them up every fifteen days from records of each days sales kept by witness. When witness entered the business he paid Mr. Carmilus between £60 and £70 for the fixtures. Since then witness had some alterations made on the gas fixtures, which cost him £14. Witness had also bought a safe, for which he believed he gave between £7 and £7 10s.

In cross-examination by Mr. Searle plaintiff said he could not say why so many items on the stock lists of 1901 and 1902 were similar. He had only put in the stock list of February last the goods actually in the shop.

Mr. Searle pointed out that out of some 70 items on the stock list of February last 44 were identical with items on the stock list of February, 1901.

Further cross-examined witness said that he had three shops at the time of the fire, but each of these shops was supplied separately by the merchants with whom he dealt.

Mr. Searle proceeded to cross-examine witness in regard to a proposal of insurance made on his behalf to the Atlas Company, which that company had declined. Witness said that he could not say whether a proposal on his behalf had been declined by any other company.

Mr. Schreiner pointed out that until then he had had no idea that a defence would be set up to the effect that a proposal for insurance had been declined by another company. What had been gathered from the pleadings was that it was the affair in connection with the storing of the oil and the cancellation of that policy that was referred to.

On the question of the declining on the part of another company to insure plaintiff's property, the following witnesses were called by Mr. Searle.

Thomas Alfred Cox, branch manager of the Commercial Union Insurance Company, said on the 29th March plaintiff through Messrs. Peycke and Co., put through a proposal for insurance with witness's company for £550. Witness produced the proposal form. Witness wrote a letter to Peycke stating that the company were unable to entertain the proposal. It was pointed out that the Atlas Company had cancelled their policy and had refunded part of the insurance money. Peycke and Co., wrote to defendant.

Cross-examined: Witness had not seen John.

Bernard Humberstone, clerk, in the defendant company, said that on the 29th March last year he was acting manager of the Commercial Union Company. Witness received a proposal form signed by John from Peycke and Co. Witness went to see the premises. John told him that he had never been declined by an insurance company, and that he had never had a fire. Witness wrote these statements on the top of the proposal form. John said that he had been insured in the Atlas Company, which had refunded some of the money. He said he did not know the reason for this, but supposed that the Atlas Company had too much insurance round there, or that they did not like the paraffine. Witness inspected the place, and afterwards wrote a letter declining the proposal.

Cross-examined: Witness could not identify the man with whom he spoke as being John.

Daniel Martin, clerk, in the employ of Peycke and Co., said that plaintiff came to him about insuring. Witness filled in a proposal form, and submitted it to the Commercial Company. On receiving the communication from that company, wit-

ness wrote to plaintiff stating that the company were not prepared to entertain the proposal.

The plaintiff was recalled and said that the signature on the proposal form produced was his. He did not know the last witness. Mr. Hoffman sent witness to an office to get insured. He went to the address given, and there saw someone in regard to the insurance. Witness did not remember having seen the last witness.

Mr. Schreiner said he would put a few questions to the witness in re-examination.

In reply to questions, witness said that he never took stock out of the Sir Lowry-road shop to his other shops. His Sir Lowry-road shop was well stocked at the time of the fire.

De Villiers, C.J., asked Mr. Schreiner whether the case could not be decided upon the point of the non-fulfilment of warranty without calling further evidence.

Mr. Heatlie (recalled) stated, in answer to questions put by the Chief Justice, that the plaintiff kept the proposal form for three or four days.

Did he give you any reason why he had not filled it in?—Simply that he could not understand it; that he could not write English.

Witness afterwards filled it in. He only filled the form so far as concerned the building, which he knew well. He sent the form to the defendant company, leaving them to find out the information which was lacking. Witness was acting as the agent for the company in this transaction. Plaintiff did not tell witness he had applied to the Commercial Union Company. Witness gathered from him that he had not been insured at all. He did not ask plaintiff whether he had applied to any other company and been refused. Witness gave plaintiff the policy, but did not explain the policy to him.

Did you then see the words "Not declined by any other company" in the policy?—No; I simply gave him the policy as I received it, although I know this is in most policies.

Mr. Schreiner, K.C. (for plaintiff): The knowledge of an agent is the knowledge of the principal. Heatlie was the accredited agent of the company. The whole matter resolves itself purely into a question as to whether the company ac-

cepted plaintiff's proposal or not. The proposal did not give sufficient information, but it was the duty of the company to ask for further information. *Wing v. Hurrey* (5, De G. M. and G., 265). The mere handing of a document such as a railway ticket or a proposal form of an insurance company, does not bind the recipient.

Mr. Searle, K.C. (for defendants). See *Jensen and Co. v. Commercial Insurance Co.* (4, Juta, 20), *London Assurance Co. v. Mansel* (11, Ch., D. 363).

[De Villiers, C.J.: The question is, is the warranty a part of the policy or not?]

Mr. Schreiner (in reply): Defendants have not produced the original proposal, and they ought to have done so. As the company's conditions were never brought to the notice of the plaintiff, he could not be deprived of his insurance.

De Villiers, C.J.: In this case it appears that Mr. Heatlie handed over to the plaintiff a form of proposal for him to sign. The plaintiff therefore had ample opportunity while he had this form of proposal in his possession to make himself acquainted with its contents. Much stress has been laid upon the fact that he is a foreigner, and does not understand the English language properly, but if a foreigner who does not understand the English language enters into commercial transactions in this country, he ought to get someone who does understand the language to assist him, because if a formal contract is entered into it cannot avail him afterwards to say, "I did not understand the terms of this contract." The form of proposal was in his possession, according to Mr. Heatlie, for three or four days, and he afterwards handed it back to Mr. Heatlie. One of the questions put was, "Has any risk of yours been declined or cancelled by any other companies?" That question was left unanswered, and the form was sent to the company with the question unanswered. Thereupon the company drew up a policy which contains the words, "Not insured in or declined by any other company." These words are in conspicuous letters in the policy, and are underlined with red ink, apparently to make them still more conspicuous. The policy was handed over to the defendant, and kept by him. Now, in my opinion, the pre-

sumption is that the plaintiff accepted the policy subject to any warranty or condition appearing in the policy. This presumption the Court is bound to act upon, and the plaintiff's ignorance of the patent fact that a warranty appears on the face of the policy, does not rebut the presumption, for his ignorance was caused by his own fault only. He subsequently discovered that there was something in the policy in regard to the keeping of petroleum which prevented him from keeping the quantity of petroleum which he required, and he then went to Mr. Heatlie and got him to get an alteration made in the policy. He does not exactly explain how he came to be aware of this clause in the policy, but it is important in my opinion that the condition regarding the keeping of petroleum appears almost immediately before the words which are now in question, and in very much smaller type. If these words in small type were brought to his notice, we may fairly conclude that the other words in conspicuous letters were also brought to his notice. The presumption is that he knew the conditions, and having accepted the policy with this warranty he is bound by it. There is, in my opinion, a clear warranty, that the proposal has not been declined by any other company. The warranty is in regard to a material fact, and there has been a clear breach of that warranty, because there was an application to another company, and a definite refusal by that company. The evidence satisfies me that such definite refusal was communicated to the plaintiff in writing in the ordinary way. I am satisfied that the refusal was communicated to him, and that it was only after that refusal was so communicated to him that he applied for insurance to the defendant company. There will, therefore, be absolution from the instance with costs.

[Plaintiff's attorney: R. Greening; Defendant's attorneys: Sauer and Standen.]

SUPREME COURT

[Before the Chief Justice the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Sir JOHN BUCHANAN.]

REX V. PRESENT. { 1902.
Sept. 11th.

Spare diet—Cumulative sentence.

Where a prisoner had been sentenced by a magistrate to six weeks' imprisonment with spare diet on twenty-one specified days, and had been sentenced on the same day to ten months' imprisonment, to take effect at the expiration of his former sentence: the judge of the week struck out the sentence as to spare diet (1) because only 19 days spare diet would be imposed under the Attorney-General's circular of 1893; (2) because no sentence of spare diet may be imposed where the period of imprisonment exceeds three months, and in such cases as the present the two sentences must be regarded as one, in view of this punishment.

Buchanan, J.: A case has come before me as Judge of the week from the Resident Magistrate's Court, Carnarvon. The prisoner Gert Present, was tried on September 1, for breach of his duty as a shepherd. He was found guilty and sentenced to six weeks' imprisonment with spare diet on certain days specified, twenty-one days in all. On the same day he was tried for theft, convicted, and sentenced to receive 25 lashes, and be imprisoned with hard labour for ten months, to take effect at the expiration of his former sentence. The Act of Parliament which has reference to spare diet states that sentences must be in accordance with regulations to be promulgated by His Excellency the Governor. Under this provision, the Attorney-General's circular of 1893 provides for spare diet being given in cases where the imprisonment does not exceed three

months. There is no provision made for spare diet being given where sentence exceeds 3 months. It is not expressly stated but I think the spirit of the circular is that spare diet should not be inflicted in cases where the sentence exceeds three months. There are two objections to the confirmation of this portion of the sentence. The first is that the sentence being for six weeks, only 19 days' spare diet could, under the regulations, have been imposed, but on the second objection the sentence of spare diet must be struck out altogether, because the two sentences of imprisonment passed on the same day came to nearly a year, and thus far exceeded three months. The convictions are correct, and will be confirmed; the two sentences will be confirmed, but the spare diet of the first sentence will be struck out. It is true that the second sentence was to take effect after the expiration of the first sentence, but this is an instance specially in point, as showing that the sentences should be taken together in considering the punishment of spare diet. If that is inflicted then the prisoner would have 19 days' spare diet, then, when he was still suffering from its effects he would have to be flogged, and then he would have to be kept in prison for a further term of 10 months. The sentences will be confirmed so far as regards the terms of imprisonment and flogging, but the sentence of spare diet will have to be struck out.

NEALE V. NEALE.

Mr. Benjamin appeared for the plaintiff; Mr. Gardiner, with him Mr. C. de Villiers, for the defendant.

The plaintiff, the husband, applied for a decree of divorce on the ground of adultery. The defendant denied the allegation, and claimed a decree of judicial separation, alleging cruelty and drunkenness on the part of the plaintiff.

After discussion, counsel agreed to an order for a decree of separation *a mensa et thoro*, defendant to retain the balance of the property of the joint estate in her own hands after paying to plaintiff the sum of £750, defendant to have the custody of the children of the marriage, and plaintiff to have access to them at all reasonable times and places, each party to pay his or her own costs respectively.

APPEAL CASES.

MAZZUR V. SELITZKY.

This was an appeal from a judgment of the Assistant Resident Magistrate of the Cape.

Mr. Gardiner appeared for the appellant; Mr. Wilkinson for the respondent.

In the Court below the defendant was sued for the price of certain bricks alleged to have been delivered to him by plaintiff. The defence was that the bricks were short delivered.

After hearing Mr. Gardiner, and without calling upon Mr. Wilkinson, the Court dismissed the appeal with costs.

De Villiers, C.J., said it appeared to be entirely a question of fact, and the Magistrate had gone in to the case and found that the bricks were short delivered it was impossible for the Court to say that the Magistrate was wrong. The appeal would therefore be dismissed, with costs.

Buchanan, J., said it was to be regretted that, where no principles were involved, and only a question of fact—which had been fully investigated by the Magistrate—concerned, the matter should be brought up on appeal, causing a waste of time and money.

NCONTSI V. NOLENEI AND } 1902.
ANOTHER. } Sept. 11th.

Kafir law—Torts committed by son.

The mother and the brother of a Kafir girl, domiciled within the Colony proper, had, as mutual guardians of the girl, sued Ncontsi in the Magistrate's Court for damages for seduction committed by his son.

Held (on appeal), that as according to our law a father cannot be held liable for the torts of his son, and as the parties were domiciled within the Colony, such action could not be sustained.

This was an appeal from the decision of the Resident Magistrate for the district of Victoria East. The defendant (present appellant) was sued for £20

damages on account of the alleged seduction by his son of a girl, who was the daughter of one plaintiff and the sister of the other. The magistrate held that under Kafir law a parent was always liable for the misdeeds of his children as if they were committed by himself. He dealt with the case by Kafir law, and gave judgment for the plaintiff as prayed with costs. The appeal was brought on the ground that the defendant was not legally responsible. It was also contended that the girl's mother and brothers were not the proper persons to sue.

Mr. De Waal, for the appellant, and Mr. Gardiner for the respondents.

Mr. De Waal cited the cases of *January v. Kilpatrick* (2, E.D.C., 18 and 19), also *Queen v. Obani* (3, E.D.C., 333, *Pollack on Torts* (p. 48), *Pothier on Contracts* (p. 444), *Cairncross v. De Vos* (Buch., 1876, p. 5), *M. De Villiers De Injuris* (p. 5). In this case, it is true, that there is no evidence as to the son's age, but as he is a Kafir his age is immaterial, since he remains under the guardianship of his father till marriage.

Mr. Gardiner (for respondents): *De Villiers De Injuris* (p. 30) shows that a mother can sue for the seduction of her daughter. The father is sued in his capacity as natural guardian. I submit that there is nothing against my contention in the cases cited for the appellant, and that the father was liable.

The Court allowed the appeal.

Buchanan, J.: The plaintiffs in this case were two natives—Nolenti, the mother, and Thomas, the brother of a Kafir girl—and they, in their capacity of guardians of the girl, instituted an action for damages for seduction against the defendant, who is described as the father and natural guardian of his minor son. The seduction, for which damages were claimed, was committed by the defendant's son, and the father is not in any way connected with the wrongful act. Exception was at once taken to this summons on the ground, that the proper course would have been to have made the injured person a party to the record assisted, if necessary, by her guardians, and to have had the person who did the injury placed on the record as defendant, assisted by his guardians, if necessary. In this case, neither the injured party nor the person complained against were made parties to

the suit. Mr. Gardiner has contended that judgment was against the defendant in his capacity as father and natural guardian, but when we look at the Magistrate's reasons, it is clear that this is not the case. The Magistrate says that according to Kafir law, by which he was guided in deciding this case, the custody of the parent over his children lasts for so long as they remain with him. "In fact," he says, "a father is always liable for the misdeeds of his children, as if they were committed by himself." This is absolutely contrary to our principles. This is not a case in which Kafir law is applicable, and even if Kafir law is applicable, there is no evidence excepting the Magistrate's judgment, as to what the Kafir law is. This is not a case from the Transkei, wherein disputes between natives some recognition is given to Kafir law. Such cases are not cognisable by this Court. There is nothing in our law which entitles a person to recover damages, from a father for a tort committed by his son. It is clear that this case has been wrongly brought, and the attempt to make the father responsible for a tort committed by his son is improper, and cannot be recognised by this Court. Judgment will be entered on the exception for the defendant in the Court below, with costs.

[Appellant's Attorney, J. J. Michau; Respondents' Attorney, Fairbridge, Arderne and Lawton.]

PHISANTE V. CAPE MARINE (1902.
SUBURBS, LTD. (Sept. 11th.)

Ejectment — Magistrate's jurisdiction.

In an action for ejectment in a Resident Magistrate's Court the defendant proved that she was the widow of a person to whom the then registered owner had given the land and on which he had built houses of the value of £300, and that she had a claim to retain the land until, at all events, one half of such enhanced value was paid to her.

Held, that the jurisdiction was ousted by virtue of the last

proviso of Sec. 10 of Act 20 of 1856.

This was an appeal from a decision of the Assistant R.M. of Cape Town.

The appellant was defendant in the action in the Court below brought by the present respondents, who applied for an order for her ejectment from certain property situated near the Round House, Camp's Bay, which they alleged was their property. Defendant excepted to the jurisdiction of the Magistrate on the ground that the title to the land was in dispute, the land being worth more than £40. She alleged on oath that Mr. Fairbridge, a previous owner had given her the property. Mr. Moller, called for the company, said that the defendant had told him that the land belonged to Fairbridge and Le Sueur. The Magistrate granted the order asked for, and against this decision the present appeal was brought. The appeal was on the grounds that the title was in dispute, and the matter, therefore, not within the jurisdiction of the Magistrate, and that there had been no tender of compensation.

The Magistrate's reasons were as follows:—

In this case the "Cape Marine Suburbs, Ltd.," sues Urden Phisanti for ejectment. Exception was taken to the jurisdiction of the Court, that title was dispute. Now "title" means "registered title," and it is clear that the "Cape Marine Suburbs, Ltd." has a clean registered title to the land and houses in dispute. The houses on the diagram are within the beacons, and the exception was therefore overruled. It was then pleaded that the Syndicate could not be ejected without compensation and that the houses were taken of the value of £10. Now, I have only the bare statement of defendant that she got the ground from Mr. Fairbridge, who told her that she could build on the ground, and against that I have the evidence of Mr. Moller, the Auctioneer, who states that when he went to value the land and houses, defendant told him that the land and houses belonged to Messrs. Fairbridge and Le Sueur. It is not alleged, and there is certainly no proof, that when the "Cape Suburbs Marine Co., Ltd." bought the property, they knew that the licenses belonged to defendant, and as they got a clear title no compensation

can be claimed from them. Defendant even told Mr. Moller where the beacons were and even if Mr. Fairbridge told defendant to build there is no proof that Le Sueur was a party to it. Defendant admits the notice and admits he pays no rent to any one and holds no occupation under plaintiffs. Therefore my judgment is.—Decree granted with costs.

Mr. Gardiner for appellant, Mr. Schreiner, K.C., for respondents.

Mr. Gardiner: See *Ras. v. Wiese* (10 Juta, 42). Here title to land is clearly in dispute and hence the Magistrate had no jurisdiction in the case. If the Court is against me on this point I would refer to *De Beers v. L.S.A. Exploration Co.* (10 Juta, 359). The appellant was a *bona fide* occupant and as such is entitled to compensation for improvements made on the property.

Mr. Schreiner K.C.: The title to this land is clearly in the plaintiff. On the survey the ground belonged to Le Sueur. It would be no defence in this Court to say, that 25 years ago the plaintiff was in possession of the land. I submit that the Magistrate was right in over-ruling the exception *De Beers v. L.S.A. Co.* (10 Juta, 359). Any man who says that he is a *bona fide* possessor must show that either he, or his predecessor in title put money into the property. The Magistrate does not believe in the appellant's claim and she has not proved herself to be a *bona fide* possessor: the Magistrate has not found that she is. In point of fact her defence was not *bona fide*. The onus rests on her and she has not discharged it. We do not know that she put money into these houses. She may personally be *bona fide* but it does not follow that her claim is *bona fide* in law. I submit that the decision of the Magistrate was correct.

Mr. Gardiner (in reply): Mrs. Phisante was not cross-examined as to the value of the house. As to community, the presumption in this country, is that people are married in community. In this case the husband and wife were *bona fide* possessors of the land and as such can claim for improvements *De Beers v. L. and S. A. Exploration Company* (10 Juta, 359).

The Court allowed the appeal with costs.

De Villiers, C.J.: The defendant stated that she was the widow of the late Gert Phisante, and in the absence of evidence to the contrary the Court must assume

that she was lawfully married, and also that she was married in community of property. She said that Mr. Fairbridge, who was now dead, gave her the ground, and that her husband built on it two houses, worth £300 or £400. That was the evidence before the magistrate, and there was really nothing to contradict it. One of the witnesses, a surveyor, admitted that the value of the houses was more than £40. After her husband's death there was an action for ejectment. To the extent, at all events, of one half the enhanced value of the property, assuming that the woman was married in community, she would be entitled to compensation. Her right of occupation appears to me to be of the clear value of £40 or upwards in terms of the last proviso of act 20 of 1856. Under these circumstances, I am of opinion that the magistrate ought to have allowed the exception that he had no jurisdiction. The appeal must therefore be allowed, with costs, on the exception, and the judgment altered to one of absolution from the instance.

[Appellant's Attorney: J. J. Michau;
Respondent's Attorney: Silberbauer,
Wahl and Fuller.]

BOOI AND ANOTHER v. { 1902.
KLOHO. { Sept. 11th.

Unlawful arrest.

Plaintiffs in the Court below had been accused by defendant, a native constable, of stealing two horses, which answered the description of certain stolen horses he had been ordered to trace. He directed the plaintiffs to go and see the police sergeant at Indwe, who sent them to see a man at Dordrecht, from whom they had received good discharges from the Military Intelligence Department, and who was alleged to have sold the horses to the first plaintiff. The police, being satisfied that the horses were not stolen, allowed the plaintiffs to go.

Held (on appeal), that the plaintiffs had not been arrested,

and that they therefore had no cause of action against defendant.

This was an appeal from a decision of the Resident Magistrate of Wodehouse in a case in which the appellant sued respondents for £20 for unlawful arrest. The Magistrate gave judgment for absolution from the instance with costs.

The evidence led in the Court below was to the effect that the appellants were on their way from Barkly East to Korenhoek, near Indwe, having with them a horse and a mare. At, or near Korenhoek, they were met by the defendant, who accused them of having stolen the horses then in their possession. One of the appellants showed Respondent (a native constable) two receipts showing what he had paid for the horses. Respondent had been sent out to look for certain stolen horses and he alleged that the horses in appellants' possession answered the description given to him of two of these horses stolen. Respondent did not formally arrest the appellants, but told them to go with him to the police camp at Indwe and see the sergeant there. They went and the sergeant directed that they should be taken to Dordrecht to see a Mr. Hoole who had given the first appellant a good discharge from military service. One of the appellants travelled by rail to Dordrecht and the other rode in company with the Respondent. They slept the previous night in the Native Location at Indwe but were told by Respondent not to run away. Respondent did not report to the Magistrate what he had done and no charge was made against the appellants before a magistrate. They had no pass.

The reasons given by the Magistrate for his judgment are as follows:

"Certain three horses were lost or stolen from Barkly East and defendant (the present respondent) was sent in search of them. From information received by him, it appears that plaintiffs (the present appellants) had been seen in possession of two horses answering the description of two of those lost. Defendant accordingly followed up the plaintiffs and in passing through Indwe reported the fact to Sergeant Collier, who was stationed there at the time. On arrival at Korenhoek on 8th of July, last

defendant found plaintiffs in possession of two horses which he believed to be the animals he was searching for. He appears to have told the plaintiffs this in the presence of Jacob and Martinus. Defendant immediately returned to Indwe and reported the circumstances to Sergeant Collier, who directed him to go back and tell plaintiffs to come and see him, which they appear to have done, in company with defendant and the other two men. Sergeant Collier appears to have interviewed Booi only, and suggested that they should all go into Dordrecht to see Mr. Hoole, the Intelligence agent who was there at that time. They all appear to have come to Dordrecht, Benjamin and Martinus travelling by rail, while Booi and defendant rode on horse-back. On arrival they went to the Cape Police Camp, where no doubt the matter was fully enquired into: with the result that plaintiffs left with their horses. There appears to have been no formal arrest, both plaintiffs being allowed their liberty all the time. Plaintiffs' attorney in his argument, laid great stress on the fact that neither of the plaintiffs was brought before the Magistrates at Indwe or Dordrecht, as he stated was required by the Cattle Removal Act.

On this point it will be observed that the plaintiffs were never lodged in gaol, consequently there was no necessity for them to have been brought before a magistrate; the matter being under police investigation which certainly was necessary seeing that neither of the plaintiffs had passes for the horses in their possession. All they could show were their discharges, and Benjamin (one of the plaintiffs) is at present on bail for stealing a horse from Col. Munro's column on being discharged from it. It is only right that I should point out that the attorney for the defence was prepared to call the defendant and other witnesses and he actually did call the defendant, but on his doing so, I intimated that I was prepared to decide the case on the evidence already before me and he thereupon closed his case. I consider that defendant as a policeman was quite justified in suspecting the plaintiffs of the theft of the horses. (which he believed to be those that were stolen) as they had no passes for them as required by the Cattle Removal Act.

Mr. Benjamin (for the appellants): The Magistrate's decision in this case was

clearly wrong. The constable said that he arrested the defendants. It is true that he did not put handcuffs on them but that is not necessary for arrest. They were told not to run away and were under moral restraint. It may be that malice must be proved in an action for false imprisonment, but that is not necessary in cases of unlawful arrest *Pocock v. Moore* (1 R. 7 and M. 321) *Chinn v. Morris* (2. Cl. and P. 774) which goes far to show that in a case of this kind the constable had no right to arrest without a warrant Sec. 12. Ord. 73 of 1830. No evidence whatever was taken against the accused and I submit that they were arrested and that their arrest was clearly unlawful. Mr. Buchanan (for respondent) was not called upon.

The Court dismissed the appeal.

Buchanan, J.: The parties to this case are all natives. The defendant is a native constable in the employ of the police. Sergeant Collier, who was in charge of the police station at Barkly East, received information as to certain two horses having been stolen, and the thereupon directed the defendant, as constable, to go and search for these horses. The defendant made search, and he found two horses which he thought answered the description of those stolen in the possession of the plaintiffs. He returned and reported the fact to Sergeant Collier, who sent him to tell the plaintiffs to come to the police station and see him. He therefore went and did so. The plaintiffs say they were arrested; the defendant says they were not, and Sergeant Collier states that when they came to the police station they were not under arrest. The plaintiffs were unable to produce any passes for the horses which were found in their possession, but they showed a document which purported to show that they had bought these horses from Mr. Hoole at Dordrecht. Sergeant Collier told them that they had better go to Dordrecht and see about this. One of the plaintiffs went to Dordrecht by train with a friend, and was not accompanied by the defendant. The other plaintiff rode into Dordrecht, and the defendant also rode with him. Neither of them was under the charge of the defendant, and the utmost that could be said in favour of the accusation that they had been arrested is that the policeman told these two natives that Sergeant Collier wished to see them

about these horses which he suspected were stolen. After enquiry the police were satisfied that there was no ground for the accusation, and the matter dropped. The plaintiffs complained that they were not taken before the Magistrate and tried, but it is difficult to see how the absence of any prosecution could aggravate the case. After hearing the evidence of the sergeant, the conclusion I must arrive at is that there had been no improper conduct on the part of the defendant, that he acted under the express instructions of the sergeant, and that what he did was reasonable and proper under the circumstances. The policeman in this case only did his duty, and did not act without reasonable and probable cause. The magistrate dismissed the case without hearing all the evidence for the defence, and I think he was quite right in his judgment. The appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Scanlen and Syfret.]

KRAMER V. VAN DER MERWE AND ANOTHER. } 1902.
Sept. 11th.
" 12th.

Purchase and sale—Condition—
Recission of sale—Damages
—*Pactum adjectum*.

The defendants bought from the plaintiff and left in his possession a wagon and ten donkeys on the understanding that he should not use them while in his possession. The plaintiff did use them on journeys of some length, but there was no evidence of injury done to them by reason of such use.

Held, that the defendants were not justified in repudiating the sale, and that their remedy was for damages for the use of things sold contrary to the agreement.

Held further, that upon the defendants refusing to take delivery of the things sold, the plaintiff was entitled, instead of insisting upon payment of the purchase price, to retain the

things sold and recover damages for the defendants' breach of contract, the measure of damages being the difference between their contract price and the market value.

This was an appeal from a decision of the Resident Magistrate of Tulbagh, given on July 14 last, in a case in which William Kramer sued Stephanus van der Merwe and Allewyn du Plessis for damages amounting to the sum of £20 in an action for breach of contract. The summons set forth that on June 24, the defendants purchased from plaintiff a wagon, span of donkeys, harness, etc., for £142 10s., payment and delivery to be completed on June 30, at Ceres-road Station. The plaintiff said that he tendered the wagon, donkeys, etc., upon payment of the purchase amount of £142 10s., but the defendants neglected and refused to accept delivery of the same to them, thereby causing damage to plaintiff in the sum of £20.

In the evidence taken in the Court below, the plaintiff said that on June 24 he agreed with the defendant to sell them the wagon, donkeys, etc., for £142 10s. After the sale had been completed, they remembered that under Martial Law permits were necessary to complete the sale, and it was agreed that plaintiff should get the necessary permits, the defendants to pay and take delivery on the following Monday, June 30. There was no agreement as to the right to use the donkeys and wagon between June 24 and 30. On the afternoon of June 25, plaintiff was asked to convey a passenger to Boomtje River, about twenty minutes' drive, and meeting the defendant Van der Merwe, informed him of that, and said that he would pay over whatever money he got. The same day a Mr. Salvage asked plaintiff to take some goods to Ceres, and that evening when the wagon was loaded up, the Permit Officer notified defendants and plaintiff that the permits for the sale and purchase had been received by him. Van der Merwe said, "All right, we will take delivery of the goods on the following Monday." The wagon started for Ceres on June 27, and soon afterwards Van der Merwe came to plaintiff and said that they would not take the wagon and donkeys on the grounds of the trip to

Ceres. Plaintiff said he would pay over to defendants whatever carriage was paid to him, and when Van der Merwe objected, suggested having the wagon brought back, but Van der Merwe said that it did not matter as he would not accept the wagon. Plaintiff had to keep his wagon idle five days owing to the action of defendants and he estimated his damages at £5 more than he had claimed so as to be able to bring the matter within the jurisdiction of the Magistrate's Court. A number of witnesses were called on behalf of the plaintiff, and then the defendant Van der Merwe was called, and said that they agreed on June 24 to purchase the turnout for £142 10s., but it was understood that they had still to ascertain whether they could obtain a permit under Martial Law to sell and purchase, and also that the plaintiff should not use the animals between that time and Monday, June 30, except to use four of the donkeys to complete the ploughing of a piece of ground. In consequence of plaintiff using the donkeys and thus breaking the contract, the defendants agreed that the best course was to decline to take the donkeys, etc. After further evidence on behalf of the defendants, the Magistrate gave judgment of absolution from the instance with costs. In his reasons, the Magistrate said that the defence set up was that the sale was repudiated by the two defendants by reason of the repeated use of the animals in question, between the date when the contract of sale was completed, and the date when delivery was to have taken place, and the purchase price paid. The plaintiff's allegation was that no understanding was arrived at in regard to the use of the animals during such a period, but the Court was satisfied from the evidence adduced that there was such an understanding, and that plaintiff thoroughly understood it. The evidence disclosed a clear breach of the contract of sale and purchase as agreed to, and justified a repudiation of the sale at the time when notice to that effect was given to the plaintiff. Against this judgment, plaintiff now appealed.

Mr. Burton appeared for the appellant; Mr. Rowson for the respondents.

Mr. Burton: I submit that the evidence does not bear out the finding of the Magistrate. The evidence of any agreement as to the use of the donkeys was

particularly weak. Plaintiff and his witnesses all swore that they knew nothing of any such agreement, and even if it had existed Van der Merwe had waived it by saying, according to his own evidence, "All right, I see you are going," when informed by appellant that he was going with the donkeys to Ceres.

Mr. Rowson: The evidence of plaintiff's witnesses is very inconsistent, and is directly contradicted by the evidence for the defence. The Magistrate, who had the witnesses before him and saw how they gave their evidence, believed the witnesses for the defence, and I submit that this Court will not readily reverse the finding of a Magistrate on a question of the credibility of witnesses. The evidence for the defence is confirmed by plaintiff's own admission that he asked defendant to allow him to use the donkeys to finish some ploughing. The whole evidence goes to show that there was a *pactum adjectum* annexed to the contract of purchase and sale to the effect that the vendor should not use the donkeys. See *Voet* (18, 1, 26). This pact was not only violated, but was grossly violated. These animals, already in poor condition, were taken two long journeys of 9 or 10 miles and back. Even had there been no such *pactum adjectum* as the Magistrate found existed, it is very doubtful whether the sale might not have been rescinded by reason of the misuse of the donkeys sold.

Cur. Adv. Vult.

Postea September 12.

De Villiers, C.J.: This is an appeal from the judgment of the Resident Magistrate of Tulbagh in an action for damages for breach of contract of sale. The summons claimed £20 damages for breach of contract in that the defendants purchased and bought from the plaintiff, who bargained and sold to them a certain wagon, span of donkeys, harness, etc., for the sum of £142 10s. The summons further alleges that the plaintiff tendered and offered, and he does offer and tender in his summons, the wagon, donkeys, etc., to the defendants upon payment of the sum of £142, and that the defendants neglected and refused to take delivery, thereby causing damage to the plaintiff in the sum of £20. The evidence clearly shows that there had been a sale for £142, and that there had been a tender and a refusal to accept delivery, but the defence

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Respondent (plaintiff in the Court below) had sued appellant in the Court of the R. M. of Ladismith for £20 damages for slander. It was alleged that the defendant said in a public street of Ladismith, in the hearing of certain persons: "I won't allow such a low-life fellow as Booker to commandeer my horses." The Magistrate gave judgment for the plaintiff for 1s. with costs. In his reasons the Magistrate said he considered that the words used were malicious and defamatory; that plaintiff suffered damages; and that he was quite right in coming to Court to vindicate his character. Plaintiff had done good work, and given valuable information and assistance to the

military, and this caused the defendant to be hostile towards him.

The appeal was brought on the ground that the words did not constitute a slander.

Mr. Burton for the appellant; Mr. Searle, K.C., for the respondent.

After argument, the Court allowed the appeal with costs.

De Villiers, C. J.: I am inclined to think that the appellant would have been well advised to leave the matter where it was, and to have paid his 1s. damages, but still, he is within his rights to appeal if he can satisfy the Court that the magistrate was wrong in the law. The magistrate laid down that these words "low-life fellow" were defamatory, but I cannot agree with him. The words are somewhat abusive but they are not defamatory in the sense of being derogatory to his character. The defendant gave vent to his ill-feeling and dislike in coarse but meaningless language, but unless that language was calculated to expose the plaintiff to contempt, hatred or ridicule it cannot be legally regarded as injurious.

If it is not injurious the defendant is entitled to succeed, and with costs, in the same way as the plaintiff would have been entitled to succeed, and with costs, if the words had been defamatory.

Buchanan, J., concurred.

[Appellant's Attorneys: Messrs. Sauer & Standen; Respondent's Attorney, C. W. Heroldt.]

PROVISIONAL ROLL.

DEMPERS V. ISAACS. { 1902.
Sept. 12th.

Mr. Gardiner applied for provisional sentence on certain two mortgage bonds for £1,101 14s. 6d.

Granted.

GOURLAY AND CO. V. DA SILVA.

Mr. Gardiner moved for the final adjudication of the defendant's estate.

Granted.

GARLICK V. SAPHIR AND { 1902.
ANOTHER. { Sept 12th.

This was an application at the instance of John Garlick of Cape Town for a decree of civil Imprisonment against Isaac Saphir and Joseph Hirsohn upon an unsatisfied judgment of the Supreme

Court dated July, 12th 1902 for £34. 13s. 0d. with interest thereon from Febr., 20th 1902, together with the sum of £25. 4s. 8d. costs.

Mr. Benjamin for plaintiff. Mr. J. E. De Villiers for the defendant Hirsohn. Defendant Saphir appeared in person.

As it appeared very doubtful whether Hirsohn was possessed of any means, on the application of Mr. Benjamin the case as against him was ordered to stand over *sine die*.

A decree of civil imprisonment was granted against Saphir, suspended on payment of 5s. a month for the first three months, 10s. for the following six months, and £1 a month thereafter.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

HEDDLE BROTHERS V. O'DELL.

Mr. Buchanan applied for a writ of imprisonment on an unsatisfied judgment for £53 11s. 9d.

Defendant appeared and said he was bringing an action against plaintiffs for an amount exceeding that for which judgment had been obtained against him. He offered to pay £10 a month until the action was brought.

A decree of civil imprisonment was granted, suspended pending payment of £10 a month, the first payment to be made on the 11th October.

SINCETON V. UDWIN.

Mr. Goch applied for provisional sentence on a promissory note for £50.

Granted.

BERMAN AND OTHERS V. SLACK.

Mr. Goch applied for provisional sentence for £184 due in terms of certain conditions of sale.

Granted.

GUARDIAN ASSURANCE CO. { 1902.
V. BUSH. { Sept. 12th.

This was an application for provisional sentence on two Mortgage Bonds each for £250. The first of these was passed by defendant in favour of the plaintiffs on December 6th, 1882, and the other on January 9th, 1883.

The matter came before the Court on August, 5th 1902, when the Court granted leave to attach certain land, the property of the present respondent to found

jurisdiction, his present whereabouts being unknown. The Court also granted plaintiffs leave to sue by edictal citation, returnable September 12th, 1902, the order to be published once in the "Gazette" and twice in the "Eastern Province Herald." Owing to unavoidable delay in returning the writ the Rule had been published only for 21 days.

Mr. Close appeared for the plaintiffs.

De Villiers, C. J.: The time of publication is seven days short. The return day will be extended to November 1st, 1902, with leave to publish the citation in the "Gazette" in an abbreviated form, to be approved by the Registrar.

[Plaintiff's Attorneys: Messrs. Tredgold, McIntyre and Bisset; Defendant in default.]

KENDRICK V. JAMALODIEN.

Mr. Bisset applied for provisional sentence on a mortgage bond for £700.

Granted.

RIDINGER V. LANE-FOX.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £2,000, and for hypothecated property to be declared executable.

Granted.

LANDSBERG V. WILSNACH.

Mr. Buchanan moved for provisional sentence for the sum of £72, interest on a mortgage bond.

Granted.

HUTTON V. STAPLETON.

Mr. Benjamin applied for a decree of civil imprisonment.

Granted.

ILLIQUID ROLL.

SHARPE V. GLENDINNING. { 1902.
Sept. 12th.

Mr. Bisset applied for judgment under Rule 329d for £58 10s.

Granted.

SOUTH AFRICA (LIMITED) V. LYNCH.

On the motion of Mr. Russell judgment was given under Rule 329d for £15 12s.

TOYK V. WYATT.

Mr. Benjamin moved for judgment under Rule 329d for certain sums paid on account of the purchase of shares.

Granted.

REX. V. BECKETT.

Mr. Searle, K.C. (with whom was Mr. Burton), appeared to move for review of the proceedings in this case.

Mr. McGregor, for the Attorney-General, said that the records had not yet arrived from Oudtshoorn. He therefore applied that the case should be allowed to stand over.

Mr. Searle consented, and the case was ordered to stand over.

ROHLAND V. ROHLAND.

Mr. Buchanan moved for an order declaring Henry Rohland, son of Christian Rohland, to be of unsound mind, and for the appointment of curators.

Mr. Benjamin appeared as *curator ad litem*.

Dr. Dodds, superintendent of the Valkenberg Asylum, said that Henry Rohland was admitted in December, 1898, and had been an inmate ever since. He suffered from weak-mindedness and was unable to look after his affairs. One of his delusions was that he was not Henry Rohland. He was not fit to take care of his property or his person. Witness was afraid his chances of recovering were not favourable.

Mr. Benjamin said he had no questions to ask Dr. Dodds. He had seen the man, and had no doubt as to his condition of mind.

The Court made an order declaring the respondent to be of unsound mind, and appointing Christian Rohland as curator of his person, and Mr. E. R. Syfret as curator of his property, with power under section 42 of the Act of 1897.

REHABILITATIONS.

On the motion of Mr. Bisset, the Court granted an order for the rehabilitation of Petrus Jacobus Swart.

Mr. Benjamin moved for the rehabilitation of George Stewart Cooper.

Granted.

Mr. Buchanan moved for the rehabilitation of Tjaart Nicolaas Jacobus van der Walt.

Granted.

A similar application by Mr. Gardiner on behalf of Vythillingum Veerasamy was granted.

GENERAL MOTIONS.

REX V. VAN DER MERWE, (1902.
ROSSOUW AND COETZEE. (Sept. 12th.

Mr. Russell appeared for applicants, and moved for their release on bail.

Mr. Nightingale appeared for the Colonial Government.

Bail was allowed on terms fixed by the Government.

Ex parte SULLIVAN.

Mr. Close moved to make absolute a rule *nisi*, granted under the Derelict Lands Act on February 20th.

Granted.

Re THE WORCESTER BUTCHERY COMPANY (LIMITED).

Mr. Schreiner moved for a rule *nisi* granted on August, 22nd. for the winding up of the company to be made absolute, and for an order appointing Mr. Daniel Bland, of Worcester, official liquidator.

Mr. Bisset appeared for D. J. Marais to move for his appointment as co-liquidator.

Several affidavits were read, and after hearing argument, on the facts the Court made the rule absolute, and appointed Mr. Bland as liquidator.

De Villiers, C. J.: The Court has a very large discretion in appointing official liquidators, and while not bound to follow the practice in cases of insolvency by which a trustee is elected by a majority in number and value of creditors, I think this rule affords a very fair model for the Court to follow in cases of appointing liquidators. It has worked well in practice in regard to insolvency that the majority of creditors, in number and value, should decide who is to be trustee, and it affords a very fair indication in the winding-up of a company as to who should be appointed by the Court. In the present case there is a majority, in number and value, in favour of Mr. Bland, and there is no allegation that he is not competent. All that is said by Mr. Marais is that he ought to be joined, because Mr. Bland has been appointed by a clique. Well, of course, if a per-

son is in a minority, he always calls the majority a clique. Providing that the person whom the majority think should be appointed is a fit and proper person, the Court should, I think, appoint him. The fact is urged by Mr. Marais that he knows all about the business, but he would naturally be influenced by the feelings engendered by his lawsuit, and would, perhaps, introduce an element of discord. I am quite satisfied that Mr. Bland is a person who will do his duty by all—towards Mr. Marais as well as towards the other creditors; and no reason has been shown why he should not be appointed. The rule will be made absolute, as prayed, with costs of opposition.

Re THE CAPE TOWN CLUB.

Mr. Schreiner, K.C., moved that the rule *nisi* granted on August, 30th for the winding up of the Cape Town Club, and the appointment of Messrs. G. W. Steytler and T. J. O'Reilly as official liquidators be made absolute.

Mr. Searle, K.C., said he appeared on behalf of a number of shareholders, who came into court not to oppose the placing of the company in liquidation, but to oppose the appointment of Mr. T. J. O'Reilly as co-liquidator with Mr. Steytler.

Mr. Schreiner said that when the rule *nisi* was granted there was a special understanding that the argument on the merits of the question whether or not such a club could be placed in official liquidation, would be reopened. He did not know whether the Court would wish to hear him in further argument on that point, seeing that there was no opposition to the winding up, the only question being as to appointment of Mr. T. J. O'Reilly as co-liquidator. He had not been able to find any other authority but the old case of the St. James's Club, where it was purely a case of subscription. In the present case he did not ask for a final decision as to whether all clubs could in this way be wound-up, but this club had a most unusual clause in its rules to the effect that the members were responsible, jointly and severally, for the debts of the club. This club stood on a peculiar footing, and there was good ground for holding that such a club could

be placed in liquidation under the Winding-up Act. Even if there were not that condition in the club's rules, he would say that the terms of the Act were wide enough to enable the Court to exercise its discretion, although he would not say that the Court would then exercise that discretion. Although the company was not registered under sections 22 or 23 of the Act, counsel submitted that it could come in under section 216.

[De Villiers, C. J.: With all the liquidations in England has there ever been a case in which a club has been wound up?]

Mr. Schreiner said that he could not find any record of the official windup up of a club. In England they seemed to have always gone upon the basis of the St. James's Club case.

In the course of further argument Mr. Schreiner said that Mr. Searle had just called his attention to the case of the *Athenæum Club*, reported in 43 Chancery Appeal Cases, page 236, which might have some bearing upon the question. Counsel then read the case and was heard in further argument.

[De Villiers, C. J.: Mr. Searle, do you admit that this club could be wound up under the Act?]

Mr. Searle said that he had been instructed to say that the parties thought it would be best that it should be wound up under the Act, if that could be done. Of course, neither he nor Mr. Schreiner appeared for the whole of the shareholders. As to the point whether the club could be wound up under the Act he could not add anything to what Mr. Schreiner had said. He could only point out certain respects in which this case differed from the *Athenæum Club* case.

The Court discharged the rule nisi.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir J. BUCHANAN and the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

HUSBAND V. HUSBAND. { 1902.
{ Sept. 13th.

Mr. Close moved for leave to the plaintiff to sue her husband by edictal citation for restitution of conjugal rights, failing which for divorce. It appeared that the parties lived in Rhodesia, and defendant left plaintiff in February, 1898. Since then he had been in irregular corps—first in Kitchener's Fighting Scouts, and then in Steinacker's Horse—during the recent war. Plaintiff had resided in Cape Colony since 1898.

The Chief Justice pointed out that it could hardly be said that defendant was domiciled in this colony, seeing that he had only come down here to join an irregular corps. Plaintiff's course of action would probably be to sue him in the Transvaal Court.

Mr. Close asked that the matter be allowed to stand over to see if evidence could be obtained as to defendant's domicile in the Colony.

The matter was accordingly allowed to stand over.

KIMBERLEY WATERWORKS COMPANY V. KIMBERLEY BOROUGH COUNCIL.

Mr. Gardiner moved for leave to the Kimberley Waterworks Company to appeal to the Privy Council against the decision of the Court in the above action.

Mr. Buchanan appeared for the Kimberley Borough Council to consent to the application, on condition that the judgment be allowed to take effect meanwhile, and that security be given for the costs of appeal.

Mr. Gardiner said that the respondents would also have to give security for any sum which might be paid by the applicants through the judgment taking effect.

Leave to appeal was granted in terms of the consent.

ANDERSON V. ANDERSON.

Mr. Gardiner moved upon notice given to respondent to show cause why a rule *nisi* granted by the Court on February 4, 1895, for restitution of conjugal rights, failing which for divorce, should not be revived and the return day extended. The affidavit in support of the application showed that the applicant was married to the respondent in 1878, which marriage still subsists. In 1881 the respondent left applicant, and had since refused to return to him. On February 4, 1895, the rule *nisi* for restitution of conjugal rights, failing which for divorce, was obtained by the applicant. Owing to it being impossible to discover respondent's whereabouts, the rule was not served, notwithstanding two extensions of the return day. Applicant was in very poor circumstances at the time, and in the hope of bettering himself left for Johannesburg in 1897, but returned the following year no better off, and was unable owing to want of means to take further steps in regard to the rule *nisi*. In August, 1901, he had contrived to save a little money, and moved to have the rule revived, but the application was then refused owing to the defendant having had no notice of the proceedings. The only reason that applicant had allowed the matter to stand over was his extremely poor circumstances, and the fact that, notwithstanding diligent inquiries, he could not trace the respondent's whereabouts. Lately he had been able to do so, and this application was now made on notice of motion given the respondent.

The Court granted an order reviving the rule *nisi*, respondent to return to her husband before the end of September, failing which to show cause on October 12 why a decree of divorce should not be granted.

Postea (October 14) the rule was made absolute and a decree of divorce granted as prayed.

LEVIN V. LEVIN.

This was an application by the wife for leave to sue her husband *in forma pauperis* for divorce.

The applicant appeared in person, and said that she was a shop assistant,

and received a wage of £2 10s. per month, out of which she had to pay for her board and lodgings.

The Chief Justice: Do you mean to say that is all you get?

Applicant: Yes; it is a very small shop.

Mr. Russell was appointed to take the reference and certify to the Court.

***Ex parte* ROUSSEAU.**

This was an application for an order in regard to the service of certain articles of clerkship.

There was no appearance for the applicant, but Mr. Benjamin said he had just received a brief on behalf of the Law Society to oppose the application.

The matter was allowed to stand over.

A similar application by Lawrence Naude, in which also there was no appearance for the applicant, was also allowed to stand over.

***Ex parte* WATSON.**

Mr. Benjamin applied for the release of the applicant from his position as curator of a certain prodigal, Pieter C. du Toit. The petitioner said that he was unable to properly attend to the interests of the prodigal, and consequently was desirous of being released. Mr. H. W. Becker was willing to accept the appointment in petitioner's place. The Master had reported favourably.

Order granted in terms of the Master's report.

***Re* THE ESTATE OF THE LATE KIEZER.**

Mr. De Waal moved for leave to the executor in the above estate to mortgage certain property in which minors were interested. The Master reported in favour of the petition being granted.

Order granted.

VAN BLERCK V. VAN BLERCK.

Mr. Benjamin moved for an order on the respondent to pay to the applicant, his wife, the sum of £20, to enable her to proceed against him in an action for divorce, and as also for the payment by him of a sum of £4 per month, pending the proceedings, for the maintenance of applicant and her child. The divorce proceedings were being taken on the ground of respondent's adultery.

The Court ordered the respondent to pay £20 to applicant's attorneys to enable an action to be brought, but made no order as to maintenance.

CRESSWELL V. VAN DER BYL AND CO.

Mr. Russell moved for a commission to take the evidence of the plaintiff in the above suit and that of his son in London.

Mr. Goch appeared on behalf of the defendants to consent to the application.

Order granted as prayed, and Mr. Mackerness appointed commissioner.

Re THE ESTATE OF THE LATE FRONEMAN.

Mr. C. de Villiers moved for leave to the surviving spouse, the executor testamentary in the above estate, to mortgage certain property in the estate in which minors were interested for the purpose of paying off certain inheritances and the existing bond.

The Master recommended that the petition be granted.

Order granted in terms of the Master's report.

Ex parte BURTON.

Mr. C. de Villiers moved for an order authorising the Registrar of Deeds to amend a certain deed of transfer, in which the petitioner was wrongly described as "Richard Burton," instead of "Richard Charles Fryer Burton."

Order granted as prayed.

Ex parte JANSEN.

Mr. Benjamin moved for an order authorising the Master to call meetings in certain estates for the purpose of appointing a fresh trustee, in the place of the late trustee, the late Secretary of the Graaff-Reinet Board of Executors, who died at Port Elizabeth on July 4 last. The petitioner had been appointed secretary of the Graaff-Reinet Board of Executors in his place.

Order granted as prayed.

Ex parte LAWS.

This was an application to have a certain ante-nuptial contract registered, although the time allowed by law had elapsed.

Mr. Buchanan appeared for the petitioner, who stated, on affidavit, that he was a notary public, practising at Aberdeen, and on June 29 B. J. V. van Heerden and Elizabeth Maria Swane-pool appeared before him and entered into an ante-nuptial contract, which was still unregistered, owing to its having been overlooked by petitioner, in consequence of the unsettled state of the district at the time, and his being employed in the office of the local Commandant. The petitioner was prepared to pay the costs of the application.

An order was granted for the registration of the contract, subject to the rights of intervening creditors, the petitioner to pay the costs.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir J. BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1902.
Sept. 15th.

Mr. Benjamin moved for the admission of Ross Ashton Dold as an attorney and notary.

Order granted and the oaths administered.

GENERAL MOTIONS.

FINLAYSON V. FINLAYSON.

Contempt of Court—Attachment of person—Custody of child.

This was an application for an order for the personal attachment of the respondent for contempt of court, committed by him in failing to comply with an order of Court granted on August 5, 1902, to pay applicant the sum of £10, to assist her in bringing an action against him, and pay her £2 per month as and for maintenance of the minor child of the marriage, and also for failing to comply with the order to restore to applicant the custody of said minor child. Also for failing to comply with the order to restore to applicant the custody of said minor child.

Affidavits were read to show that respondent had failed to comply with the order of the Court, he having said to one deponent that he would comply with the order if it suited him to do so, and also that on two occasions, when the applicant visited him at his house and requested him to hand over the custody of the child, he said that he would not attend to the order of the Court unless and until he was compelled to do so.

Mr. Nightingale for the applicant.

Mr. Close for the respondent, read replying affidavits made by the latter, in which he stated that he had not entered an appearance at the time the order was granted, as he was under the impression that he had to be summoned to attend. After the order he had consulted an attorney, and letters had passed between the latter and applicants' attorneys showing that an attempt had been made to effect an amicable settlement between the parties, but applicants' attorneys said that they had been instructed that before any step could be taken in that direction the respondent should first comply with the order of the Court. Respondent further stated that he earned only £2 8s. a week, at the Post-office, and after paying for the board, lodging, and clothing of himself and the child, he was unable to pay the sum of £10 to applicant as directed in the order of the Court. As to giving up the child, he stated that the applicant had left him ill in bed, not owing to his intemperance as had been alleged by her, but in a fit of temper, because he said she ought to stay and attend to him instead of going to her father. The little boy was left with her mother, and on respondent going to Wynberg to see him there he found him in a dirty, filthy state, with his clothing in rags. He accordingly took the child away and put him under the care of a respectable Scotswoman, paying her £2 a month for his maintenance. Respondent further stated that applicant was unable to look after the child, as she was employed at the Valkenberg Asylum, and was only at home one night a week, and her mother having five other children, was not in a position to properly look after this child. Respondent denied the acts alleged against him by applicant.

Several affidavits were read on behalf of the petitioner, the Rev. J. M. Russell, Dr. Philander, and Mr. A. G.

White, deposing as to the character of Mrs. Matheson, who was stated by them to be a fit and proper person to take charge of the child. The allegations of the defendant were denied by Mrs. Matheson and Mrs. Finlayson, and it was stated on affidavit that the defendant was informed of the fact that the notice of motion stood as summons.

Mr. Close: The Respondent did not really understand his position before the Court. There was no intentional contempt. The last affidavit was only served on us late on Saturday and we have therefore had no opportunity of replying to it. As to the respondent's means his affidavit that he receives only £9 10s. a month is not denied. He tried honestly to do his best for the child and therefore his person should not be attached.

Mr. Nightingale: The applicant does not attach much importance to the payment of £10 a month, but only wants the custody of her child. I submit however, that the respondent can well afford to pay £2 a month.

Do Villiers, C.J., said there was no wilful disobedience of the order of the Court in regard to the £10, because a man could not be imprisoned for not doing what it was impossible for him to do. But as to the restoration of the child, at all events, that was quite within his power, and after service of the order of Court upon him he had refused to deliver the child, in compliance with that order, to the applicant. He had committed contempt of Court, and an order for his attachment must therefore be granted. But he (the Chief Justice) wished to give respondent another opportunity of obeying the order, and the Court would therefore grant a decree for attachment, to be suspended if respondent, before noon on the 16th September, delivered the child of the marriage to the applicant, and paid to the applicant the sum of £2 a month for the maintenance of herself and child until further order of Court, the first payment to be made on the 1st October.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinné.]

SCOTT V. ISAACS AND { 1902.
ANOTHER. { Sept. 15th.

Cancellation of Sale—Motion.

The Court cancelled a certain sale on an unopposed motion.

Mr. Alexander moved upon notice given the respondents to show cause why the sale of certain land and buildings thereon should not be cancelled, why the respondent should not be compelled to pay the sum of £7 10s. as rent of the property, and why he should not pay the taxed costs incurred in suing for provisional sentence, and, further, to show cause why a sum of £100 deposited by the respondent on the day of sale on account of the purchase price should not be retained by the applicant until all the judgments and costs of these proceedings were satisfied.

There was no appearance for the respondents.

Mr. Alexander (for applicant). *Re Stevens* (6 Sheil 150) is a precedent for cancelling a sale on motion. On July 15th judgment was obtained against the respondents under Rule 329 d. There is also the case of *Kuttel v. Thomas* (12 C.T.R., 266).

[De Villiers, C. J.: There was no defence in those cases.]

That is so. In the case of *Stevens* the Court granted a rule for the cancellation of the sale, subject to the right of respondent to file pleadings and proceed by action. That rule was subsequently made absolute. We have done all we could to serve the rule. The sale took place more than a year ago.

De Villiers, C. J.: It is advisable in these cases that the proceedings should be by way of action instead of by motion, because if the respondent could show that he would be prejudiced by the absence of pleadings the applicant on motion might have to bear the additional costs himself. In the present case, however, there is no appearance for the respondents, although there has been due service, and the Court will therefore grant an order as prayed on condition that the balance of the £100 after deduction of the rent and costs of the provisional sentence, and also of the costs of this application, be repaid to the respondents.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

LITTLEJOHN V. KINGSWELL. { 1902.
 { Sept. 15th.

Mr. Close moved for leave to the defendant Kingswell to sign judgment against the plaintiff for not proceeding with the above action.

The plaintiff had been barred under Rule 25 for default of declaration.

Mr. Rainsford (for plaintiff) pointed out certain inconsistencies between the affidavit of defendant and one of the supporting affidavits.

[De Villiers, C. J.: There is no notice of *Far* here.]

Mr. Rainsford: The plaintiff is in Court and I can place her in the box. She has a substantial cause of action and I submit the Bar should be removed.

The Court granted leave to sign judgment as prayed.

Ex parte JOHNSON.

Mr. Alexander moved for leave to applicant to sue his wife in *forma pauperis*.

Applicant was sworn, and said he worked as a labourer, and earned 4s. a day.

The Chief Justice (to applicant): Just keep out of your 4s. a day as much as you need to sue your wife. (To counsel) A sturdy man like that must earn money to sue his wife; not come here as a pauper.

The application was refused.

Ex parte ROUSSEAU AND NAUDE.

Articles—Suspension of Attorney.

Where two clerks had been articulated to an attorney, who was thereafter suspended for three months. The Court held that the said three months would not constitute a break in their service, but that they must serve a similar period after the completion of their articles.

Mr. Alexander appeared for petitioners; Mr. Benjamin for the Law Society.

The petitioners stated that they were articulated to Mr. D. J. Michau, attorney, Cradock, who had recently been suspended for three months. They applied for leave to serve this period after the termination of their articles. The Law

Society contended that the applicants should cede their articles to some other attorney or attorneys.

De Villiers, C. J.: It appears to me of that the applicants are not in any way responsible for this break. The attorney to whom they were articulated has been suspended for three months, and it would be a matter of great inconvenience—it might be almost a matter of impossibility—for them to find some other attorney willing to take over the articles. On the whole, I think it is an application that should be granted. The applicants wish to go back to the attorney when he resumes practice, and they are prepared to make up the lost three months by serving an additional period. If the period of suspension had been for a long period the objection would certainly have been a valid one but as the attorney was suspended for only three months the application will be granted.

Ex parte EXECUTORS IN } 1902.
THE ESTATE OF THE LATE } Sept. 16th.
WEBBER.

Will—Codicil—Reservatory clause—Probate.

A testatrix made a will in due form in 1891 and afterwards, viz., on 30th June, 1894, purported to execute another will, which, however, was invalid by reason of her not having signed her name upon at least one side of every leaf. On the 16th of June, 1899, she made a codicil which was executed in due form, but purported to be by virtue of the reservatory clause in her will of "30th June, 1890." No will of this date has, however, been found.

Held, that the codicil of 16th June, 1899, should be admitted to probate, but that the will of 30th June, 1894, to which the testatrix may possibly have intended to refer in mentioning a will of "30th June, 1890," could not be incorporated with and rendered valid by the codicil of 16th June, 1899.

This was an application for an order declaring the validity of a certain codicil.

The petition of Charles William Webber, of Avondale, in the district of Bedford and Charles Frederick Kayser, of Port Elizabeth, in the capacity of executors testamentary in the estate of the late Millicent Ann Webber (born Nash), showed:

1. That the petitioners were the executors testamentary of the estate of the late Millicent Ann Webber (born Nash), widow of the late Benjamin Mitchel Webber, of Avondale, in the district of Bedford (hereinafter styled the testatrix) under letters of administration, dated 5th July, 1902.

2. The testatrix executed a certain last will and testament on 26th October, 1901, and by virtue of the reservatory clause therein contained, added a codicil thereto dated 7th April, 1893, in which codicil the petitioners were appointed executors testamentary, both of which will and testament have been duly proved.

3. Subsequently, to wit on the 30th June, 1894, the testatrix made another will, copy of which is hereunto annexed (marked A), but inasmuch as she did not sign such will on each leaf, as is required by Sec. 3 of Ord. 15 of 1845, such will is invalid; which will was also filed with the Master of this Honourable Court, together with the will of the 26th October, 1891, referred to in paragraph 2 hereof.

4. Subsequently, to wit on the 16th June, 1899, the testatrix executed a further codicil, which has also been lodged with the Master of this Honourable Court, copy of which is hereunto annexed, marked B.

5. This last-named codicil was made under and by virtue of the reservatory clause in a certain last will and testament dated the 30th of June, 1890, and bears the signature of the testatrix and both witnesses on each leaf and at the foot thereof.

6. The petitioners have made search for a will dated 30th June, 1890, but have not found the same, or any record or trace of a will being executed by the testatrix on that date; and do not believe that a will was ever executed by the testatrix on such date.

7. The petitioners believe that the said codicil (i.e., of 16th June, 1899) was made by virtue of the reservatory clause con-

tained in the invalid will of 30th June, 1894, and that the date 30th June, 1890, was a clerical error in the codicil on the part of the person who drew such codicil.

8. Inasmuch as no will bearing date 30th June, 1890, can be found, and the said will of 30th June, 1894, is invalid, the said Master will not recognise the validity of the said codicil of 16th June, 1899, without having a decision of this Honourable Court.

Wherefore your petitioners pray: That your lordships will be pleased to grant an order declaring the validity of the said codicil of 16th June, 1899, and authorising your petitioners to perform and carry out the wishes of the testatrix therein contained, and further that the costs of this application be paid out of the estate.

The usual verifying affidavit was attached.

The terms of the wills and codicil are not material to the merits of this application.

Mr. Buchanan (for applicants): There was a codicil to the invalid will of June 30, 1894. The codicil to the will of June 30, 1894, was in almost the same terms of the codicil of July 23, 1897. The method of investment provided for in the codicil to the will of June 30, 1894, is almost identical with that directed by the codicil to the will of October 26, 1891. That will was valid. The will of June 30, 1894, was invalid because it was not duly attested; but these two wills were in almost identical terms. The codicil we now wish to prove alters the dispositions of these wills materially, (1) in respect of the pre-legacies; (2) with regard to the investments.

[De Villiers, C.J.: The difficulty is that the codicil purports to be made in virtue of the reservatory clause in an invalid will.]

But see *Van Reenen v. Board of Executors* (Buch. 1876, 44), which shows that a validly-executed codicil does not fall with an invalid will. See also *Voet* (29, 7, 5).

[De Villiers, C.J.: Does he say that this is the case if the codicil is made in virtue of a reservatory clause in the invalid will?]

I do not know that he exactly says that, but he lays down very clearly the distinction between our law and the civil law as to the dependence of a codicil on a will. See also *Voet* (28, 3, *passim*), but

specially 29, 7, 5, where he says distinctly "that codicils do not fail on the failure of the will. There he is speaking generally and includes codicils made under the reservatory clause. This codicil can stand by itself. See also *Voet* (29, 7, 1). In this case the provisions of the codicil can be carried out without reference to the imperfect will. The will of October 26, 1891, was not the last will of the testatrix. This codicil expresses that last will.

[De Villiers, C.J.: The codicil cannot incorporate the will of 30th June, 1894, because there is no such will in existence. An invalid will is no will.]

Could not the imperfect will be regarded as a codicil?

[De Villiers, C.J.: What is your English case on this point?]

Sheldon v. Sheldon (1, Robert, 81), cited by *Williams on Executors* (p. 87, vol. 1). See also note (e) at p. 87 of *Williams*. In English law parol evidence would be admissible to prove the will of June 30, 1894.

[De Villiers, C.J.: But the codicil refers to a will of June 30th, 1890. Can a codicil be upheld in English law if the will fails?]

Yes, under certain circumstances; see *Encyclopedia of the Laws of England* (article "codicil," vol. 3, p. 64), *Gardiner v. Courthope* (12, Prob., 14).

[De Villiers, C.J.: That case does not come up to the point. If a will is invalid *ipso jure*, must not the codicil also be invalid *ipso jure*?]

I submit not, if there is no real will then the codicil must stand alone, as the case last cited shows. As to the doctrine of "incorporation" in English law, see *In Bonis Stedham* (6, Prob., 205).

[De Villiers, C.J.: Have you *Black v. Jobling*? (1, Prob. and Matrim, 1311).]

I believe it is also reported in 21, L.T., Rep., N.S., p. 298. See also *In Bonis Clements* (1892, Prob., 254).

De Villiers, C. J.: On the 16th June, 1899, the testatrix executed a testamentary document, which purports to be "under and by virtue of the reservatory clause in my last will and testament, dated the 30th June, 1890." She says therein: "I hereby declare the following to be a codicil to my said last will and testament," and she then proceeds to make certain dispositions. Now, this codicil is in every respect executed as a testamentary disposition should be executed.

It is properly signed on the different leaves and properly attested. Two questions arise, firstly whether the will referred to in this codicil can be incorporated with the codicil, and secondly, if it cannot be so incorporated, whether the codicil should stand by itself, and ought to be accepted by the Master. As to the incorporation of the will there is no such will in existence as a will dated the 30th June, 1890, and therefore it becomes unnecessary to decide whether the English law which permits such an incorporation is applicable in the present case. The point was raised in the case of *Van Reenen v. Board of Executors* (6, Buch. 44), but did not enter into the decision of that case. The difficulty in regard to our own law is that Ordinance 15 of 1845 requires—differing in this respect from the English Wills Act—that where the instrument is written upon more leaves than one, it must be signed and attested upon at least one side of every leaf. If the sole requirement had been that it should be signed at the foot or end thereof it might have been plausibly argued that after its incorporation with the codicil, which is signed and attested at the foot or end thereof, the will might be also regarded as so signed and attested, but no amount of subtlety would shew that the instrument as a whole conforms to the further provisions of our Ordinance. This question does not, however, really arise in the present case because there is no will in existence of the 30th June, 1890, to be incorporated with this codicil. Now the English authorities are clear that in order to incorporate a will with a codicil, the will must be clearly identified as the will which the codicil intended to incorporate. In the present case it is impossible to so identify it. It is quite possible that the testatrix may have executed a will on the 30th June, 1890. There is nothing to show the contrary, and therefore there would be great difficulty in identifying the will of 1894 as the will which the testatrix had intended to incorporate. Then arises the second question as to whether this codicil should be accepted by the Master. It appears that there is a will in existence executed in 1891, and duly executed, and a codicil to that will, also duly executed. These, I understand, have been admitted to probate, and the applicants now wish to add this codicil to which I have just referred.

It is possible to imagine cases in which it would clearly militate against the testators intentions by giving effect to a codicil without giving effect to a will to which it purports to be a supplement, but the present is not such a case. It is supposed that the will to which this codicil refers is the invalid one of 30 June, 1894, but if that will falls to the ground there is no reason why the codicil should not stand. In point of fact there is no such will as that of 30 June, 1890 to which the codicil in terms refers. The application will therefore be granted in terms of the prayer of the petition.

[Applicant's Attorneys: Innes & Hutton.]

MCDONALD V. STANGU. { 1902.
{ Sept. 16th.

Appeal—Costs—Resident Magistrate's Court—Judicial discretion.

In an action in a Transkeian Magistrate's Court the plaintiff claimed damages for injury done by a carrier to his cart and harness, and the defendant tendered £7. The Magistrate awarded £23 as damages, but, although he found no fault with the plaintiff's claim as being excessive or with his conduct as being in other respects improper, he ordered that each party should pay his own costs. Held, that this was not a judicial exercise of the magistrate's discretion as to costs.

This was an appeal from a judgment of the Resident Magistrate of Mount Fletcher.

From the evidence taken in the Court below it appeared that both parties lived at Fairview, in the district of Mount Fletcher. The appellant was plaintiff and respondent defendant in an action for damages to a certain cart, which plaintiff had bought at Queen's Town. He had paid £60 for the cart and £15 for certain harness. His agent sent the cart and harness to Indwe, and defendant undertook to bring them from there to Fairview for £2, and to de-

liver them in the same good order in which he received them. On the way he had a collision, and the cart was damaged. He tendered delivery of the cart in its damaged condition, but did not tender the harness. Plaintiff refused to accept delivery except on payment of £30 damages. No damages were tendered at that time, and defendant was brought into Court by the plaintiff, who sued him for delivery of the articles and £30 damages, or for the original value of the cart and harness, and cost of transport from Queen's Town to Fairview. Defendant's attorney pleaded that defendant had tendered £7, but there was no evidence at all of any tender; defendant simply said he was willing to pay reasonable damages. Plaintiff said it would take £20 to repair the cart; another witness deposed that the repairs would cost from £14 to £15 if they could be done at Fairview. Another witness—called for the defendant—said the damage could be repaired for £8, but they all agreed that the cart could not be repaired at Fairview, and it would cost £8 to send the cart to Queen's Town and back. The Magistrate inspected the cart, and gave judgment for £7 damages, and for £16, for the harness not delivered, and he made plaintiff pay his own costs. Against that judgment plaintiff now appealed.

The Magistrate, in his reasons for his judgment, said: This is a case where McDonald, the plaintiff, sues one Plaatje, a carrier, for damages to a certain cart, and also for a set of harness which was loaded on Plaatje's wagon, but not delivered to the plaintiff. As far as the cart is concerned the Court personally inspected same, and after careful examination, fixed the damages at £7 sterling. The Court did not feel justified in ordering the defendant to pay the costs of carriage to and from Queen's Town, and in this was guided by the case of *Stent v. Gibson Brothers*, (5 High Court reports, page 148.) Defendant was quite willing to abide by result of wire from the agents at Indwe as to the loading of the harness, and as this was against him judgment was entered for the plaintiff for the £16 value of harness. Costs were ordered to be paid by each party, for the reason that the Court considered that the defendant was unnecessarily brought into Court, and has also

tendered £7 in settlement for the damages.

Mr. H. Jones (for appellant). The Magistrate's reasons are not supported by the evidence: not even by that of defendant's witnesses. They estimate the damage to the cart at £8 at least. Then the cart had to be sent to Queen's Town for repairs, and the expense of sending it ought to be taken into account. The case of *Stent v. Gibson Brothers* relied on by the Magistrate is not in point. As to costs, the Magistrate did not exercise a judicial discretion. The costs should have followed the event. The Court allowed the appeal, and ordered judgment to be entered in the Court below for plaintiff for £26, with costs in the Supreme Court and in the Court below.

De Villiers, C.J.: The Court is loth to interfere with the decisions of magistrates upon questions of fact, but in the present case the defendant's own witnesses state that it would cost £8 or £10 to repair the cart, while the plaintiff's witnesses speak of £15 to £30 as being the sum such repairs would cost. Taking it that judgment should have been given for £10, which is the highest sum mentioned by the defendant's witnesses, costs certainly would have had to follow the result. Judgment was given for £7 and costs were not given plaintiff, because it was said that there had been a tender of £7, but if this Court orders £10 to be paid then, of course, costs will follow the result. Moreover, the magistrate ordered the value of the harness to be paid, viz., £16, and although there had been a tender of £7 only the order was that each party should pay his own costs. That does not appear to me to have been a judicial exercise of the Magistrate's discretion as to costs. The plaintiff had to come into Court to obtain his money, and as there was no improper conduct on his part and no sufficient tender on the part of the defendant I consider that even upon the Magistrate's judgment costs ought to have been awarded to the plaintiff. In my opinion the judgment ought to be amended by awarding the plaintiff £10 instead of £7. As to the £4 which is claimed upon the carriage or freight for sending the cart to Queen's Town, and the £4 for bringing it back, I am not satisfied that it would be really necessary to send the cart to Queen's Town to have these repairs made. I

think they might have been executed at Fairville. Therefore I am inclined to think that the cost of the freight to and from Queen's Town should not be allowed, but that as we should award £10 for the damages to the cart, as well as £16 for the harness, the judgment should be altered to one for

the plaintiff for £26 instead of £23. The appeal will therefore be allowed, and judgment entered for the plaintiff for £26 with costs in this Court and in the Court below.

[Appellant's Attorneys: Findlay & Tait.
Respondent in default].



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Chief Justice (the Right
Hon. Sir J. H. DE VILLIERS, P.C.,
K.C.M.G., LL.D.)]

ADMISSIONS. { 1902.
Oct. 13th.

Mr. Benjamin moved for the admission of Gustave Hartog as an advocate.

Order granted and leave given for the oath to be taken before the Registrar of the High Court of Griqualand West.

Mr. C. de Villiers moved for the admission of Tredwell John Houghton Gray as an advocate.

Order granted and leave given for the oath to be taken before the Resident Magistrate of Upington.

Mr. Buchanan moved for the admission of Laurie McLeod Ross as an attorney and notary public.

Order granted and leave given for the oaths to be taken before the Resident Magistrate of East London.

Mr. Benjamin moved for the admission of Edgar James Boyes as an attorney and conveyancer.

Order granted and the oaths administered.

Mr. Close moved for the admission of James Jacob Wardhaugh as an attorney and notary. There was broken service for about four months, but applicant had since completed his service.

Order granted.

Mr. J. E. R. de Villiers moved for the admission of Daniel Wilhelm de Klerk as an attorney and notary. Counsel mentioned that the applicant had been

disfranchised for a period of five years. He merely mentioned that because it was a new circumstance, and not because he thought it would be any impediment to the admission of the applicant.

De Villiers, C.J.: But why was he disfranchised? Surely it would only be because he was convicted of high treason.

Counsel read applicant's affidavit, in which the applicant said that at the time of the Republican invasion of the district of Aliwal North he was a poor man, being only a salaried clerk, and was not able to move into some other place not occupied by the Republicans, and he was accordingly commandeered. Then he was arrested, and kept in gaol for four months and thereafter sent on parole for six months. Subsequently, in May, 1901, he was summoned to appear before the treason court at Dordrecht, and as he did not appear he was sentenced to the penalty of five years' disfranchisement.

[De Villiers, C.J.: If applicant had already been admitted as an attorney and notary, and an application had been made to the Court for his suspension, the Court would have granted the order. Therefore, how can a person in his position now apply as a matter of right to be admitted?]

Counsel said that the Law Society had had notice of this application, and they were not opposing it.

[De Villiers, C.J.: It seems to be somewhat inconsistent. In the case of persons already on the roll, who had placed themselves in a similar position to the present applicant, there had been applications made to strike them off the roll, and the applications had been granted.]

Counsel said that applicant need not necessarily have been sentenced for high treason.

[De Villiers, C.J.: He could not have been disfranchised unless he committed high treason.]

Counsel said the Act mentioned high treason or any crime of a political character.

[De Villiers, C.J.: Before giving judgment I will consider the matter and consult my colleagues about it.]

Mr. Alexander moved for the admission of Cyril Kershaw Barry as an attorney and notary.

Order granted.

PROVISIONAL ROLL.

S.A. MILLING CO. V. GRAND (1902.
JUNCTION RAILWAYS. (Oct. 13th.

This was an application to have a provisional order for the sequestration of defendants' estate made final.

Mr. Buchanan appeared for the defendants, and asked that the matter be postponed until November 30. There were twelve cases in which provisional sentence for various amounts was asked against the defendants, and there were also eight illiquid cases on the roll in which they were defendants, but he understood that in nearly all of these the plaintiffs had signed a paper agreeing to the postponement and in the other cases the parties would not proceed at present.

Mr. Benjamin appeared for the plaintiffs, the S.A. Milling Co., and said that they were prepared to allow the matter to stand over until November 30, as it was understood that the defendants had now instituted an action against the Colonial Government, which would come on during the November term.

The postponement until November 30 was allowed, the other cases also to stand over until that time.

GARLICK V. HERSER.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant. On September 12 an application for a decree of civil imprisonment was made against the above defendant and one Saphir. The case against Herser was then ordered to stand over, but the

Court granted a decree of civil imprisonment against Saphir with a stay of execution pending payment of certain instalments. Counsel now moved for a decree of civil imprisonment against Herser.

Mr. Close appeared for the defendant, and read an affidavit in which Herser said he had had no benefit of the goods for which judgment had been obtained. He further stated that he had no means to satisfy the debt in whole or in part. Being an illiterate man, he was unable to earn much. At present he got only £2 per month as a wagon-driver.

Two affidavits were filed, alleging that recently defendant had come down to town to sell certain horses which belonged to him, and also that he had admitted to a representative of the plaintiff that he owned a pair of horses and a cart which he was driving at Paarl. It was alleged that defendant then gave his name as Cohen, but on being taxed with the fact that his name was Herser he admitted that.

The Court granted a decree of civil imprisonment, but suspended execution pending payment of the debt by instalments of 5s. per month; the first instalment to be paid on November 1.

HAVANGA AND DICKSON V. TURCK..

Mr. Close moved for provisional sentence on a judgment of the Resident Magistrate's Court, Paarl, for £127 6s., with interest and taxed costs. To the writ of execution issued, there had been a return of *nulla bona* made, and a decree of civil imprisonment was now asked for.

The defendant appeared in person, and, going into the witness-box, said that at present he had no means of satisfying the debt, as he had not yet received the money for some horses, harness, and a wagon which the military had commandeered from him. The horses and wagon had been commandeered at Matjesfontein. He had sent in his claim, and had received a reply to the effect that it would be submitted to the War Losses Compensation Commission. He had no other property.

In reply to Mr. Close, defendant said that he was now at Dikkops Kraal, where he was making a garden. He had

made nothing out of his garden yet, but the crops were all coming on, and would be ready in January next. He valued the horses and wagon which had been commandeered at over £100 altogether.

Further questioned by the Court, the defendant said that he had at present ten goats.

De Villiers, C.J.: I do not think this is a case for civil imprisonment. The unfortunate man has had all his horses, harness and cart commandeered, and has not yet been paid for them. There is no wilfulness in his not paying the debt, and the plaintiffs have the remedy in their own hands, as they could apply for the attachment of the money due to defendant for the horses, etc.

Mr. Close asked if the Court would grant a special order of attachment now, as that would save expense. The difficulty in the case could be met by giving an order attaching any moneys belonging to defendant in the hands of the Imperial or Colonial Governments.

De Villiers, C.J., said it was so very vague at present that he could not make any order. They only knew that the military had taken these horses, etc., but they did not recognise their liability, because they referred defendant to the War Losses Compensation Commission.

No order was made.

SILBERBAUER V. WHYTE.

Mr. Close moved for provisional sentence for £27 6s., due on a promissory note.

Provisional sentence granted as prayed.

FLETCHER V. LITTON.

Mr. Buchanan appeared for the plaintiff in the above matter.

Mr. Benjamin appeared for the respondent, and asked that the matter be allowed to stand over until the end of the list, as some papers connected with the case had just been put into his hands.

Case allowed to stand over. (*Vide* p. 804).

DE GREILLE, HOUDRET AND CO. V. STANWAY.

Mr. Buchanan moved for the final sequestration of defendant's estate as insolvent.

The defendant appeared in person, and raised some objections as to the amount alleged to be due by him to applicants. Eventually, however, he agreed to the order being made final, on the understanding that plaintiffs would undertake that there should be a fair investigation of the business.

Mr. Buchanan said that the trustee who would be appointed would see to that.

Order made final as prayed

PETERS V. JONES

Mr. Close moved for a decree of civil imprisonment against the defendant on a Magistrate's Court judgment for £20, with £2 5s. 1d. costs. When an application for a decree of civil imprisonment was made in the Magistrate's Court, the defendant offered to pay the debt by instalments of 7s. per month, and on this understanding the decree was suspended. Defendant, however, immediately thereafter removed to another district, and had not paid the instalments due.

Mr. Buchanan appeared for the defendant, and read an affidavit stating that the defendant was employed as a clerk in the Army Service Corps, and was paid at the rate of 10s. per day. Off the £15 a month he thus earned he had to pay £5 a month as instalments on debts due to other creditors, and off the remaining £9 10s. a month he had to support himself, his wife, and two young children.

The Court granted a decree of civil imprisonment as prayed, but suspended execution pending payment of the debt by instalments at the rate of £2 per month; the first instalment to be paid on November 1. As there had been some tender made by the defendant, he was ordered to pay costs only, as if there had been no opposition. Leave was also given the plaintiff to apply again in case it could be shown that defendant was in a position to pay more than £2 per month.

HARRIS V. DU TOIT. { 1902. Oct. 13th.

Mr. J. E. R. de Villiers moved for provisional sentence for £276 5s., due on a mortgage bond, with interest from 31st January, 1899. The bond was ceded

to plaintiff on April 13, 1901. It had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Mr. Schreiner appeared for the defendant, who, in an affidavit, repudiated his signature to the mortgage bond. He had affixed his signature to certain papers in his father's estate, but did not understand that among them was the power of attorney to pass this bond and binding him to take over a certain bond already in existence against his father's estate. He also pleaded that at the time he was minor, and could not bind himself. He further stated that he had never paid interest upon the alleged bond, but had repudiated the genuineness of his signature, and plaintiff knew that when he took cession of the bond.

Replying affidavits were read to show that defendant was well aware of what he was doing when he entered into the transaction, and further, it was stated that he was married at the time, and therefore, although he was not then of full age, by the law of the Colony he was not a minor.

Mr. Schreiner was heard in argument, and submitted that in any case interest could only be claimed from the date on which the bond was ceded to plaintiff.

De Villiers, C.J.: A point raised in this case is a very important one, but at this stage I am not prepared to decide it without further argument. The Court has considerable latitude in granting provisional sentence, but in the present case there seem to me to be reasons why provisional sentence should not be given for interest dating further back than the date of cession. Circumstances are disclosed in the case which, while not justifying the Court in refusing provisional sentence altogether, are sufficient to justify the Court in not granting provisional sentence for interest further back than the 13th April, 1901. That will not prevent the plaintiff from going into the principal case and claiming the arrear interest. A stay of execution will be granted for three months, so as to enable the defendant meanwhile to file his plea and raise the defence which he wishes to raise; but I would strongly recommend the defendant to raise the money for the purpose of paying this capital and interest from 13th April,

1901, rather than go into the further case, because I think that on the merits of this case he has absolutely no defence. He was of age at the time by marriage, and it would be an extremely difficult thing, and would require extraordinary circumstances to induce any court to refuse to give judgment upon a bond based upon a power of attorney made under the circumstances disclosed here. The Court will therefore grant provisional sentence for the capital amount and for interest from April 13, 1901, with a stay of execution for three months from this date. Then if the plaintiff wishes to sue for all the arrear interest, he can go into the principal case. The defendant can then file his plea, and the case will be fully heard. I do not decide at present as to whether or not such interest is payable, but I think there are grounds at present for refusing provisional sentence for interest prior to April 13, 1901.

[Defendant's Attorneys, Walker and Jacobsen.]

ESTATE OF THE LATE EATON V. BATHGATE.

Mr. P. S. Jones moved for provisional sentence for £1,400, due on a mortgage bond, for £1 16s., insurance paid, and also for interest from July 1, 1901, with costs. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and property declared executable.

ROBERTSON AND SONS V. DE VIGNE.

Mr. De Villiers moved that the provisional order of sequestration granted on September 17 last be discharged, an arrangement having been come to with the creditors.

Order granted as prayed.

MACINTYRE V. MACINTYRE.

Mr. Alexander moved for a decree of civil imprisonment against the defendant on a judgment for £23 7s. 8d., with costs. Defendant had made an offer to pay the debt by instalments of £4 per month, and plaintiff was willing that execution of the decree of civil imprisonment should be suspended on those terms; the first payment to be made on October 20.

A decree of civil imprisonment was granted, and execution stayed pending payment of the debt by instalments of £4 per month; first payment to be made on October 20.

HAARHOFF AND MICHAU V. MARITZ.

Mr. Alexander moved for provisional sentence for £1,200, less £200 paid on account, due on a mortgage bond, with interest at the rate of 6 per cent. from February 11, 1898. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and property declared executable.

JAGGER AND OTHERS V. COHEN.

Mr. Benjamin moved that a provisional order for the sequestration of defendant's estate be made final.

Order made final as prayed.

LAING V. BARRETT.

Mr. Buchanan moved for provisional sentence for £250, due on a promissory note made on March 1, 1898, with interest at the rate of 20 per cent. as stipulated in the promissory note.

Provisional sentence granted as prayed.

HARSANT V. MANCHESTER.

Mr. P. S. Jones moved for provisional sentence for £1,000, due on a mortgage bond, with interest at the rate of 6 per cent. from November 1, 1901. The bond had become due by the reason of the non-payment of the interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

LOTZ V. KHAN.

Mr. J. E. R. de Villiers moved for provisional sentence for £1,260, due upon certain conditions of sale.

Provisional sentence granted.

LANDSBERG V. DODDS.

Mr. Close moved for provisional sentence for £287 10s., being the interest due on a certain mortgage bond.

Provisional sentence granted.

GLIDDON AND MCINDOE V. JAMALDIEN.

Mr. Close moved for provisional sentence for £300, due by the expiry of the due date of a certain mortgage bond. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

HEYDENRYCH V. JAMALDIEN.

Mr. Buchanan moved for provisional sentence for £220, due on two promissory notes, and also for two sums of £20 and £6 5s. respectively, due on two good-fors.

Provisional sentence granted.

MOSS V. WAGENAAR.

Mr. P. S. Jones moved for provisional sentence on £49 2s., due on a promissory note, and also asked that certain property hypothecated under a bond be declared executable for the purpose of this debt.

The Chief Justice said that the amount due was very small, and plaintiff might have his claim satisfied by taking execution against the defendant's personal estate.

Provisional sentence granted and the property declared executable, but execution so far as the land is concerned not to issue until two months after this date.

GARLICK V. WHITE.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant on a judgment obtained in the Wynberg Resident Magistrate's Court. The amount had been reduced by payments on account to £26.

Order granted as prayed

AURET V. CAVADATKIS.

Mr. Buchanan moved for provisional sentence for £45 4s. 3d., with interest *a tempore morae* and costs of suit, on an I O U signed by two persons, of whom the defendant was one. Counsel submitted that by an I O U the persons undertook jointly and severally to meet the debt.

[De Villiers, C.J.: The general principle would be that each would be liable for his share of the debt. To say "I O U" when the document was signed

1. A true and full account from the defendant of his administration of the property of certain 26 people resident at Stellenbosch, styling themselves the "de Klauwklip Garden Company," of whom the plaintiff is one, and for whom the defendant acted as trustee in the purchase of certain landed property situated at Stellenbosch, and of all moneys and securities received by him, and of all moneys disbursed by him as agent for the said 26 persons, supported by proper vouchers; to debate such account before the Court, and to pay over to him (the plaintiff) and his co-owners such sum of money as shall be found to be due by the defendant to them, with interest *a tempore moræ*, and also that the defendant

shall be ordered to give up all documents and papers belonging to the 26 persons.

2. That the said defendant be ordered to amend a certain deed of sale executed by him on March 19, 1902, with one Francois N. Schonken, as agent for the widow of Christiaan J. Ackerman, by it being made to appear on the face thereof that he, the said defendant, acted as trustee for the said Company.

3. Alternative relief.

4. Costs of suit.

Defendant having failed to enter an appearance, the Court, on the motion of Mr. Benjamin, granted judgment as prayed with costs, and ordered the account to be rendered within two months.

[Plaintiff's Attorneys: Faure and Zietsman.]

ENGELS V. ENGELS AND OTHERS. { 1902.
Oct. 13th.

This was a motion under 329d for the cancellation of a certain deed of transfer and for the ejectment of certain persons.

The summons called upon Willem M. Engels and certain seven other co-defendants to answer William Engels, of Rondebosch, in an action wherein the defendant claimed:—

1. That a certain deed of transfer, bearing date May 11, 1888, to and in favour of the first six defendants, of a certain piece of land situate in the Cape District, being a portion of a certain piece of perpetual quitrent land, remainder of the property marked No. 3 of the subdivided estate "Haredale," transferred to the late Lootje Peters on October 18, 1871, measuring 199 square roods and 76 square feet, be cancelled and set aside on the ground that such transfer was fraudulently and falsely obtained and passed, and that the last defendant, in her capacity as executrix in the estate of the late Maria Engels, be ordered to forthwith give transfer and conveyance of the said piece of ground to the plaintiff, by whom the same was legally purchased.

2. That the said defendants, or such or any of them as may be occupying the said premises, or any person or persons occupying the same by or through them, may be forthwith ejected from the said ground and the plaintiff placed in possession thereof.

3. Payment of the sum of £250 as and for damages suffered by the plaintiff from being precluded to occupy the said premises.

4. Alternative relief.

5. Costs of suit.

The defendants having failed to enter appearance, the Court, on the motion of Mr. Alexander, counsel for the plaintiff, granted judgment as prayed, with costs.

[Plaintiff's Attorney: J. J. Michau.]

ILLIQUID ROLL.

PETERSEN V. HOOLE. { 1902.
Oct. 13th.

Mr. Buchanan moved, under Rule 329d, for judgment for £17 9s. 3d., being balance of account for goods sold and delivered.

Judgment granted as prayed.

DE BEERS V. HEYNS.

Mr. Benjamin moved, under Rule 329d, for judgment for £328 15s. 6d., goods sold and delivered.

Judgment granted as prayed.

MACKIE, DUNN AND CO. V. FARQUHAR AND OTHERS.

Mr. Benjamin moved, under Rule 329d, for judgment for a sum of £1,800, being the value of certain goods stolen by defendants, of which theft defendants had already been convicted.

Mr. Howell Jones appeared for the defendants, and put in an affidavit, in which J. P. Farquhar acknowledged himself indebted for the whole amount, while the other two defendants acknowledged themselves indebted for £850 each.

Order granted in terms of the paper put in.

DALLY V. COCHRANE AND CHERRY.

Mr. Rainsford moved, under Rule 319, for judgment in default of plea.

Judgment granted as prayed.

TAYLOR AND CO. V. BARRY.

Mr. Benjamin moved, under Rule 329d, for judgment for £173, for meat supplied.

The defendant appeared in person, and denied that he had received the meat for his own benefit, the meat being ordered through a Mr. Hudson, to whom the business belonged.

The Court granted judgment as prayed.

SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSION.

{ 1902.
Oct. 14th.

Mr. Benjamin moved for the admission of James William Robertson as an attorney, notary public, and conveyancer.

Order granted and leave obtained for the oaths to be taken before the Resident Magistrate of King William's Town.

PROVISIONAL ROLL.

FLETCHER V. LITTON.

Mr. Buchanan moved for confirmation of a writ of arrest and for provisional sentence upon a certain document. In his affidavit, the plaintiff, Moses Fletcher, alleged that Litton was indebted to him in the sum of £66 on a certain I.O.U. The arrest had been granted upon the statements of plaintiffs and others that the defendant was about to leave the country.

Mr. Benjamin appeared for the defendant, and said that he did not oppose the confirmation of the writ of arrest, the defendant having already given security for the debt, but he opposed the granting of provisional sentence. An affidavit made by the defendant was read, in which he alleged that he entered into a partnership with Fletcher in connection with the purchase of certain bricks. The I.O.U. was given for the bricks, and Fletcher was indebted in half of the amount. Defendant also alleged that plaintiff owed him other moneys. Counsel accordingly asked that provisional sentence be refused, and plaintiff directed to go into the principal case, when defendant could bring forward his counter-claim.

An answering affidavit by Fletcher denied that there was any partnership in question, and further stated that defendant owed him a large sum of money, not yet wholly due.

De Villiers, C.J.: There seems a doubt as to whether there is a counter-claim at all. At all events, the plaintiff has produced this liquid document, and provisional sentence will now be given, leaving it for the defendant to go into the principal case.

ILLIQUID ROLL.

TUDOR V. LEAR.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £71 10s. 11d., money paid to defendant on behalf of plaintiff, which money defendant failed to account for.

Judgment as prayed.

ROBERTSON V. MARITZ.

Mr. Benjamin moved, under Rule 329d, for judgment for £50, money lent and advanced, less £4 paid on account.

Judgment granted as prayed.

W. AND G. SCOTT V. SANDERS. { 1902. Oct. 14th.

This was an application for judgment under Rule 329d for £722 5s. 6d., goods sold and delivered. The defendant, William K. Sanders, of Woodstock, was called upon by the summons to answer George Adie Scott, carrying on business as W. G. Scott, in an action for the above sum for goods sold and delivered to the firm of Etheridge and Co., which had since been sequestrated as insolvent, and in which the defendant was a partner. There was also a claim for interest *tempore moræ* and costs of suit.

Defendant having failed to enter an appearance, the Court, on the application of Mr. P. S. Jones, granted judgment as prayed.

[Plaintiff's Attorneys: Reid and Nephew.]

SCHUTZE AND CO. V. MANSFORD.

Mr. P. S. Jones moved for judgment, under Rule 329d, for £21 1s. 3d., for work done and materials supplied, less £9 paid on account.

Judgment granted as prayed.

REVIEW CASES.

REX. V. VAN DER MERWE. { 1902. Oct. 14th.

Martial law — R. M. Court —
Secondary evidence.

The Court quashed a conviction for contravening Martial Law Regulations obtained in a Resident Magistrate's Court on

the ground that the offence of which the accused was convicted was not known to our law. As the military authorities neglected or refused to produce the record, the Court admitted secondary evidence thereof.

This was an application for review by Andries Petrus van der Merwe under Rule 190.

Mr. Benjamin appeared for the applicant Van der Merwe.

Mr. McGregor appeared for the Crown, and asked that the matter be allowed to stand over.

[De Villiers, C.J.: There is no denial of applicant's allegations, and no postponement can be granted.

An affidavit by Mr. Vos was read, showing that the Resident Magistrate of Colesberg, before whom Van der Merwe had been tried for contravention of a martial law regulation, had forwarded all the records in martial law cases to the administrator of martial law and that such records were now in the possession of the military authorities. An application had been made by the Attorney-General's Department to the officer commanding the forces here for the production of the record for the purposes of this case, and a reply had been received on October 3 from the General commanding stating that the documents were not in his possession, but he had sent for them, and if he found that their production was not prejudicial to the interests of the public service he would forward them to the Attorney-General.

Mr. Benjamin (for the applicant): The accused was not guilty of any offence against our law. I submit that even on the report of the Magistrate the sentence should be quashed in accordance with the decision of the Court in similar recent cases.

Mr. McGregor (for the Attorney-General) did not ask to be heard in reply.

[De Villiers, C.J.: If the military authorities do not choose to give up the original documents, then the Court must take secondary evidence as to the contents of those documents.]

Mr. McGregor said that he could only leave the matter in the hands of the Court. Counsel said that in view of the

position he would not have appeared at all, but that it was intended to apply to the Privy Council for leave to appeal.

[De Villiers, C.J.: But surely the application is always made in the first place to the Supreme Court for leave to appeal.]

Mr. McGregor said that he would represent to the Department that as a matter of courtesy they should apply first to the Supreme Court for leave to appeal.

[De Villiers, C.J.: It is a matter of practice; a matter of courtesy is a very minor matter.]

The Court decided to hear secondary evidence as to the contents of record.

A copy of the record was attached to the affidavit of applicant's Colesberg attorney. Mr. Benjamin read from this, and submitted that it was clearly shown that the charge against Van der Merwe of contravening Martial Law Regulation No. 22 had been preferred in the Magistrate's Court and before the magistrate sitting as such. Counsel submitted that as a contravention of the martial regulation disclosed no offence known to civil law, this case fell entirely within the scope of the case of Van Reenen previously decided by the Court, and therefore the sentence passed on applicant should be quashed as far as it was a record of the Resident Magistrate's Court.

De Villiers, C.J.: The statement is not denied that this trial came on in a Court of a Resident Magistrate, and although the Magistrate, after describing himself as Magistrate, added the letters "D.A.M.L.," the Court has already decided in previous cases that the mere fact that these letters were added does not affect the fact that if the trial took place in the court of a resident magistrate, as such it was wholly illegal and that the proceedings should be quashed. The same order will therefore be made in this case as in previous cases.

[Applicant's Attorneys: Michau and De Villiers.]

REX. V. WALTERS.

Martial Law — R. M. Court —
Gross irregularity.

This was an application for review under Rule 190.

The applicant had been tried at Malmesbury, before the A.R.M., on March

PEDERSON V. NASH, N.O. 1902.
(Oct. 14th.
Costs between attorney and client.

This was an application for costs as between attorney and client. The respondent had instituted a certain action against the applicant but subsequently abandoned it. Applicant now asked for his costs as between attorney and client on the ground that respondent's action was vexatious. A tender of ordinary costs had been made on September 20, 1902.

The affidavit of Edward J. Moore, one of the applicant's attorneys, stated that on the 19th September, 1902, the respondent's attorney served upon his firm a notice that application would be made to the Court on the 13th October, 1902, for costs against the applicant. That on September 20 deponent's firm wrote to the respondent's attorney intimating that the matter had been withdrawn, and asking for his bill of costs. That on October 4, 1902, respondent's attorney sent in his bill of costs with a letter announcing that respondent would consent to a withdrawal of the matter only on condition that applicant should pay all costs, including costs between attorney and client. On October 7, deponent's firm wrote to respondent's attorney tendering to attend taxation of his costs upon service of the usual notice, and informing him that any costs incurred after date of tender must be borne by respondent. No answer was received to this letter, but on October 11, 1902, a clerk from the office of respondent's attorney called upon deponent and asked if the applicant was prepared to pay costs between attorney and client? Deponent replied in the negative. Deponent was not aware that the respondent was proceeding with his application for costs until he (deponent) saw the matter mentioned on the Motion Roll of October 13.

The affidavit of David Tennant, jun. (respondent's attorney), stated that on being informed that the applicant intended withdrawing further proceedings he wrote to applicant's attorneys calling their attention to the fact that his client consented to a withdrawal only on condition that all costs, including those between attorney and client were paid by the applicant, as he maintained that applicant had put him to needless expense and that applicant's case was vexatious. This latter allegation deponent denied.

Mr. Alexander (for the petitioner): It would seem that there is some misunderstanding as to what has been withdrawn.

[De Villiers, C.J.: Where is the bill of costs?]

It has not been taxed.

[De Villiers, C.J.: Where is the notice of motion?]

It was filed on September 19. We gave notice of motion, and it was for the respondent to bring his action as to the question of costs between attorney and client. See *Astley v. Jay* (1 P. and D. 460). The whole question is whether the respondent's case was not so vexatious and collusive that we are entitled to costs between attorney and client. Our letter of October 7 was not replied to.

[Mr. Benjamin: I object; that introduces extraneous matter.]

There can be no question that the action was vexatious.

[De Villiers, C.J.: How could it be if it was withdrawn?]

Our contention is that the taxing officer should be able to tax costs between attorney and client as well as between party and party.

[De Villiers, C.J.: It is impossible to say whether the action was vexatious or not without going into the pleadings.]

We do not object to the bill being taxed. All we ask is that the costs between attorney and client should be taxed. Section 34 of Act 20 of 1856 shows that the principle of taxing costs between attorney and client is recognised. The only question is whether the respondent was acting collusively or not. A considerable number of the affidavits filed tend to show that he was. Fictitious claims were proved.

Mr. Benjamin was not called upon.

De Villiers, C.J.: I am not inclined to give costs to the applicant after September 20. There is no doubt that in certain special circumstances the Court would order costs between attorney and client, but here it is very difficult, when the Court has not heard the case to decide whether such special circumstances exist. No doubt in the present case certain charges have been made, but until the trial took place it was impossible to say what reason the plaintiff had for making those charges. The Court will, therefore, grant costs as between parties only up to the date of the tender. Under the special circumstances of this case I am not inclined to

the ground that the offence of which the accused was convicted was not known to our law. As the military authorities neglected or refused to produce the record, the Court admitted secondary evidence thereof.

This was an application for review by Andries Petrus van der Merwe under Rule 190.

Mr. Benjamin appeared for the applicant Van der Merwe.

Mr. McGregor appeared for the Crown, and asked that the matter be allowed to stand over.

[De Villiers, C.J.: There is no denial of applicant's allegations, and no postponement can be granted.

An affidavit by Mr. Vos was read, showing that the Resident Magistrate of Colesberg, before whom Van der Merwe had been tried for contravention of a martial law regulation, had forwarded all the records in martial law cases to the administrator of martial law and that such records were now in the possession of the military authorities. An application had been made by the Attorney-General's Department to the officer commanding the forces here for the production of the record for the purposes of this case, and a reply had been received on October 3 from the General commanding stating that the documents were not in his possession, but he had sent for them, and if he found that their production was not prejudicial to the interests of the public service he would forward them to the Attorney-General.

Mr. Benjamin (for the applicant): The accused was not guilty of any offence against our law. I submit that even on the report of the Magistrate the sentence should be quashed in accordance with the decision of the Court in similar recent cases.

Mr. McGregor (for the Attorney-General) did not ask to be heard in reply.

[De Villiers, C.J.: If the military authorities do not choose to give up the original documents, then the Court must take secondary evidence as to the contents of those documents.]

Mr. McGregor said that he could only leave the matter in the hands of the Court. Counsel said that in view of the

position he would not have appeared at all, but that it was intended to apply to the Privy Council for leave to appeal.

[De Villiers, C.J.: But surely the application is always made in the first place to the Supreme Court for leave to appeal.]

Mr. McGregor said that he would represent to the Department that as a matter of courtesy they should apply first to the Supreme Court for leave to appeal.

[De Villiers, C.J.: It is a matter of practice; a matter of courtesy is a very minor matter.]

The Court decided to hear secondary evidence as to the contents of record.

A copy of the record was attached to the affidavit of applicant's Colesberg attorney. Mr. Benjamin read from this, and submitted that it was clearly shown that the charge against Van der Merwe of contravening Martial Law Regulation No. 22 had been preferred in the Magistrate's Court and before the magistrate sitting as such. Counsel submitted that as a contravention of the martial regulation disclosed no offence known to civil law, this case fell entirely within the scope of the case of Van Reenen previously decided by the Court, and therefore the sentence passed on applicant should be quashed as far as it was a record of the Resident Magistrate's Court.

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Mr. Alexander (for the petitioner): It would seem that there is some misunderstanding as to what has been withdrawn.

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give the costs subsequent to the date of tender, September 20.

[Applicant's Attorneys: W. E. Moore and Son; Respondent's Attorneys: D. Tennant, jun.]

LAW SOCIETY V. SCHOLTZ. { 1902.
Oct. 14th.
Attorney—Suspension—Misconduct.

The Court suspended indefinitely an Attorney and Notary who had been convicted of high treason, although the Court which convicted him had passed only a nominal sentence. Leave was, however, granted to the respondent to apply at some future time to be reinstated.

This was an application for an order suspending the respondent from practice as an attorney and notary on the ground of professional misconduct.

The affidavit of Gideon B. van Zyl, Secretary of the Incorporated Law Society, stated: That the respondent, an attorney and notary of the Supreme Court, had at the Court of the Resident Magistrate of Middleburg, C.C., held on August 19, 1902, pleaded guilty on an indictment of high treason, and was sentenced by the Magistrate to be detained until the rising of the Court.

Mr. Benjamin moved on behalf of the Law Society.

Mr. Schreiner K.C. (for respondent). The respondent is a young man, only 26 years of age. He was charged with high treason before the Resident Magistrate at Middleburg. But where, on the declaration of peace, a man has been tried for treason or rebellion and punished by deprivation of his franchise, he ought not to be punished a second time. It is one thing to judge a man and award a punishment while a rebellion is in active progress and quite another matter to deal with him after peace has been concluded. See *Law Society v. Badenhorst* (12 C.T.R., 124). In *Vermooten's* case the accused was disfranchised, but he was not struck off the rolls.

[Mr. Benjamin: I do not press for having respondent struck off].

Badenhorst's case was decided during the war, so it is by no means on all fours with the present case.

Mr. Benjamin was not heard in reply.

De Villiers, C.J.: I think it would be very difficult in the present case for the Court to fix any period of suspension. In the two previous cases which have been mentioned the respondents have not been struck off the roll, but simply suspended for an indefinite time. In this particular case I don't think I am in a position to state what should be the period of suspension, but in any order that I may give he will have leave to apply to the Court at some future time for a removal of the suspension, in the same way as leave was given to the other two persons mentioned. At some future time the Court will be in a better position to say what should be the period of suspension. It is said that the prisoner has received a very lenient sentence, but at the same time the Court cannot lose sight of the fact that an attorney with his legal knowledge ought to know what the results of rebellion are, and, moreover, an attorney has taken the oath of allegiance, which has not been taken in the case of the ordinary class of rebel. These are circumstances which the Court cannot lose sight of. An order will therefore be granted for the respondent's suspension, with leave to him to apply at some future time to be reinstated. The respondent must also in the meantime hand over his certificates as an attorney and notary to the Registrar of the Court, and must also pay the costs of this application.

[Respondent's Attorneys:

CLIFFORD V. CLIFFORD.

Mr. Buchalan appeared for the applicant in this matter.

Mr. Benjamin, for the respondent, applied for a postponement until November 1, so as to enable certain affidavits to be obtained from England.

Postponement until November 1 allowed.

Postea (November 6): J. W. Clifford, the defendant, was ordered to pay his wife £10 to enable her to defend a divorce suit and make a claim in reconvention.

REX. V. HEYNS.

Mr. Benjamin applied for the release of the petitioner, who was charged with high treason and other crimes, on bail.

Mr. Howel Jones consented to the application on condition that bail be given

PROVISIONAL ROLL.

GARLICK V. SNADEB.

Mr. Buchanan moved for provisional sentence for £123 15s. 3d. for goods sold and delivered

The application was granted.

Ex parte VAN RENSBURG.

Mr. De Waal moved for Mr. Henry J. van Rensburg's admission on bail.

Mr. Nightingale consented on behalf of the Crown on condition that Van Rensburg gave personal security in £2,000, and two sureties of £1,000 each, service to be accepted at Cradock.

Order granted as prayed.

GENERAL MOTIONS.

KOCK V. CAPE DIVISIONAL COUNCIL.
Beacons--Re-survey--Divisional Council.

This was an application for an order compelling the Cape Divisional Council to re-survey the farm Frogmore, near Retreat.

This matter came before the Court on the following notice of motion: To show cause why an order should not be granted to compel the Cape Divisional Council to appoint a surveyor to make a re-survey of the farm Frogmore, so as to have the correctness of the beacons determined to enable applicant to obtain amended title of his farm from the Surveyor-General, or to appoint arbitrators for the above purpose. Applicant's affidavits alleged that the area of the sub-divided portion of the farm was between 14 and 15 morgen in extent, the discrepancy of two morgen being due to the shifting of beacons as decided on by a committee.

The affidavit of the Assistant Secretary of the Cape Divisional Council stated that so far as the Council were aware the only objection to the beacons had been raised by the Council themselves. The Council were prepared to abide by the decision of the Court as to the appointment of arbitrators.

It appeared that there was a strip of land in dispute, 10 feet in depth, facing the road, but that along this strip was a large drain.

Mr. Buchanan for applicant; Mr. Benjamin for respondent.

[De Villiers, C.J.: I do not know anything more cumbersome or expensive than the procedure in such cases. It was a paltry dispute as to a few feet of land along the road. Surely the parties could come to some agreement. It seems to me that the Divisional Council have absolutely no interest as to where a man's beacons are.]

Mr. Benjamin: Our contention is that the land is not vested in applicant at all.

[De Villiers, C.J.: Because the Council claim that the road must be of a certain width.]

De Villiers, C.J.: The petition prays the Court to grant an order to compel the Cape Divisional Council to appoint a surveyor to make a re-survey of the farm Frogmore, or, in the alternative, to appoint some fit and proper person to act as an arbitrator. Now, I am of opinion that the facts stated in the petition do not disclose a case for such an order, and, as far as I can judge, the only way in which the applicant can assert his rights as against the Divisional Council, would be by an action. It would be very much simpler than the cumbrous system required by the Act, and would do away with the anomaly of asking the Divisional Council to appoint itself as arbitrator in a case in which it was interested. But I am by no means satisfied that the Divisional Council is really an interested party at all. If they are not the owners in terms of Act 9 of 1879 then there is no necessity for their consent, and the Surveyor-General ought to be asked to proceed without obtaining their consent. It may be that there are other facts not disclosed in the present case, but upon the facts disclosed I am not all satisfied that the Council can be treated as the owners. They proclaim a road to be of a width of 30 feet, and presuming they are to be treated as the owners of that 30 feet, it does not follow that they are the owners beyond that 30 feet because there is a drain there that receives the surface water from the neighbourhood. These beacons will not touch the road—they are about 8 feet distant from the road—and I fail to see how the Surveyor-General can treat the Divisional Council as one of those owners whose consent is required. I do

give the costs subsequent to the date of tender, September 20.

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It appeared that there was a strip of land in dispute, 10 feet in depth, facing the road, but that along this strip was a large drain.

Mr. Buchanan for applicant; Mr. Benjamin for respondent.

[De Villiers, C.J.: I do not know anything more cumbersome or expensive than the procedure in such cases. It was a paltry dispute as to a few feet of land along the road. Surely the parties could come to some agreement. It seems to me that the Divisional Council have absolutely no interest as to where a man's beacons are.]

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not wish to pre-judge the case, but I do say that as at present advised I am by no means satisfied that the Surveyor-General is right in his contention. The application cannot be granted as it stands.

No order was made as to costs.

[Applicant's Attorneys: D. Tennant, jun.; Respondent's Attorneys: W. E. Moore and Son.]

Ex parte LAING. { 1902.
Oct. 20th.

Mr. Close moved for an order authorising petitioner to execute a mortgage bond upon a certain piece of ground at Cradock, the property of his minor sons.

Order granted as prayed.

Ex parte ROOS.

Mr. J. E. R. de Villiers moved on behalf of the Rev. J. Roos, in the latter's capacity as Commissioner of the Dutch Reformed Church in South Africa, for leave to sue one, Peter Parson, by edictal citation.

Order granted as prayed.

GREENSLADE V. MCGRATH.

This was a petition from Arthur E. Hayton and others for leave to intervene as co-defendants in the above action.

Mr. Benjamin was for the applicants; Mr. Schreiner, K.C., with him Mr. Upington, was for respondents.

Mr. Schreiner opposed on the general ground that applicants really had no interest in the matter.

The order was granted on condition that applicants plead within ten days, and that the case go to trial next term, costs to be costs in the case.

Ex parte PICKARD.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to amend the petitioner's name as at present appearing in a certain deed of transfer and mortgage bond.

Order granted as prayed.

K 5

Ex parte VAN DER SPUY AND OTHERS.

Mr. Schreiner, K.C., moved for an order authorising the winding-up of De Paarlse Landaardkoop Maatschappij under the Companies Act, 1892.

The Court granted a rule calling upon all interested to show cause by November 1 why an order should not be granted as prayed, the rule to be published once in a Cape Town and once in a Paarl newspaper.

Ex parte CUPIDO.

Mr. Buchanan moved for an order authorising the Master to call a meeting of the next-of-kin and creditors in the estate of David Cupido, of Lady Grey, who had been missing for thirty years.

The Court authorised the petitioner, as curator, to realise and distribute the assets of David Cupido among his heirs, upon their giving personal security to the Master of the Supreme Court that they would restore to him the capital sums respectively received from his estate in case that Cupido should hereafter be found to be alive, petitioner to retain for herself her half-share of the joint estate, the costs to come out of the funds.

De Villiers, C.J.: There is a very strong probability, amounting almost to a certainty, that Cupido is dead, still, that is not sufficient to justify the Court in declaring that he is dead.

Ex parte FILMER. { 1902.
Oct. 20th.

This was an application for an order authorising the sale and transfer of a half-share of the farm Dunoraggan, within the division of Cathcart, C.C.

The petition of Rose Elizabeth G. Filmer (born Forwood), widow of the late Herbert P. Filmer, and now married without community of property to Benjamin B. Norton, shewed:—

1. That she was the natural guardian of a minor child, issue of the marriage with her late husband.

2. That transfer of half share of Dunoraggan was passed by the executors testamentary of the estate of the late H. P. Filmer to the petitioner, in trust for the said minor child, on March 18, 1899.

3. The Divisional Council valuation of the whole farm is £1,625.

4. The appraised value is £3,700.

5. The owner of the remaining half of the farm has offered to purchase the minor's share for £2,200.

6. Petitioner considers that this offer being far in excess of the Divisional Council valuation, should, in the interests of the minor, be accepted, and paid into the guardian's fund.

Wherefore, petitioner prays for an order authorising the sale and transfer of the said farm from the said minor to the owner of the remaining half share (George W. Filmer) for £2,200.

The Master's report was as follows: "It appears that it would be to the benefit of the minor that the price offered should be accepted. The surviving spouse having re-married, is in terms of the will entitled to the usufruct of the property only until the minor attains majority; the proceeds of the sale may therefore be paid into the guardians fund, or otherwise secured."

Mr. Buchanan moved.

The Court granted an order in terms of the Master's report.

[Applicant's attorneys: Innes and Hutton.]

Ex parte PRETORIUS. { 1902.
Oct. 20th.

This was an application for an order authorising the Master to pay out certain moneys for the maintenance of certain minors.

The petition of Petrus Jacobus Pretorius, in his capacity as executor and tutor testamentary of the minor children in the estate of the late Theunis L. Kruger, showed:

1. That there were eight children issue of the marriage of the late testator (in community with his predeceased wife). The ages of these minors were respectively 19, 17, 14, 12, 10, 8, 6, and 5 years.

2. That the portions awarded to each of these minor children from the estate of their father amounted to £202 17s. 5d., and from the estate of their mother to £48 11s. each, and that all these portions had been deposited with the Master of the Supreme Court.

3. That petitioner has maintained the said minor children since January 1 last at his own expense, as the Master refused to pay out anything beyond the interest on capital invested without an order of Court.

Wherefore, petitioner prays for an order empowering the said Master to pay out to petitioner the sum of £45 for each previous quarter of the current year and also for the present and every future quarter for the maintenance of the above-mentioned minor children during their minority. It is, of course, understood that this amount shall be proportionately diminished as each child attains its majority. Further, that the said Master of the Supreme Court may be empowered to defray all actual disbursements hitherto made, or to be made in the future, by the said petitioner on behalf of the above minor children, e.g., for clothing, doctor's fees, school fees, etc.

Mr. Gardiner moved.

The Master's report was as follows: "The amount applied for (£45 per quarter) is a moderate allowance for the maintenance and education of eight children, and I beg to recommend that the application be granted. But the youngest of the children is only five and the eldest 19 years of age; and while the elder children have had the advantage of maintenance and education free of expense in the lifetime of their parents, the younger ones would have to pay for their support from their infancy. If then all contributed towards the £45 per quarter, or £180 per annum, at the same rate, those who will attain majority shortly would receive nearly the whole amount awarded to them, while the shares of the younger ones would be exhausted before they attain their majority. In fairness to all the children, so that each may receive about the same amount of inheritance when he or she becomes of age, the annexed graduated scale has been framed, on which it is proposed to charge each child's contribution towards the common fund, and which is submitted for your lordship's approval. In addition thereto, the Master should be authorised to pay for clothing and school fees.

The Court granted an order in terms of the Master's report, and directed payment to be made as if the order had

been granted at the date of the petition.

SCHEDULE.

NUMBER OF YEARS BEFORE CHILD ATTAINS MAJORITY.																		Total account of each Child.	
Age of Child.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	Proposed distribution of expenditure already in- curred and not included in the totals.		
	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.	Amt. p.a.			
19	72	72	48	48	..	..	..	..	..	..	..	..	..	..	..	..	..	£42 2 10	£144 0 0
17	36	36	24	24	..	..	..	..	..	..	..	..	..	..	..	..	..	27 0 0	168 0 0
14	24	24	18	18	30	30	30	..	..	..	..	..	..	..	..	..	..	17 10 0	188 0 0
12	18	18	18	18	24	24	24	30	30	..	..	..	..	..	..	..	..	12 10 0	204 0 0
10	10	10	12	12	24	24	24	24	24	30	30	..	..	..	..	..	..	8 0 0	236 0 0
8	8	8	12	12	18	18	18	24	24	30	30	30	30	..	..	..	..	5 10 0	262 0 0
6	6	6	12	12	12	12	12	18	18	24	24	30	30	30	30	..	..	3 10 0	276 0 0
5	6	6	10	10	12	12	12	12	12	18	18	24	24	30	30	48	..	....	284 0 0
Total } p.a.	180	180	142	142	120	126	120	108	108	102	102	84	84	60	60	48	£116 2 10	....
Grand Total																		£1,760 0 0	

[Applicant's Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).

PROVISIONAL ROLL.

REX V. COETZEE. { 1902.
Oct. 21st.

Mr. Benjamin moved that one, Coetzee, who had been arrested as a rebel and charged with murder, be admitted to bail, £2,000 personal and two sureties of £1,000 each.

Mr. Nightingale, on behalf of the Crown, assented to these terms.

Motion granted as prayed.

GENERAL MOTIONS.

ROYAL BANK OF QUEENSLAND V. MCKENZIE AND CO. (LTD.).

Mr. Schreiner, K.C., for applicants, moved for an order of Court in terms of a consent paper which had been filed.

It appeared that Messrs. McKenzie and Co. and Howes Bros. had settled the claim.

The order was granted.

WILLIAMS V. ESTATE OF WILLIAMS. { 1902.
Oct. 21st.

Arbitration—Award—Appraisement—Rule of Court—Excess of authority.

A deed of submission, the effect of which was to refer the question of the value of the estate of a deceased person to the decision of certain appraisers as arbitrators, having been executed between the executor and heir of the estate, the arbitrators made an award by which a certain sum was found to be due by the executor of the heir.

Held, that the arbitrators had exceeded their authority in making an award which involved an inquiry not conten-

plated or provided for by the deed, and that the heir was not entitled to claim that such award should be made a rule of Court.

This was an application that the award of certain arbitrators be made a rule of Court.

Mr. Gardiner was for applicant, and Mr. Benjamin for respondent.

The arbitrators had decided that the executrix Lydia Mary Williams should pay to the other relatives the sum of £1,029 in consideration of her taking over the whole of the estate of her late husband, who died in December last. The respondent, however, desired that the costs of the arbitration, £103, should not be ordered to be paid by the estate, it being maintained that the costs were unreasonable. £1,029 was half the value of the estate.

His Lordship pointed out that the costs would have to be taxed. It was not part of the award.

[De Villiers, C.J.: The operative part of the deed states that the parties thereto had "agreed to refer the whole matter of the value of the estate to the appraisal and final award" of certain arbitrators. Further, as it is provided that neither party shall do anything to prevent a final award being made. The fact that the expressions "arbitrators" and "final award" have been used does not constitute the transaction a deed of submission to arbitration in the proper sense of the term. At all events, it did not justify the appraisers in making an award which included matters not contemplated by the parties to the deed, nor referred to in the deed. The award is to the effect that the respondent, in consideration of her taking the whole of the business of the estate, shall pay to the applicant the sum of £1,029 in satisfaction of his claims. The Court is now asked to make this award a rule of Court but, in my opinion, the appraisers exceeded their authority in making their award. They should only have appraised the value of the estate and should not have added a finding that a particular sum is owing by the respondent to the applicant. Such a finding, if made a rule of Court, would prevent the respondent from raising such questions as

the amount of the executors fees due to her and the amount of succession duty payable by the estate, questions which were never intended to be referred to the arbitrators. The application to make the award a rule of Court must, therefore be refused with costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorney: C. W. Heroldt.]

MICHAU V. ASHE.

Mr. Benjamin, on behalf of the plaintiff, J. J. Michau, in the above libel action, applied to the Court to fix a day for the trial of the action by a jury. In the action plaintiff sued defendant for £1,000 as and for compensation for libel. The proceedings closed on October 10, and notice had been given the defendant's attorneys claiming a trial by jury.

Mr. Schreiner, K.C., appeared on behalf of the respondent, Dr. Ashe.

The Court fixed the trial for November 26.

Ex parte MORRIS. { 1902.
Oct. 21st.

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain property and to pass the said transfer free from payment of transfer duty.

The petition of Helen Ann Morris (married out of community of property to Richard Henry Morris, and by him assisted as far as need be) showed:—

1. That on March 10, 1902, a deed of transfer of certain property situate in Cape Town was passed in favour of petitioner.

2. That a certain piece of the property purchased was not included in the said deed of transfer, which portion omitted is still registered in the name of the vendor's predecessor in title.

3. No valid transfer of this omitted portion was ever passed to the vendor, but as both he and petitioner verily believed that the deed of transfer covered the whole of the property purchased by them respectively: transfer duty was paid in each case as though the said omitted portions had been included.

Wherefore petitioner prays for an order authorising the Registrar of Deeds to pass transfer of the said portion of the property from the immediate pre-

decessor in title of the vendor direct to petitioner, without payment of any transfer or stamp duty. The Registrar reported that he saw no reason, provided due notice be given to all concerned, why transfer should not be allowed. If an order to that effect was obtained the petitioner would be enabled to apply under Act 5 of 1884 for relief from payment of transfer duty, such duty having really already been paid.

On the motion of Mr. Benjamin, the Court granted a rule *nisi* calling upon all persons concerned to show cause by November 1 why an order should not be granted as prayed, omitting that part of the prayer in regard to relief from payment of transfer duty. Rule to be published once in two Cape Town newspapers.

Postea (November 6), the rule was made absolute.

Ex parte McDONALD.

Mr. Benjamin moved for the appointment of a curator *ad litem* to look after the interests of the minor children of the petitioner in the partition of certain lots of land in which they are interested.

Order granted as prayed, and Mr. James McDonald appointed curator *ad litem*.

HELLAWELL V. READ AND OTHERS.

This was an application upon notice given to the respondents to show cause why certain 30 mules consigned by the one of the respondents to another of the respondents at Queen's Town should not be declared to be the property of the applicant, and why an order should not be granted, directing the delivery of such mules to applicant forthwith.

Mr. Benjamin appeared for the applicant, and read an affidavit made by the latter, in which he said he was a speculator residing at Maitland. On October 15 he agreed to sell to one of the respondents the thirty mules for £720 cash. On the evening of that day Reed asked to be allowed to take the mules away, and said that he had not as much cash on him as the purchase price amounted to, but he would give a cheque for the amount, which cheque would be duly honoured on the following morning. Applicant accepted the cheque, and allowed Reed to take the mules away, but on presenting the cheque at the bank on the

following morning it was not honoured, and applicant did not receive the cash. An order for the attachment of the mules, which are now at Queen's Town, had been granted by Mr. Justice Maasdorp in Chambers. Notice of the present application had been duly served on respondents, but there was no appearance in their behalf.

An order was granted as prayed

En parte HINSBEECK.

This was an application for an order authorising the Registrar of Deeds to transfer certain property.

The petition of Francois Jan Hinsbeeck, of Cape Town, showed:

1. That the petitioner and the Colonial Orphan Chamber were the executors testamentary of the estate of his deceased wife, Dorothea F. S. Hinsbeeck (born Stephan).

2. That by the last will and testament of petitioner's deceased wife he is appointed heir to one half of her estate and usufructuary heir to the remaining half.

3. That in part payment of the inheritance due to petitioner he had taken over certain properties (fully described in the petition) for £2,000 sterling, being the value placed thereon by a sworn appraiser to the Master of the Court.

4. That there were three children of petitioner's marriage with his deceased wife, two of whom are majors and the other a minor of the age of 20 years.

5. That petitioner's said children had consented to his taking over the said property for the aforesaid sum of £2,000.

Wherefore, petitioner prayed for an order authorising the Registrar of Deeds to allow the transfer from the estate of his deceased wife, of the aforesaid property to be passed in his favour.

The Master recommended that the application be granted, and on the motion of Mr. Close, the Court granted an order as prayed.

[Applicant's Attorney: P. de Villiers.]

En parte BARNARD.

Mr. Gardiner moved for an order directing the Mutual Life Insurance Company of New York to register certain cessions affecting the change of beneficiary under a certain policy of insurance. It appeared that a number of

years ago, the petitioner, then a bachelor, insured his life for £500, and under such policy appointed his niece to be beneficiary so long as he was unmarried, she being his nearest relative. In 1895, however, petitioner married, and there were four children, issue of that marriage. Under an ante-nuptial contract petitioner had settled on his wife the policy for £500, having obtained from the father and natural guardian of the niece a formal cession of the same.

[De Villiers, C.J.: It appears to me that we must consider the interests of the niece. She apparently received an out-and-out gift of all benefits under that policy, and apparently her father gave that away without any consideration of all.]

Mr. Gardiner submitted that there was no vested interest in the niece.

[De Villiers, C.J.: Why the whole interest is her's; it is her property.]

That would have been so if the interest had been accepted by the father on her behalf, but it had never been so accepted by the father. He had never ratified or accepted the gift.

[De Villiers, C.J.: That might alter what I have said as to its being an out-and-out gift, but I would still like the matter referred to the Master for report. It might be that it was not to the minor's interest to pay the annual premium of £14. It seems to me that the petitioner might have provided for his wife by taking out a fresh policy. It seems an ungracious thing of him, first to make his niece a present of the life policy and then to take it away.

The matter was allowed to stand over so that it might be referred to the Master for report. (See p. 849.)

Ex parte LARMER.

Mr. P. S. Jones moved for an attachment of certain property *ad fundandam jurisdictionem* and also for leave to sue by edictal citation in an action to be brought against Charles Bathgate for the recovery of the capital amount and interest due on a mortgage bond.

Order granted as prayed; citation to be returnable on November 20; one publication to be made in a Cape Town and one in a Bulawayo newspaper.

Ex parte GOODSON.

This was a similar application.

Mr. P. S. Jones moved.

A similar order was granted.

Ex parte CADLE.

Mr. Buchanan moved for leave to the Registrar of Deeds to make amendments in certain deeds of transfer. It appeared that the registration had been made in the name of petitioner as John Henry Cadle, while his full name was John Henry Lance Cadle.

Order granted as prayed.

Ex parte COLLETT.

Mr. Buchanan moved for an order authorising the transfer of certain land to petitioner. It appeared that the petitioner purchased at public auction certain land from an estate in which he was an executor. The usual affidavits as to the sale being in order and as to the value of the property were put in.

Order granted as prayed.

MASTER OF THE BARQUE MARGA V. E. SEARLE AND CO. AND OTHERS.

Mr. Schreiner, K.C., moved on behalf of the plaintiff for a commission *de bene esse* to take the evidence of certain witnesses at Hamburg, the said evidence being material to plaintiff's case. It was also asked that the Commission take expert evidence on certain points of German Shipping Law.

Mr. Benjamin consented as regarded the first portion of the application, but not as regarded the expert legal evidence, submitting that before they could issue such a commission the question of foreign law should have been raised on the pleadings.

After hearing counsel, the Court granted the order as prayed, it being pointed out that the taking of the expert evidence referred to did not prevent the question of its relevancy being raised when the case came on for hearing. The British Consul at Hamburg or other person acting in such capacity to be commissioner; costs to be costs in the cause. The commission was also made a joint one.

Ex parte ALHEIT.

This was an application for the ejectment of certain persons from the occu-

pation of certain church property at Uppington, Gordonia.

The petitioner was the Rev. Willem Adolph Alheit, of Ceres, the Chairman of the Home Missions Committee of the Dutch Reformed Church, and as such sued for an order for the ejectment of certain persons who are now in possession of the church, school, teachers' dwelling, and mill, at Gordonia, in Uppington, which property is vested in the Home Missions Committee. This was a mission under the supervision of the Rev. Mr. Schroder. About April, 1900, Mr. Schroder was arrested on a charge of high treason, and lodged in gaol, being subsequently admitted to bail, but on condition that he resided in Cape Town. There was no one at Uppington to keep the mission going, a permit for another missionary being refused by the military, owing to the state of the country. A portion of the congregation then resolved to join the Congregational Church, and asked the Dutch Reformed Church to hand over the buildings and lands, which application was refused by the Home Missions Committee. A portion of the congregation had now taken possession of the buildings, and the application was to have these persons ejected.

Mr. Gardiner for applicant.

In reply to the Court, counsel said that it seemed that the defence of the respondents as set up in the correspondence was that they decided to separate, and thought that in doing so they were entitled to the possession of the property in question. As far as the Congregational Church was concerned, it appeared that they had asked for a peaceable settlement for the sake of Christian harmony, and they asked for the use only of the church and lands. This request, however, the Home Missions Committee could not agree to.

De Villiers, C.J., asked whether there were representatives of the Dutch Reformed Church at Uppington to whom possession could be given.

Mr. Gardiner said that there was now a missionary there.

A rule *nisi* was granted, calling upon all persons concerned to show cause by November 27, why they should not be compelled forthwith to quit the church, teachers' dwelling, and mill, etc., at Uppington, and give them up to the ap-

plicant so as to enable the missionary now appointed to have free and undisturbed possession, and to restore to petitioner any other property belonging to the church at Uppington, and why respondents should not pay the costs of this application.

COWLEY V. COWLEY.

Mr. Close moved for an extension of the return day in the above matter. The petitioner had leave to sue the respondent by edictal citation for restitution of conjugal rights, and it was now asked that the return day be extended to December 12, so that publication of the rule might be made in the "Government Gazette."

Extension granted as prayed.

TRUSTEES OF THE DIOCESE OF CAPE TOWN V. SOLOMON FRIEDGOOD.

Mr. Alexander moved upon notice given the respondent, calling upon him to show cause why he should not be compelled to remove certain obstructions in a passage common to the applicants and respondent.

Mr. Buchanan appeared for the respondent.

After several affidavits had been read the Court allowed the matter to stand over so that a further affidavit might be put in by the respondent, as well as replying affidavits by the applicants.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.)]

REX V. MEYER AND ANOTHER { 1902.
Nov. 1st.

Masters and Servants Acts—
Contract.

Where a service is stipulated to commence after one month from the date of a written contract and such contract is not executed in the presence of a magistrate or other proper

officer, the servant who fails or refuses to commence such service at the stipulated time cannot be convicted of a contravention of the Act 18 of 1873.

De Villiers, C.J., mentioned a case tried by the Resident Magistrate of Stellenbosch, which had come before him as judge of the week. His Lordship said: In this case two persons, Philip Meyer and July Christians, were charged with contravening clause 1, section 7, of Act No. 18 of 1873, in that they did wrongfully and unlawfully, after having entered into a contract with one Joseph Walker, clerk of works to the Victoria Brick Company, at or near the railway station at Stellenbosch, fail or refuse without lawful excuse to commence service at the stipulated time. Both pleaded not guilty, but were found guilty, and sentenced to pay a fine of £1 each. A contract, which was in writing, was put in, in which it was agreed that the service was to commence on the 15th September, 1902, while the contract was dated 19th April, 1902, that was, several months before the time when the contract was to commence. This agreement was witnessed by Walker and Davidson, but it was not entered into before a magistrate. Now, the first section of Act No. 18 of 1873 provides that no contract for service in writing shall be valid or binding in any case on any servant, unless the service so contracted for shall be stipulated to commence within the period of one month from the date of the contract, except the contract be signed with the name, or, in case of illiterate persons, with the mark, of the contracting parties, in the presence of a magistrate or other proper officer, described in the second section of Act No. 15 of 1856, who shall satisfy himself by inquiry of the servant or apprentice that the contract was entered into by the parties voluntarily, and with a clear understanding of its meaning and effect. In view of that section I sent the case back to the Magistrate with the following note: "The service contracted for was to commence some months after the date of the contract. The first section of Act No. 18 of 1873 requires that in such a case the contract shall be in writing, signed with the name or mark of the contracting parties

in the presence of the Magistrate or other proper officer. In the present case neither the Magistrate nor other proper officer appears to have been present. Perhaps there is some other Act which has escaped my observation, which has induced the Resident Magistrate to convict." In his reply the Magistrate said that he was satisfied that the accused understood and agreed verbally to the terms of the document, and he took it that the idea of the Legislature was to protect the servant in that connection. Well, I am afraid that the Magistrate was wrong, as the Act expressly provides that such a contract shall not be valid or binding unless signed before a magistrate or other proper officer, and if it is not valid or binding one of the contracting parties could not be criminally prosecuted for a contravention of the Act. This matter is very important, and no doubt it would be advisable that punishment should be provided in such a case, but as the law stands it is not provided and the sentence must be quashed.

ADMISSIONS.

Mr. Close moved for the admission of Daniel Laquerenne von Zyl, as an attorney and notary public.

Order granted and the oaths administered.

Mr. Benjamin moved for the admission of Alfred Friedlander as an attorney and notary public.

Order granted and the oaths administered.

Mr. Gardiner moved for the admission of Bernardus Josephus van de Sandt van Noorden as a conveyancer.

Order granted and the oaths administered.

Mr. Benjamin moved for the admission of Francis Sibson Reid as a translator.

Order granted and leave given for the oath to be taken before the Resident Magistrate of Swellendam.

Ex parte BOYES. { 1902.
Nov. 1st.

Notary public—Service of articles
—Act 12 of 1858.

B. had been admitted as an attorney, and had passed the examination required to qualify

him as a notary public. The firm of attorneys, however, to which he had been articulated as a clerk were not notaries.

Held, that as the applicant had been admitted as an attorney, and had passed the notaries' examination, he might be admitted as a notary public.

Mr. Benjamin moved for the admission of Edgar James Boyes as a notary public.

Mr. Searle, K.C., said he had been instructed by the Law Society to appear and bring to the notice of the Court the fact that although Mr. Boyes had been admitted as an attorney, the attorney to whom he had been articulated was not a notary public. At the same time he must admit that it seemed to him that it was perfectly clear that being an attorney and having passed the examination for notary public Mr. Boyes was under the Act entitled to be admitted as a notary public. In the present case there might be no objection as Mr. Boyes had served his articles in a large office, where he would be taught all the branches of the work, but there might be an objection in a case where a person served his articles to an attorney who was not a notary public in a small office, where he would have no practical experience of the work of a notary public.

De Villiers, C.J.: It is clear from the Act that as Mr. Boyes had been admitted as an attorney and had passed the notaries' examination, he must now be admitted as a notary public.

An order was granted as prayed.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton.]

PROVISIONAL ROLL.

GUARDIAN ASSURANCE AND TRUST CO.
V. BUSH.

Mr. Close moved for provisional sentence on two mortgage bonds for £250. The defendant had been sued by edictal citation.

L 5

Provisional sentence granted as prayed and the property specially hypothecated declared executable.

LEA V. BENNETT AND ANOTHER.

Mr. Close moved for provisional sentence on a promissory note for £110.

The second defendant had signed the note as surety and co-principal debtor.

Provisional sentence granted as prayed.

DOYLE V. SANDERS.

Mr. P. S. Jones moved for provisional sentence on four promissory notes for £20 each.

Provisional sentence granted as prayed.

SACHS, CHIAT AND CO. V. ALEXANDER HAY.

Mr. Alexander moved that the provisional order for the sequestration of defendant's estate as insolvent be superseded.

Provisional order superseded.

B. WILSON, SON AND CO. V. SUCHEDOWITZ.

Mr. M. Bisset moved that the provisional order for the sequestration of defendant's estate as insolvent be superseded.

Provisional order superseded.

HAVENGA AND DICKSON V. BRAUDE.

Mr. Benjamin moved for provisional sentence on a promissory note for £97 10s.

Provisional sentence granted as prayed.

WALKER V. THEUNISSEN.

Mr. C. de Villiers moved for provisional sentence for £550 due on a mortgage bond. It was also asked that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed and the property declared executable.

SALIE V. ISHMAEL.

Mr. Close said he understood that a provisional order for the sequestration of defendant's estate had already been granted, and accordingly he asked that this application for provisional sentence be allowed to stand over.

Application allowed to stand over.

ILLIQUID ROLI.

DE WAAL V. J. M. (1902.
MAURICE. (Nov. 1st.

Mr. Schreiner, K.C., moved for judgment, under Rule 319, for £117 18s. 11d.

Judgment granted as prayed.

RELSTAN V. KOBLE.

Mr. Upington moved, under Rule 329d, for judgment for two sums of £10 10s. and £17 17s. respectively, being money lent.

Judgment as prayed.

BUYSKES V. BLOWS.

Mr. De Waal moved, under Rule 329d, for judgment for £36 rent due.

Judgment granted as prayed.

HARKNESS AND HUTTON V. MAHOMED.

Mr. C. de Villiers moved, under Rule 329d, for judgment for the sum of £436 13s. 5d., goods sold and delivered.

Judgment granted as prayed.

HAIRBRIDGE V. GOODMAN AND LEWIS.

Mr. Russell moved, under Rule 329d, for judgment for the sum of £226 15s. 6d., goods sold and delivered.

Judgment granted as prayed.

REX V. BECKETT AND ANOTHER.

This was an application made by William John Archibald Beckett and his wife

Beatrice Beckett, for review of certain proceedings in the Court of the Resident Magistrate of Oudtshoorn.

The facts of the case were practically similar to those of several other cases which have been before the Court, including that of Van Reenen, in which the Resident Magistrate sat as a deputy administrator of martial law. W. J. Beckett and his wife were tried before Mr. Stapleton for contravention of martial law regulations, in having given food and shelter to the enemies of His Majesty the King, and were convicted. The record at the time showed that the proceedings took place before a Resident Magistrate, but subsequently the words "Resident Magistrate" were erased and "Deputy Administrator of Martial Law" substituted. It was contended that the accused were led to believe that they were being tried before Mr. Stapleton in his capacity as Resident Magistrate, and that if he acted in such capacity the crime was one unknown to our law, that the sentence was in excess of the jurisdiction of the Magistrate, and that the proceedings were grossly irregular.

The affidavit of Mr. Stapleton, the Resident Magistrate, showed that the record in the case had been sent to the Administrator of Martial Law for that area, and that this record could not now be produced. He admitted that on July 21 last, having occasion to inspect the record of the cases tried, he found that the charge sheet in this case had not been altered so as to show that the case was tried by him as Deputy Administrator of Martial Law, and he had then *bona fide* instructed his clerk to make the necessary alterations. A request had been made to the military authorities to furnish the original documents or copies of the original documents in this case, but that request had not been complied with.

Mr. Searle, K.C. (with him Mr. Burton) for applicants. Mr. Nightingale for the Attorney-General.

[De Villiers, C.J.: The case of Van Reenen, which was a similar application to this, was decided by the Supreme Court on July 12.]

Mr. Nightingale admitted that under the circumstances it was impossible to differentiate this case from those which had already come before the Court.

De Villiers, C.J.: The charge is for contravention of martial law regulations, and it appears that the decision of this Court must govern the present case. The Magistrate as Magistrate had no jurisdiction whatever to administer the martial law regulations. It is said, however, that he did so in his capacity as Deputy Administrator of Martial Law, but that does not appear from the record as it originally stood. It is true that the record was amended, but that seems to have been done only a couple of weeks after the judgment of the court in the case of Van Reenen, a similar case, in which the proceedings were declared null and void. There is no doubt that in the present case this alteration was made merely because of that judgment, and this alteration does not, in my opinion, affect in any way the original proceedings, which were proceedings in the Magistrate's Court. These proceedings must accordingly be quashed.

An order was made accordingly.

[Applicant's Attorneys: Tredgold, McIntyre and Bissett.]

REX V. SAAYMAN.

This was a similar application, the case coming from the Court of the Resident Magistrate at Uniondale.

Mr. Burton appeared for the applicant.

Mr. Nightingale appeared for the Attorney-General, and said that it was impossible to differentiate this case from the foregoing ones.

There was an additional application in this case for the refund of the amount of the fine paid, but as it appeared that this money had been handed over to the military authorities, Mr. Burton said he had his doubts as to whether they could claim that refund now. There was *prima facie* evidence that the fine had been paid into the Colonial revenue, but it was stated that it had afterwards been paid over to the military authorities.

De Villiers, C.J., said that if the money was still in the hands of the Colonial Government the latter would no doubt act upon the spirit of the order and return it.

An order similar to that in the above case was granted.

De Villiers, C.J.: This appears to me to be an even stronger case than the one which had preceded it, a copy of the record which had been taken showing that

the words Deputy Administrator of Martial Law did not appear at all. It is true that this is only a copy of the record, but as the military authorities refuse to grant an inspection of the original, then the Court had to be guided by the copy. If the original showed that the copy was wrong, then there would be a difference, but in the absence of the original, the Court must accept secondary evidence. I am satisfied upon that secondary evidence that that copy is correct, and it shows that the appellant was charged for contravening the martial law regulations in the Court of the Resident Magistrate, who had no jurisdiction to administer martial law. The proceedings must therefore be quashed.

[Applicant's Attorneys: Walker and Jacobsohn.]

REX V. VAN DER MERWE.

This was an application for the review of certain proceedings in the Court of the Resident Magistrate of Malmesbury.

Mr. Burton was for the appellant, and Mr. Nightingale appeared on behalf of the Attorney-General.

Mr. Burton stated that the appellant, Willem Jacobus van der Merwe, a teacher at the Government-aided school at Bridgetown, in the Malmesbury division, was arrested in February last for an alleged contravention of the martial law regulations, and was kept in jail without trial for 26 days. On March 8 he was brought before Mr. C. Broers, A.R.M. of Malmesbury, and charged with using seditious language. It was alleged that without appellant being asked whether he was guilty, the Magistrate said "I find you guilty," and sentenced him to pay a fine of £10, or in default to undergo three weeks' imprisonment. Accused was given no opportunity of calling witnesses.

Mr. Nightingale said Mr. Broers tried the case in his capacity of Magistrate and Deputy Administrator of Martial Law. There was nothing to distinguish it from other cases of the kind.

A similar order was made to that in the above case.

REX V. LOUW.

This was an application for the review of certain proceedings in the Court of the Resident Magistrate of Malmesbury.

Mr. Burton was for the appellant, Mr. Nightingale appearing on behalf of the Attorney-General.

It appeared that on March 29, appellant was arrested for contravening the martial law regulations by going to his neighbour's farm without a pass, being sentenced by Mr. Broers, A.R.M. of Malmesbury, to ten days' hard labour without the option of a fine.

Mr. Nightingale said he must leave the matter in his lordship's hands.

A similar order was made to that in the preceding cases.

REHABILITATION. { 1902. Nov. 1st.

Mr. Buchanan moved for the rehabilitation of William Alexander Forbes, whose estate was surrendered in September, 1897.

Order granted as prayed.

GENERAL MOTIONS.

Ex parte BARRON.

Mr. J. E. R. de Villiers moved that the return day of the rule *nisi* under the Derelict Lands Act be extended.

The Court ordered the return day to be extended until the last day of the term.

BIRD V. BIRD.

This was the return day of an order calling upon defendant to show cause why he should not return to his wife, or in default why a decree of divorce should not be granted.

Mr. De Waal was for plaintiff; Mr. Upington for defendant.

Mr. De Waal stated that defendant had expressed his willingness to have his wife and two children back, but she had decided not to return to him. Under the circumstances, Mr. De Waal simply asked that defendant be ordered to pay the costs of the action.

Mr. Upington opposed the application for costs on the ground that the summons and declaration were served together on defendant, who was then up-country. On May 28, defendant wired to plaintiff offering to receive her, and to pay all the costs of the action to date. On the same day he received the telegraphed reply: "Telegram too late. Proceedings on." On August 29, the Court ordered defendant to return to plaintiff on or before

October 15, on which date his attorneys wrote stating that he would receive her, and enclosing a cheque for £25 to cover her travelling expenses.

In an answering affidavit, plaintiff alleged that defendant originally ordered her to leave him, and had not of late supported her.

De Villiers, C.J.: In a case of this description it is essential to its success that there should be a persistent refusal on the part of the husband or wife, as the case may be, to receive or live with the other party. If there is clear proof on the part of defendant in a case involving the restitution of conjugal rights, that he or she is willing to go back, I think that evidence should be brought to the notice of the Court, even though the case is undefended. The summons in this case was issued on May 13, and on May 29, defendant sent a telegram to the plaintiff's attorneys, stating that he was quite willing to restore his wife's conjugal rights, and to receive her at his domicile. Here is a clear indication that he is willing to take back his wife. The answer sent to him, however, was: "Too late; proceedings on." Not only the telegram, but also money was sent to enable defendant's wife to go to him. But all that was concealed from the Court when the application was made for restitution of conjugal rights. It is said that some telegrams were in the hands of the Judge before whom the application was made, but it does not appear from the records that this particular telegram was put in. Under these circumstances I do not think the defendant is entitled to any costs at all; she ought to have disclosed all the facts, and for not doing so, I think she is debarred from coming to the Court for relief. As to the cheque for £25 forwarded by the husband, even if costs had been awarded to the plaintiff, I should not order them to be paid out of the cheque, which was sent by defendant for a special purpose. I would suggest, however, that the £25 might be left by the husband with the wife for the children. The application must be refused. No order will be made as to costs.

Judgment was entered accordingly.

[Plaintiff's Attorney: J. J. Michau; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

INCORPORATED LAW SOCIETY (1902.
V. AN ATTORNEY.) Nov. 1st.

Attorney—Notary and Conveyancer.

Where a certain attorney, who had only recently arrived in this Colony, used notepaper announcing that he was also a notary and conveyancer, being under the impression that he did not require to be specially admitted in the two latter capacities, and had, on the matter being brought to his notice, erased the words "notary and conveyancer" from the said paper: the Court refused to grant an order for his suspension as an attorney, but, on the ground that he had shown great negligence, refused to grant him costs.

This was an application for an order suspending respondent from practising as an attorney. Mr. Searle, K.C., was for applicants; Mr. Schreiner, K.C., for respondent.

For the applicants affidavits were read stating that respondent used notepaper headed "A.B., Solicitor, Notary Public and Conveyancer." The board outside his office was also inscribed "Solicitor, etc.," which might lead, it was alleged, to people concluding that he was entitled to act in other capacities than those of an attorney.

On behalf of the respondent it was stated that he had had the words "notary public and conveyancer" placed on his notepaper under a misapprehension, being under the impression that a solicitor in the Cape, where he arrived only a few months since, was entitled to act as a notary public and conveyancer without being specially admitted as such, as was the case in Natal, where he had practised for a time. On the matter being brought to his notice by the Law Society he did not destroy the paper, as he had a large quantity of it printed, not being—as Mr. Schreiner put it—"offensively rich," but he gave instructions to his clerks for the offending words to be marked over.

An answering affidavit mentioned several instances in which the words had not been cancelled on the respondent's notepaper.

Mr. Searle, K.C.: I have no information as to the practice in Natal.

[De Villiers, C.J.: Do you wish me to read the letter received from the Registrar of the Supreme Court of Natal?]

Mr. Schreiner: I have no instructions on that point.

Mr. Searle: I submit that this case merits censure.

[De Villiers, C.J.: May not the use of this paper have been an oversight; would the respondent have written to attorneys and even to the Secretary of the Law Society on this paper if he were *mala fide*?]

[Mr. Searle: If he has written to the public, including attorneys, on this paper, he is deceiving the public. Even after the matter was brought to his notice, he still used this paper. Hence he cannot say that he did so by an oversight. Then, again, he describes himself on his notice board as "Solicitor, etc."]

[De Villiers C.J.: I am not inclined to grant the application.]

[Mr. Schreiner, K.C.: I hope not. Here we have the case of an English solicitor who has landed in Natal and practised there as an attorney, notary, conveyancer, and advocate, and then arrives in this colony in utter ignorance of our practice. He gave instructions to have a large quantity of paper with the heading now objected to printed off. This paper he did not wish to throw away, and he therefore gave instructions to all his clerks to erase the words to which objection has been taken. After several months he receives a formal notice from the Law Society calling upon him to explain by ten a.m. on the day following why he had used this paper. He gave his explanation in writing, and offered to destroy such of the paper as bore the inscription to which objection had been taken. I submit that to have the words "Notary and Conveyancer" printed on one's paper and then to erase them is not to hold oneself out as a notary and conveyancer, but to distinctly proclaim that one is *not* a notary or conveyancer. My client eliminated these words, but in spite of this he receives a summons on September 17 calling upon him to show cause by ten a.m.

the next day why he should not be struck off the roll. The whole evidence against him was the very meagre affidavit of Mr. G. S. Van Zyl— an affidavit which by no means discloses all the facts of the case. This is a most serious matter for a professional man, and I submit that the Secretary of the Law Society should be more careful before bringing forward such applications. Of what professional misconduct has the respondent been guilty? Professional misconduct implies (1) reprehensible acts and (2) wrongful intent. First, then, as to the facts of this case. A careful search has been made throughout Cape Town for letters written from the respondent's office on the paper complained of. During the months he has been in practice here hundreds of letters must have been written from his office, and yet only some half-a-dozen can be produced from which the words complained of have by an oversight not been erased. Then as to intent. It is quite clear that respondent did not act with any culpable intent. He may have been guilty of some little carelessness or negligence, but nothing more. I submit that the Law Society has not treated my client with the consideration which professional men ought to exercise towards each other. I ask that the application be dismissed with costs against the Law Society.

Mr. Searle, K.C. (in reply): Even after the use of the paper objected to was brought to the notice of respondent, he continued to write to attorneys on it. The words "Notary and Conveyancer" were only marked with a tick, which no one would take for an erasure. The Law Society was bound to notice the matter, and as I submit that respondent's explanation is not satisfactory, I ask for costs.

De Villiers, C.J.: If I felt satisfied that these words "notary public and conveyancer" had been intentionally and deliberately used by respondent I should have had no hesitation in punishing him at all events by a period of suspension. I do not think, however, that it was done intentionally. I think it was an inadvertence, but it was an inadvertence of a kind which I think is very grave. It is said that he is a stranger here, having been admitted since April, but after five months he still continued occasionally to write letters without these words being struck out. It was a very negligent way of doing busi-

ness, and although it was not done intentionally I think the Law Society is not to blame for bringing the matter to the notice of the Court. As to the question of costs, I am inclined to think that there should be no order as to costs. I certainly should not give respondent the costs. I do not think he should have his costs, because his conduct was so negligent that it gave occasion for this application being made. Therefore in refusing the application the Court will make no order as to costs.

LITTLEJOHN V. KINGSWELL. { 1902.
Nov. 1st.

This was an application made on behalf of the defendant in the above action for the appointment of a commission *de bene esse*, to take the evidence of certain witnesses whose evidence was alleged to be material to defendant's case.

Mr. Searle, K.C. (with whom was Mr. Close), appeared for the applicant (defendant in the principal case).

Mr. Rowson appeared to oppose the application.

The Court granted an order authorising the appointment of Mr. Septimus Bent as commissioner to take the evidence of one James Gray, at Perth, Australia. As to the other witness, Cadman, who was supposed to be somewhere in South Africa, the Court intimated that if definite information could be brought as to his whereabouts the defendant could apply again for a commission to take that witness's evidence. An order was also made for the case to go to trial next term whether the commission has been returned or not.

[Applicant's Attorney's: Tredgold, Mc-Intyre and Bisset; Respondent's Attorney: R. Greening.]

SMIT V. TURNER.

Mr. Schreiner, K.C., moved to fix a date for the trial of the above case by a jury.

The case was set down for trial by a jury on November 20.

REX V. KEMP.

Mr. Benjamin applied for the release of the accused in the above case on bail. Accused was charged with murder, and the case arose out of the recent war. The Attorney-General was willing to consent to bail being granted on the same terms as in previous cases of a similar nature,

viz., accused in £2,000 personal security and two sureties of £1,000 each.

Mr. Nightingale appeared on behalf of the Attorney-General to consent to bail being granted on these terms.

An order was granted in terms of the consent.

Ex parte LARMER.

Mr. P. S. Jones moved for the extension of the return day of the citation in the case of Larmer v. White.

An order was granted extending the return day until December 20.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS. P.C., K.C.M.G., LL.D.]

H. JONES AND CO. V. BERN-STEIN. 1902. (Nov. 3rd.

Mr. J. E. R. de Villiers moved to make absolute a certain rule *nisi* granted on October 31, 1902, authorising the sale by public auction of a certain vessel stranded in Table Bay; the proceeds to be held in trust, pending further application.

Granted.

VAN DER WESTHUIZEN V VAN DER WESTHUIZEN.

Mr. Burton applied for an order for restitution of conjugal rights, or, failing compliance, divorce. The plaintiff, the wife, was a boarding-house keeper at Somerset Strand, and the defendant a speculator living at Victoria West. The marriage took place at the Paarl on April 30, 1884, and there were five children. Plaintiff alleged that in December, 1901, her husband deserted her.

Evidence having been adduced in proof of the marriage, the plaintiff, Elizabeth Johanna van der Westhuizen, gave evidence. She said she was married in community, and contributed between £700 and £800 at the time of the marriage. She subsequently inherited £1,000 from her mother's estate, and this, together with the pro-

ceeds of the sale of certain property, was handed to her husband. After marriage they went to live at Carnarvon, and in 1899 were living at Victoria West. After leaving her respondent sent her a couple of hundred pounds, with which she started a boarding-house. About eight years ago, and also just before the desertion, there was trouble owing to defendant's conduct. She wrote to defendant calling upon him to restore conjugal rights, but he refused, saying that after what had passed between them it was impossible. Witness was quite willing to return to her husband. Witness sent up one of the children to defendant's parents, and had been informed that defendant had removed her. Defendant was always well-to-do when living with witness.

An order was granted as prayed, with costs, defendant to return to applicant on or before November 30, failing which to show cause why a decree of divorce should not be granted, applicant to have the custody of the children and defendant to pay £5 a month towards the maintenance of each of the three children under the age of 16 years.

Postea (December 19), the rule was made absolute.

CORREA V. CORREA.

Mr. Buchanan moved for an order for restitution of conjugal rights, failing which for a decree for divorce.

Plaintiff, Dorothy Magdalene Correa deposed that she was married to defendant on July 13, 1893. They lived at Johannesburg and Cape Town and at the former town defendant, who was a barman and billiard marker, left her. She had asked him to return, but he made no reply. Defendant was now in Cape Town.

An order for restitution was granted, defendant to return to or receive plaintiff on or before November 30, failing which to show cause why a decree of divorce should not be granted.

Postea (December 19), the rule was made absolute.

GUSH V. GUSH.

Mr. Gardiner applied on behalf of Amy Gardner Gush for an order for restitution of conjugal rights.

Plaintiff said she was married to Frank Gush in 1891 in London. They came out to the Colony in 1894. Before leaving London he took to drinking and continued these habits after coming here. Defendant left her in 1898. Witness then left him a letter telling him that unless he provided a home and gave up drinking she would not return to him. He had since written asking her to return, but he had sent no money. Witness had agreed to return when he could provide her with a home and when he reformed. Defendant was now in London. He had been on active service and was invalided Home. Witness was a nurse. She was willing to return to her husband.

The Court granted a decree of restitution, with costs, defendant to return to plaintiff on or before January 15, 1903, in this colony, or to pay her the sum of £35 to enable her to return to him in England, failing which a rule will issue calling upon defendant to show cause why a decree of divorce should not be granted, with costs, the order to be served personally.

WILEY V. MUNDINCH AND CO. ^{1902.}
Nov. 3rd.
" 4th.

Condictio sine causa—Failure of consideration—Interest.

Where a mortgagor who has paid interest in advance on his mortgage debt voluntarily repays the capital sum of the debt before it is due, without stipulating that interest shall be refunded to him, he cannot claim back interest accruing between the date of payment and the date when the debt became payable.

This was an appeal brought mainly on a point of law which came before the Magistrate of King William's Town, and was in the nature of a special case. The respondent had paid six months' interest on a bond in advance. He had agreed with the appellant that the interest should be so paid. The respondent and appellant had agreed that the latter should have the right of demanding and

the former the right of paying the principal sum due on three months' notice given by either to the other. On August 4, 1902, respondent, without giving any previous notice, repaid the principal sum. Plaintiff, in the Court below (the present respondent) had demanded a refund of three months' interest. The summons was as follows: "Summon Arthur Henry Wiley, of King William's Town, in his capacity as surviving executor testamentary of the estate of the late Thomas William Robertson (hereinafter styled the defendant), that he appear, etc., . . . to show why he shall not be adjudged to pay to Engelbert Melzenbach and Leonard Mundinch, trading and carrying on business together at or near Muxesha, in the district of King William's Town, as Mundinch and Co. (hereinafter styled the plaintiffs), the sum of £8 1s. 9d., in an action as hereinafter mentioned, and thereupon the plaintiffs complain and say:

1. That heretofore, to wit, on or about December 24, 1901, and at King William's Town, the said plaintiffs, trading as aforesaid, passed in favour of the defendant, in his capacity as surviving executor testamentary of the estate of the late Thomas W. Robertson, the mortgage bond hereto annexed for the sum of £1,200.

2. That in terms of the said bond the interest on the aforesaid sum of £1,200 at the rate of 6 per cent. per annum was payable half-yearly in advance, that is to say, on June 15 and December 15 in each year, at the office of Messrs. Robertson, Wiley and King, in King William's Town, which interest was to continue to be so reckoned until the whole of the aforesaid principal sum of £1,200 should be fully paid off, and which principal sum the plaintiffs were allowed and also obliged to pay three months subsequent to legal notice having been given or received to that effect.

3. That on or about June 17 now last passed, the said plaintiffs paid the defendant, in his aforesaid capacity, the aforesaid sum of £36, being six months' interest on the aforesaid bond from June 15, 1902, to December 15, 1902.

4. That on or about August 4, 1902, the plaintiffs paid to the defendant, in his aforesaid capacity, the aforesaid sum of £1,200, principal of the said bond, and that instead of three months' notice the defendant was entitled to three months' interest on the aforesaid prin-

capital sum at the rate of 6 per cent., reckoned from August 4, 1902.

5. That the plaintiffs having already paid to the defendant interest on the said bond from June 15, 1902, to December 15, 1902, by reason of the payment of the aforesaid principal sum on August 4, 1902, the plaintiffs are entitled to recover from the defendant repayment to them on the interest of the aforesaid principal sum from November 4, 1902, to December 15, 1902, viz., the sum of £8 1s. 9d., which sum the defendant neglects and refuses to pay to the plaintiffs.

6. That all things have happened and all times have elapsed to entitle the plaintiffs to receive payment of the aforesaid sum of £8 1s. 9d. Wherefore, the plaintiffs pray, etc.

1. Defendant admitted the allegations in paragraphs 1 and 2 of the summons.

2. With reference to paragraph 3 of the summons, defendant said that on or about June 14, 1902, he received from the plaintiffs the sum of £36 in payment of the half-yearly interest in advance to December 15, 1902, which interest, in the absence of any notice of repayment of the capital sum, became due and payable on June 15, 1902.

3. Defendant admitted the payment of the said capital sum of £1,200, as alleged in paragraph 4 of the summons, but denied the conclusions of law therein, and in the remaining paragraphs of the summons, and said that by the payment of the said half-yearly interest in advance to December 15, 1902, the plaintiff covenanted that no notice of repayment of the said capital sum would be given which would expire prior to the said December 15, 1902. That he (defendant) never demanded repayment thereof, which, on the contrary, plaintiffs voluntarily made on August 4, 1902, and that plaintiffs are therefore estopped and precluded from demanding any refund as claimed. Defendant further pleaded the general issue, and prayed for judgment with costs.

The Resident Magistrate gave judgment for the plaintiffs, with costs. His reasons were as follows:

In this case the facts are admitted, and a decision is asked on a point of law.

On December 24, 1901, the plaintiffs passed a mortgage bond for £1,200 in favour of defendant. Interest was stipulated therein at the rate of 6 per

cent. per annum, payable half-yearly in advance on June 15 and December 15 in each year, being reckoned from December 15, 1901. The bond stated no prescribed time for payment, but contained the usual clause of three months' legal notice being given or received. On August 4, 1902, the plaintiffs repaid the capital sum of £1,200 without giving notice, and apparently nothing was said by either party as regards the interest which had been paid in June, 1902, up to December 15 in that year. On August 13, 1902, the plaintiffs demanded from defendant repayment of that portion of the last instalment of interest covering the period from August 4 to December 15, after deducting a sum equivalent to three months' interest, which they relinquish as a payment in lieu of notice. Defendant refused to make any refund: hence the present action. Defendant contends that by the payment of the half-yearly instalment of interest in advance in June, 1902, the plaintiffs covenanted that no notice of the repayment of the capital sum would be given which would expire prior to December 15, 1902, and that the defendant never demanded repayment thereof until August 13, 1902, and that defendant never demanded repayment thereof, which, on the contrary, the plaintiffs voluntarily made on August 4, 1902; and that the plaintiffs are therefore estopped and precluded from demanding a refund as claimed. A general issue is also pleaded. That appears to me to be the whole case. The cases quoted and others I have looked into, hardly assist me in arriving at a decision. I find the question raised whether a bond with interest at a rate *per cent. per annum* does not imply the running of such bond for a year certain, but no decision appeared to have been arrived at. Mr. Hutton quoted *Addison on Contracts* to show that the intention of the parties must be gathered from the contract. The clauses indicating the intentions of the parties are those as to the payment of interest and as to the repayment of the capital sum. The former I have given at the commencement of my judgment. The latter runs: "which payment of the said capital sum the ap-pearer, q.q. shall be allowed and shall be obliged to make three months subsequent to legal notice having been given or received to that effect, pro-

vided the said payment be then made in one sum in good, current and lawful money, together with the expense of the said notice and such interest as may be due thereon at the said office of Messrs. Roberstson, Wiley and King, of King William's Town aforesaid." Interest was paid as stipulated by the bond, but the capital sum was repaid in a manner not anticipated by the parties. It was certainly not anticipated that defendant should have his capital back with more than four months' interest in hand. The capital we must take for granted was received without remark as to interest paid in advance. Plaintiff no doubt thought the interest had to be adjusted afterwards, and defendant may have considered all claim to it was relinquished. Defendant had the capital back and more than four months' advance interest also. Defendant was not bound to accept the capital at the time he did, but having done so, I do not think it reasonable he should retain more than three months' interest in lieu of notice of repayment. I may be wrong, but I do not conclude the law would hold otherwise. I have not been able to find any authority leading to the contrary conclusion. I am of opinion judgment should be for the plaintiffs, as prayed, with costs of suit.

Mr. Benjamin (for appellant): I submit that the decision of the Resident Magistrate was wrong. The payment of the interest in advance does not do away with the necessity for notice. This point was raised by Buchanan, J., in *Stetton v. Holder* (4, E.D.C., 321). In that case, his lordship referred to *Busk v. Cloete* (1, Menz., 15). In this case there was an implied contract that the plaintiff would not pay the principal until after six months, and that was precisely what we meant by the acceptance of this interest, and by the provision that payment should be made six months in advance.

[De Villiers, C.J.: Were no conditions made as to refund when the interest was paid?]

None whatever; the bond was paid off on August 4, and on the 13th of the same month a demand was made for a refund.

[De Villiers, C.J.: They might have refused to accept payment without three months' notice.

Yes, but it does not follow that it is reclaimable under a *conditio indebiti* (Burge, Vol. 3, p. 26).

[De Villiers, C.J.: Has there not been failure of consideration?]

Possibly, but if so that was owing to the fault of the mortgagor.

[De Villiers, C.J.: Both may be in fault; clearly the action of *conditio indebiti* would not apply, but does not the *conditio sine causa*?]

See Grotius (3, 13, 15). In this case there was an implied contract to let the mortgagee have the use of six months' interest in advance. *Gronwegen in Dig* (45, 1, lex, 122).

[De Villiers, C.J.: But does not the creditor waive his rights by accepting the money? They give you three months' interest.]

But was the creditor bound to take the money, even with three months' interest?

[De Villiers, C.J.: I think that the principles enunciated by *Gronwegen* have often been acted upon in this Court.]

Mr. Upington (for respondent): The ground respondent takes up is that the respondent did not by acceptance of the payment of the principal waive his rights as to the conditions of the bond. If a creditor agrees to accept the payment of the capital he cannot rely upon some stipulation or other of the bond. *Busk v. Cloete* (1, Menz., 15). In this case the bond has become due on three months' notice, and the interest was payable half-yearly. It was clearly in the contemplation of the parties that the bond might be called up or paid within the year. By accepting payment of the capital he has waived his right to interest. *Gronwegen* and *Voet* are in point only where there has been no waiver. By his conduct the plaintiff is estopped from claiming six months' interest.

[De Villiers, C.J.: Why did he not pay the interest minus that due for three months. How is he to recover?]

On equitable principles; we have not had the use of the money for four months and have received no consideration for this interest. The creditor having agreed to accept money cannot be in a better position than if he had called up his bond, though his position may possibly be worse.

Mr. Benjamin was heard in reply.

Cur. Adv. Vult.

Postea (November 4), the Court gave judgment in this appeal case, allowing

the appeal with costs in the Supreme Court and in the Court below.

De Villiers, C.J.: This is an appeal against a judgment of the Resident Magistrate of King William's Town in a case in which judgment was given for the plaintiff for the sum of £8 1s. 9d. It appears that on the 24th of December, 1901, the plaintiff passed a bond in favour of the defendant for £1,200. The bond bore interest at the rate of 6 per cent. per annum, payable half-yearly in advance, and it contained a clause that the bond should be payable on three months' notice being given. The plaintiff paid the interest according to the bond. The first payment was made on December 15, 1901, in advance, and the second payment was made on June 15, 1902, in advance for interest from June 15, 1902, to December 15, 1902. On August 4, however, that is only a few weeks after the last interest had been paid, the plaintiff paid off the whole amount of the bond, £1,200, and nothing was said at that time as to any refund of the interest which had been paid in advance, but a few days afterwards a demand was made by the plaintiff on the defendant for the refund, not of the whole amount from August 4 to December 15, but a period of three months added and interest was claimed from the expiration of that period of three months to December 15. It is this interest, amounting to £8 1s. 9d., for which judgment was given in the Court below, and in my opinion the Magistrate erred in giving this judgment. The mere fact that the sum of £1,200 was received by the defendant does not, in my opinion, constitute an undertaking on the defendant's part to refund any portion of the interest which had been paid. The only ground upon which the plaintiff could possibly be entitled to a refund would be that there has been a total failure of consideration and that the plaintiff is entitled to recover a refund of interest by way of *condictio sine causa*. To illustrate the *condictio sine causa*, Voet mentions the case where a lessee pays rent in advance, say for twelve months, and during the twelve months is deprived of the occupation of the property, and says that he can claim a refund. In such a case there has been a total failure of consideration owing to the destruction of the property which had been leased to him, but he was prevented

from occupying the property without any fault of his own. But where, as in the present case, a mortgagor voluntarily pays a debt without stipulating that interest paid in advance in respect of that debt shall be refunded to him, he clearly cannot rely upon failure of consideration as a ground for claiming back interest accruing between the date of such payment and the date when the debt was payable. The appeal must be allowed with costs in this Court and in the Court below.

[Appellant's Attorneys: Innes and Hutton; Respondent's Attorneys: God-lonton and Low

ESTATE GARDINER V TOWN ! 1902.
COUNCIL OF PORT ELIZA- } Nov. 3rd.
BETH.

Exceptions—Pleading—Executors
—Servitude—Municipality.

To a declaration in an action brought by an executor to interdict the Town Council of P. from preventing the sale of certain land belonging to the estate in lots according to a certain general plan, the Council pleaded that the land had been reserved by the previous executor as an open space for municipal purposes. To this plea the defendant excepted that it was bad in law in that there is no law in this Colony authorizing an executor to reserve as an open space for municipal purposes ground forming an asset in the estate of which he was executor. The exception was overruled.

This was an argument on an exception to the plea filed by the Town Council of Port Elizabeth in an action in which the executor dative of the estate of the late Johanna M. Gardner was plaintiff. The testatrix, Johanna Magdalena Gardner, died in 1864, notice of death not being filed until 1877, in which year John Alfred Holland was appointed executor dative. Holland caused a plan of subdivision to be made, and caused a certain lot to be sold and deducted from the estate. Thereafter-

wards remained registered in the name of the testatrix a large area of land, to which the Town Council now made claim. Hammond was the predecessor of the present plaintiff. Upon the plan of sub-division, which Hammond caused to be prepared, were endorsed on a certain portion of the land the words, "Reserved for municipal purposes." To this portion of the estate the Town Council now made claim, and plaintiff complained that the Council had wrongfully and unlawfully refused to allow him to sell this ground. He applied for an order confirming his title to the land, and authorising him to sell the same in accordance with a certain plan which had been prepared. The plea was to the effect that the ground had been reserved by the plaintiff's predecessor—Hammond—as an open space for municipal purposes, and that the Council had since exercised control of the land in the interests of the public. The plea admitted that the ground was still registered in the name of the executor. Exception was taken to the plea on the ground that it was bad in law, in that there was no law in this colony authorising an executor to reserve as an open space for municipal purposes ground forming an asset in the estate of which he was an executor.

Mr. Schreiner, K.C., for the plaintiff (the present exceptor.)

Mr. Searle, K.C. (with him Mr. Benjamin), appeared for the Town Council of Port Elizabeth.

Mr. Schreiner, K.C. (for plaintiff): In this case the land is claimed by the Town Council as "an open space." No such title is known to our law. A title may be by transfer, by registration, by codicil, or legacy, or by gift. Public bodies may also acquire land by the fact of its having been dedicated to public purposes, but a man cannot make any such dedication simply by making a note on the plan of his property. The only case I can find bearing on this question is *Alwal North Municipality v. Ozer and Smith* (Buch., 1875, p. 138.) This shows that given a clear title, even if individual neighbouring proprietors come forward, they cannot prevent an executor from winding up the estate, no matter what reservations there may be on the plan.

[De Villiers, C. J.: Is the plan you refer to registered?]

No.

[De Villiers, C. J.: But would not any adjoining proprietor, who had purchase on the faith that this open space, as shown in the plan would have a right to come forward and object?]

I submit not; there is no title known to our law which gives them any such right. Certainly, section 120 of Act 27 of 1897, does not give the municipality of Port Elizabeth any such powers. Any rights which may be possessed by an indefinite number of individuals, A, B, C, D, etc., do not amount to a common right. The words on the plan "reserved for municipal purposes," convey no common right. Let us take the case of a sale of land, and suppose that these or similar words are written on the sale plan: no title could thereby vest in any municipality subsequently formed unless by prescription. Erfholders, and their rights of access to their property, are by no means on the same footing with a Town Council in a matter of this kind. Then again, certainly, the executor had no power to put these words on his plan. The Municipal Council cannot simply say, "we refuse to allow you to sell," they must show that their objection comes under section 183 of the Act.

[De Villiers, C. J.: Are they bound to say in what manner this ground was reserved; may it not have been by servitude?]

They do not say so, and they ought to have specified a common law, or a statutory title. If a servitude is reserved the description of servitude, and the manner in which it was constituted, should have been set forth—*Richards v. Nash* (1 Juta, 312)—and even if a man dealing with his own property could thus confer rights on a municipality, it by no means follows that an executor could do so.

Mr. Searle, K.C. (for the Town Council): I submit that the exception taken to the plea is bad, whatever the plea itself may be. The exception is not that it is vague, or embarrassing, "but merely that it is" bad in law, and that there is no law in this Colony authorising an executor to reserve as an open space for municipal purposes, ground forming an asset in the estate of which he is an executor." This exception is very indefinite. The plea practically comes to this, viz., that the ground has been reserved by either the executor or the owner: it does not matter which.

If a man buys land on the faith that an open space will be reserved in his neighbourhood, surely, the people who engaged to make such reservation, are bound by their promise. If this plan is not in the office of the Registrar of Deeds, it may nevertheless be in the Surveyor-General's office, and in that case both parties would most certainly be bound by it. *Ohlsson's Breweries v. Whitchud* (9 Juta, 84); *Hidding v. Topps* (4 Searle, 107. The executor is, for all practical purposes, the owner of the property, and if he arranged with the municipality that certain portions of the property of which he was executor should be left as open spaces, not only will private citizens, but also the municipality have a right to demand registration; provided, that there was something in the nature of a contract between the vendor and the public. The only real exception to our plea is, that the executor cannot make any such reservation. But we submit that he can do everything that the owner can do. Our plea shows that there was a legal reservation, and I submit that a case such as this, which was to be traced back to 1878 cannot be decided upon exception. Section 120 of the Act 27 of 1897, fully covers this case. The heirs of the property have had the benefit of good sales, owing to this open space having been reserved, and they cannot now draw back from an undertaking of which they have reaped the full benefit.

Mr. Schreiner (in reply): The plea contains no allegation of any promise, or by whom the promise was made, of this vacant space. The exception is not vague, since it is as precise as circumstances will admit. All we say is that the municipality do not disclose therein any title to this land known to our law.

De Villiers, C. J.: I am inclined to think it would have been better if this plea had been fuller and had entered into greater detail, but I am not prepared to say that the plea, as it stands, is so vague as to justify the Court in upholding the exception which has been taken. The plea states that the ground which is the subject matter of the claim in this action was reserved in the year 1878 by John Alfred Holland, plaintiff's predecessor as executor, as an open space for municipal purposes, and that the defendants have, since that date, exercised control

in and upon the said ground, in the interests of the public and the owners of adjoining lots. By the term "was reserved," what I take it is meant is "was legally reserved." This ground may have been reserved in different ways. It may have been reserved by registration against the title or by contract which entitled the Town Council to have it registered, and in either case, the words "was reserved," or "was legally reserved," would be a sufficient statement of the claim on behalf of the defendants without stating the particular manner in which the reservation was effected. There should be a general legal statement of the defence, but the details of the evidence upon which the defendant relies need not be stated. There would have been no objection to further particulars being stated, but the absence of these particulars in the present case is not sufficient to justify the Court in declaring the plea bad. But if one looks at the exception it does strike one that the point intended to be raised is whether an executor may reserve ground for municipal purposes. It is contended that an executor has no right to enter into such an arrangement. Well, I do not see that an executor has any less right than any individual to do anything for the benefit of the estate. It might have been entirely for the benefit of the estate that the executor acted in this instance. There may have been sales of lots, and such lots may have been sold at very much higher rates than they would have otherwise by reason of the reservation. Therefore, it appears to me to be an untenable contention that an executor may not in law make such a reservation. Anyone wishing to impugn what an executor has done, must show that his action was to the prejudice of the estate. I am therefore unable to accept the principle that an executor is not entitled to make such a reservation, provided he does so in the manner prescribed by law. That must be proved at the trial. That question I am not in a position to decide now. The plea would entitle the defendants to produce proof that there had been registration, and it would entitle them to prove that there was such a contract made as would entitle the municipality to take advantage of the reservation. If there was a general reservation for the benefit of the rate-

payers of the municipality, I should have thought that the municipality is entitled on behalf of the ratepayers to protect their rights and the rights of the general public. However, these are questions which can be raised at the trial. At present I am not prepared to say that the plea is so bad as to justify the Court in upholding the exception. The exception must, therefore, be overruled, with costs.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants' Attorney: G. Trollip.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

DALZIEL V. DALZIEL. { 1902.
Nov. 4th.

This was an action for divorce brought by the plaintiff against her husband on the ground of his adultery with one Emily Myland, his niece. The plaintiff also claimed the custody of the five minor children of the marriage and a sum for their maintenance. The petition set forth that plaintiff resided at Sea Point and defendant resided at Woodstock. They were married in community of property on May 24, 1887. About October, 1898, defendant left plaintiff, and had not since returned to her. She alleged that he had committed adultery with one Emily Myland, his niece, by whom he had two children.

Mr. Alexander appeared for the plaintiff; the defendant was in default.

Charles William Henry Smith, clerk in the Colonial Secretary's Office, in charge of the marriage registers, produced the original certificate of marriage of plaintiff and defendant.

Mrs. Susan Edith Dalziel gave evidence in support of her petition. After their marriage in 1887, witness and her husband lived together in various places, finally, in 1897, settling at Mossel Bay. In October, 1898, defendant left her and went to Uitenhage to look for work. He wrote her in November of that year, enclosing some money, and that was the

last letter she received from him. Witness had then to part with her children and go into service to earn her living. Of the five children of the marriage, four were boys, the eldest fifteen years old, and the youngest four years old, and a girl eight years old. Witness had sued her husband in the Magistrate's Court, and got an order for £6 per month for maintenance. He did not, however, pay regularly, and witness had to sue him again in the Magistrate's Court.

By the Court: Her husband was a carpenter, and earned on an average £16 per month. The last payment of maintenance witness received from defendant was in June last.

Christine Wagner, a midwife, residing at Wynberg, gave evidence in support of the allegations of adultery, defendant having called her in to nurse a woman whom he described as his wife. Plaintiff was not the woman.

Mr. Alexander said that in view of the judgment obtained in the Resident Magistrate's Court, he would not press the claim for maintenance.

The Court granted a decree of divorce, with forfeiture of the benefits of the marriage in community of property; plaintiff to have the custody of the minor children of the marriage.

SELLS V. SELLS.

This was an action for divorce brought by the plaintiff against her husband on the grounds of his adultery and subsequently bigamous marriage. Plaintiff also asked for the custody of the minor children of her marriage with defendant.

Mr. P. S. Jones appeared for the plaintiff; defendant was in default.

The allegation in the petition was that in 1899 the defendant committed adultery with one Minnie Bruyns, with whom he subsequently entered into a bigamous marriage, for which offence he was tried, and convicted at the July Criminal Sessions.

Charles William Henry Smith, clerk in charge of the marriage registers in the Colonial Office, produced the original marriage register of plaintiff and defendant. He also produced the records of the marriage of one William Allen to Minnie Bruyns.

Mrs. Caroline Elizabeth Sells said her maiden name was Leibbrandt. She was married to defendant at Kalk Bay in

1896. She continued to live with her mother until January, 1899, when her husband left her. After defendant's bigamous marriage, he came to witness along with the girl Minnie Bruyns and, admitting the bigamous marriage, asked witness not to do him any harm. She subsequently gave evidence in the case against defendant, who, as a matter of fact, pleaded guilty to bigamy.

Archibald More produced the record of the trial and conviction of one William Sells, alias William Allen, on a charge of bigamy.

The Court granted a decree of divorce; plaintiff to have the custody of the minor children of the marriage.

VAN RYN WINE AND SPIRIT COMPANY
V. W. F. AUBET.

This was an action to compel the defendant to pass transfer of certain property purchased by the plaintiff company from the defendant.

In January, 1902, the defendant agreed to sell to the plaintiff certain property at Muizenberg, including a bottle-store and licence. The purchase price to be paid was £12,250. Certain terms were made for this money, one being that the plaintiffs should pay £4,000 against the transfer of the bottle-store, grocery business, and dwelling-house above. The £4,000 had been tendered, but transfer had not been given, there being some hitch owing to a strip of the ground sold being land belonging to the Kalk Bay-Muizenberg Municipality. After the issue of summons in the case time had, in response to a request by defendant, been allowed to enable him to obtain transfer of this strip of land. It was said that defendant had obtained transfer of this land, but as he still delayed giving transfer of the property mentioned to plaintiffs, this action had been brought.

Mr. Schreiner, K.C., for the plaintiffs. The defendant had been barred for default of plea.

Arthur T. Edwards said he was in the employ of the plaintiff company, and negotiated with defendant the purchase of the property at Muizenberg now in question. Witness deposed as to the terms of purchase. The rate of interest was to be five per cent., not six. The £2,000 were paid on the transfer of the licence to witness's name on April 5. Then the £4,000 for the bottle-store, etc., was

tendered, but a difficulty in passing transfer arose owing to their being a small encroachment on municipal ground.

The Court granted an order as prayed, with stay of execution for a fortnight.

GROENEWALD V. VAN { 1902.
SCHOOR. { Nov. 4th.

Death of party to action—Power of Attorney—Amendment of summons.

A plaintiff in an action in a Resident Magistrate's Court died before the case was concluded, and the agent who had been appointed by the plaintiff proposed to proceed with the case without a fresh power from the executor. The defendant's agent objected to this course, and the magistrate gave absolute from the instance.

Held, that as the agent persisted in proceeding without a fresh power, and without applying for an amendment of the summons, the magistrate was justified in granting absolute.

This was an appeal from a decision given by the A.R.M. in the Court of the Resident Magistrate at Stellenbosch.

The facts of the case were set forth in the Magistrate's reasons for his judgment as follows: In this case the plaintiff, assisted by her husband, sued defendant for the return of a certain horse or its value, £20. After certain evidence had been taken the plaintiff's agent applied for the case to be adjourned *sine die*, in order that evidence of the plaintiff, who was residing at the Paarl and was seriously ill, might be obtained by interrogatories. Interrogatories were forwarded to the R.M., Paarl, and the replies to the same obtained from the plaintiff. Cross-interrogatories were then forwarded by the defendant's agent, but before answers could be obtained the plaintiff died. On the resumption of the hearing of the case plaintiff's agent handed in letters of administration in favour of plaintiff's husband, but no power of attorney signed by the executor to proceed with the case. Defendant's agent then plead-

ed that the plaintiff is now barred as the power of attorney granted to Mr. Shaw (her agent) by plaintiff lapses on account of the death of the plaintiff, and proceedings must be instituted *de novo*. *Van der Linden* (book 3, chapter 3, section 7), says, "If one of the parties to an action, whether plaintiff or defendant, should die before the case has proceeded to final judgment, it cannot be continued against his heir, unless he has been expressly summoned for that purpose." I presume that this will also apply to executors or trustees, or *vice versa*. Section 8 of the same authority states, "The death of one of the parties to an action extinguishes the power of attorney granted to his attorney." I considered that the plaintiff was barred as the power of attorney granted to his agent lapsed, on account of the death of the plaintiff, and gave judgment, absolution from the instance with costs.

Against this judgment the plaintiff's executor appealed.

Mr. Rainsford appeared for the appellant; Mr. B. Upington appeared for the respondent (defendant in the Court below).

Mr. Rainsford (for the appellant): I submit that the Magistrate was wrong. *Van der Linden* (3-3-7) cited by him is not in point. The following section (8) is that which applies to the present case. See *Re Gerdt's Estate* (6 E.D.C., 5).

[De Villiers, C.J.: Was not a fresh power given to the legal representative?]

I believe not. I would submit that the judgment of the Magistrate should be upset, and the case adjourned *sine die*.

Mr. Upington (for the respondent): This case was heard on May 29. Mr. Shaw appeared, by a power of attorney, dated May 21. The case was then postponed till Sept. 15. Meanwhile the plaintiff had died. Plaintiff's husband, who had previously assisted his late wife in the suit, took out letters of administration as executor on Sept. 20. He had therefore full notice of the suit. Subsequently Mr. Shaw put in the letters of administration, but no power of attorney to continue the action had been signed by the executor. The Magistrate, therefore, had no alternative save to dismiss the case. The power given by the plaintiff to Mr. Shaw lapsed on her death, and hence there was no representative of the estate before the Court. The case

was quite different from one in which the plaintiff had died, and no executor has been appointed.

[De Villiers, C.J.: Was no application made for a postponement, or for an amendment of the record?]

No.

[De Villiers, C.J.: If the Magistrate had allowed an amendment of the record there would have been no difficulty. There was ample time for this between the date of plaintiff's death (August 20 and Sept. 15). Was the executor in Court?]

I do not know. Of course, he was in a sense a party to the original proceedings, and no doubt the Magistrate would have allowed the name of the executor to be substituted for that of the late plaintiff, if he had been applied to.

Mr. Rainsford (in reply): There is nothing to show that the executor was in Court. Even if he was, how could he have applied for a postponement if he had no *locus standi*. *Nolte v. Registrar of Deeds* (5, Sheil, 105).

De Villiers, C.J.: The record of the proceedings in this case is very meagre. What seems to have taken place is this: Mr. Shaw handed in the letters of administration granted to J. Gronewald (who had appeared previously to assist his wife, the plaintiff), his wife having died, and he having been appointed executor. Then the agent for the defendant pleaded that the plaintiff is now barred, as the power of attorney granted to Mr. Shaw by the plaintiff lapses on account of her death, and that therefore Mr. Shaw had no *locus standi* in the case, and that all the power is now vested in the executor of the estate. So far he was right, but then he went on to say that the proceedings must be instituted *de novo*. There he was wrong, as there was no necessity to institute the proceedings *de novo*. It would have been enough for the executor to give a power of attorney for the agent to proceed with the case and the agent might then have applied for an amendment of the summons, and the case would have proceeded. That would be the ordinary course in this Court, and no doubt it would have been the proper course in the Magistrate's Court also. If the agent had asked for a postponement of the case so as to enable him to get the power of attorney from his client to apply for an amendment of the

summons, and the Magistrate had then refused such application, I should certainly have said that the Magistrate was wrong. No such application was made, and from what I can gather, the plaintiff's agent must have persisted in proceeding with the case as it stood. The agent must have contended that his power was enough, whereupon the Magistrate granted absolution from the instance. I am not prepared to say that the Magistrate was wrong, although it would have been better for him to have suggested the postponement of the case. However, he did not make such a suggestion, and it was the plaintiff's business to know what to do. The plaintiff's agent seems to have made no suggestion, but he persisted on the case proceeding upon the power he had. But the power which deceased had given him was gone and could not justify him in proceeding with the action. He had to obtain a fresh power from the executor, which he did not do. Under these circumstances, while I regret that the expense of a fresh summons cannot be saved, the appeal must be dismissed.

After hearing counsel on the question of costs,

The Chief Justice said: The appeal will be dismissed with costs in this Court; the costs in the Court below to abide the result of any action that may be instituted in any Court below by the plaintiff's executor; if such an action be not instituted within three months, the respondent to have leave to apply to this Court for a further order as to costs in the Court below.

[Appellants Attorney: W. G. Coulton; Respondent's Attorneys: Faure and Zietsman.]

SOUTHALL AND CO. V. (1902.
CUTHBERT AND CO. (Nov. 4th.

Trade mark—Registration—Act
12 of 1895.

The word "Lightfoot" as applied to a certain special make of boots and shoes was held (1) not to be an invented word, and (2) to be a word having reference to the character or quality of the goods, and hence not to be registrable as a trade mark under Act 12 of 1895.

This was an application, upon notice of motion, calling upon the respondents to show cause why they should not be restrained from having the exclusive use of a certain trade mark registered in the in the registry of trade marks in this colony; why they should not be restrained from further interfering with the sale of similar goods by applicants, and also why the Court should not order to be expunged such trade mark so registered from the Trades Mark Registry of this colony.

The word proposed to be expunged was "Lightfoot." This mark was registered by the respondents in January last. The applicants then sent in an objection to the words being registered, but inasmuch as the objection was not accompanied by the fee of one guinea, in accordance with the trade marks rules, the Registrar refused to note that objection, and referred the applicants to the Court. It appeared that the word "Lightfoot" had been registered in connection with boots and shoes, and it seemed from the affidavits that the applicants, who carried on the business of boot and shoe manufacturers in England, had used the word "Lightfoot" for the last seven or eight years in connection with the boots and shoes, and had supplied the same to a firm in Cape Town. From the respondents' affidavits it appeared that they had used the word "Lightfoot" for about nine years in connection with their trade as boot and shoe merchants.

Mr. Benjamin for the applicants. Mr. Schreiner, K.C., for the respondents.

Mr. Benjamin: We contend that this word "Lightfoot" is not registrable. See section 2 of Act 12 of 1895. It is not an invented word, it is a dictionary word. See *Ruffel v. The Registrar of Deeds* (16, S.C.R., 141, and 9, Sheil, 100). Here we have two ordinary words "Light" and "Foot," and the compound is recognized in the dictionaries as a word descriptive of quality. Such words cannot be registered. *Wright, Crossley and Co. v. Royal Baking Powder Co.* (15, S.C.R., 9, and 8, Sheil, 11). *Peck, Frean and Co v. Carr and Co.* (15, S.C.R., 172), as to the words "Cafe Noir." *Re Unced Trade Mark* (1 Ch. D., 1901, p. 550), and Ch. D., 1902, p. 783 in appeal, as to the word "Unceda." This case shows that a combination of ordinary words cannot be registered even if dis-

without registration, that another, who has used the very same mark only 2 or 3 months, could come in and get it registered. I submit that on the legal merits of the case no good ground has been shown for expunging our trade mark from the register; nor indeed have any equitable grounds been shown for doing so. Very similar words, e.g., "Iron-clad" in reference to boots) have been registered in England.

Mr. Benjamin was not called upon in reply.

De Villiers, C.J.: The evidence in this case satisfies me that the respondents have

the registration must therefore be granted with costs. It was necessary for the applicants to come into Court to show that they had *bona fide* used this trade mark for a number of years, and I do not think that the fact that they went further in this motion than the Court is now inclined to go affects the costs. The application to have this registration set aside will therefore be granted with costs.

[Applicant's Attorney, D. Tennant, jun.; Respondent's Attorneys, Walker and Jacobsohn.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP
and a Jury.]

YOUNG V. CAPE GOVERN-
MENT RAILWAY. { 1902.
Nov. 5th.
" 6th.

This was an action against the Cape Government Railway by one Mrs. Young for £2,000 damages in respect of certain injuries sustained by plaintiff at Faure Siding. Plaintiff, who had been spending a few days at Sir Lowry Pass, proceeded on a visit to Faure, travelling in a first-class carriage in the first coach next to the engine. There were four or five other persons in the compartment. The train drew up just beyond the platform, at a point where it sloped down to the ground. In getting out plaintiff, who concluded that the train had drawn up at the platform, fell some four or five feet. She sustained serious injuries, which necessitated her being taken back to Sir Lowry Pass and being subsequently treated at a private hospital. Plaintiff was put to a considerable amount of expense, while her business was neglected during the time she was under treatment. The defence was that there was no negligence on the part of the railway officials, and that plaintiff left the train while it was in motion. The issues before the jury were whether the Government had been guilty of negligence in the matter, and, if so, what damages had been sustained, or whether the plaintiff left the carriage while the train was moving.

Mr. Searle, K.C. (with him Mr. Upington) for plaintiff. Mr. Schreiner, K.C. (with him Mr. Nightingale) for defendants.

Mrs. Young stated that for the past eight and a half years she had carried on an ostrich feather business in Strand-street. She supported herself and had four children. Last December she was staying at Sir Lowry Pass, and on the morning of December 16 she travelled to Faure by train. She sat facing the engine, and on reaching Faure she saw people on the platform. A gentleman inside the carriage opened the door, and she got

out. She remembered no more until she came to in the waiting room. She was the first to leave the carriage, but she did not get out while the train was in motion. She was taken back to Sir Lowry Pass, where she was attended by Dr. Hewat. She returned to town on March 1, and consulted Dr. Petersen. In May she went into Monte Rosa Hospital, remaining there for about a month. Owing to her inability to pay proper attention to her business, plaintiff since July had to employ a manager, to whom she paid £20 a month. She also had to pay £6 a month for a workroom on the ground floor, as, owing to her injuries, she could not go upstairs to the ordinary workroom. Doctors and nurses' expenses came to about £150. When she asked the station-master at Faure how the accident happened, he replied, "There is only one answer. The train was too long for the platform. If it had not happened to you, it would have to some one else."

Capel Jenner Hogg, chief inquiry clerk in the Standard Bank, said he was travelling in the same carriage with plaintiff from Sir Lowry Pass to Faure. He opened the door for her to alight when the train had come to an absolute stop. Plaintiff fell to the ground and was carried to the waiting-room. Her foot was badly injured. He thought the fall would be about three feet.

Cross-examined: He was absolutely positive that the train had stopped before he opened the door. He stepped round her to prevent himself from stepping upon her.

Re-examined: There was no Government official to help her into the waiting-room.

Thomas Raymond Savage, who travelled in the compartment behind the one occupied by the plaintiff, said he saw Mrs. Young lying in a heap on the platform. The train seemed to be stopped exactly where she had fallen, as she was lying opposite the door of the compartment from which she had fallen. She fell about three or four feet away from the door. Her ankle was very much swollen and the bone projected. Mr. Adams pushed the bone back into position.

Cross-examined by Mr. Nightingale: He had to jump to get down. He did not see plaintiff step out of the carriage, but he saw her falling to the ground.

He was certain that he was travelling in the first coach of the train.

Frank Adams, formerly in business in Strand-street, Cape Town, said he was a passenger by the same compartment as the plaintiff. On their reaching Faure the door was opened by a gentleman in the corner, and Mrs. Young and another lady got out. Then he heard a scream and he found Mrs. Young lying opposite the door. He saw her ankle was swollen and he thought it was a sprain. He tried to pull it back and as he did so he believed the lady fainted. Then they carried the plaintiff away. When they got into the carriage he noticed a tree opposite to the door. He could not answer whether the train had moved. Mrs. Young was lying three-quarters the way down the slope. He reported the matter to the authorities at Cape Town.

Cross-examined by Mr. Schreiner: He settled the position where Mrs. Young was lying by the site of the tree. He did not think he was one of the gentlemen who opened a carriage door before the train stopped. He did not as a rule open the door before the train stopped. He would not admit that the common man did the other thing. He did not know whether Mr. Hogg opened the door before the train stopped.

Re-examined by Mr. Searle: He was sure the train was stopped when he alighted. If he had walked straight out he should have walked upon Mrs. Young.

Dr. Richardson said that the plaintiff's ankle was photographed by Rontgen rays. Witness produced copies of photographs. These showed that there had been a fracture of the outer bone of the ankle and at the same time there was a partial displacement of the foot. The outer bone had united, but not in a straight line, and this prevented the foot from being used properly. To put the ankle right it would have to be broken and set in its natural position. If this were done it would relieve Mrs. Young's condition very considerably.

Cross-examined by Mr. Schreiner: He could not say whether it was known before the Rontgen rays were brought into use that the plaintiff's ankle was fractured. It was certainly suspected before then that the ankle was fractured.

Dr. Petersen said he attended the plaintiff in August. She was suffering much pain and discomfort and was using two sticks. He reduced the swelling and he discovered what he thought to be a fracture. He afterwards recommended the Rontgen rays. He agreed with the evidence of Dr. Richardson as to the treatment which ought to be adopted to rectify the displacement beneath the ankle bone.

Cross-examined by Mr. Schreiner: He was not at all clear as to the date when the plaintiff consulted him. He did not think there was a considerable delay between the plaintiff consulting him and her admission to the Monte Rosa Hospital.

Dr. Hewat, of Somerset West, said that he attended the plaintiff after the accident during the first few months of this year. His charges were eleven guineas. He saw her after she was removed from Sir Lowry's Pass to Gordon's Bay. When she left Gordon's Bay she seemed to be in practically the same condition as she was in now. He treated the case as one of a bad sprain.

Re-examined: He got his first telegram from Sir Lowry's Pass to attend the case. He afterwards received a telegram from the Government. He treated the plaintiff as a private patient.

Mrs. Lever, manageress of White's Hotel, Sir Lowry's Pass, said she was travelling in the same compartment as the plaintiff. She was the last to leave the compartment. Mrs. Young was lying exactly opposite the door. Mrs. Young came to the hotel on the Saturday and the accident happened on the following Monday. The hotel charge of £10 extended from the Saturday to the following Monday week.

Cross-examined by Mr. Schreiner: They left the carriage hurriedly. She thought the plaintiff was lying about half way down the slope.

Wm. Lucas Brown deposed to having taken certain photographs (produced) of the platform.

Mr. Searle said that the plaintiff was in the Monte Rosa Hospital from the 2nd May to the 29th May. Counsel produced cheques given in payment to the doctors amounting to £29.

After correspondence had been put in, the case for the plaintiff was closed.

Mr. Schreiner said that before calling evidence it would perhaps simplify mat-

ters if he outlined the case for the defence. A train coming in from Sir Lowry's Pass to Faure Siding would habitually stop so that the guard's van would rest at the Sir Lowry's Pass end of the platform to discharge its parcels and to receive parcels, and of course as it was only a two and a half bogie platform the train would overshoot the platform, the length of which was about 124 feet. On this occasion the train drew up in the ordinary manner with a view to stopping the guard's van at the Sir Lowry's Pass end. The only officer at the station was Mr. Cradock, the foreman. The train was coming into the station when the fireman, who was sitting just outside the engine, saw a lady leaving the train before it had ceased motion. He then warned the driver to stop as soon as he possibly could, and the driver stopped probably within three yards after the time he was warned. When the train came to a standstill the guard's van was drawn up so that it was not quite, as to its doors, opposite the platform, but just about two feet down, and the foreman went to the doors. After dealing with the guard's van the practice would be for the foreman to go down the platform to see that all was in order before he gave the "right-away" to the guard. The guard and the foreman did not see what actually took place in connection with the accident, but when plaintiff was taken to the waiting-room she made a statement to the latter. Counsel said he hesitated almost to take up the time of the Court in putting any evidence before the jury, because there was not a word of evidence of negligence that he was able to follow. But he had decided, as this was a Government case, to let the whole of the case be heard, though in leading the evidence he submitted that the evidence adduced did not in law justify the allegations of the plaintiff.

George Cradock, foreman at Faure Siding, said that when a train drew into the station, the guard's van was usually stopped at the Somerset West end of the platform. On that occasion the train was stopped in the usual manner. Witness gave "right away" to the guard, and he transferred it to the driver. If it happened that passengers were carried by the siding, they could give orders to back the train. The first he knew of the accident was when he saw the lady being carried on the platform by some gentle-

men. Witness did not remember saying to the lady that the train was too long for the platform, nor did he recollect saying that if the accident had not happened to her it would have happened to someone else.

Cross-examined by Mr. Searle: It was very rarely that anyone alighted outside the platform. Witness was the only official there, and as far as he was aware there was no notification to passengers that they might beckon to him to have the train backed. The passengers, with care, might safely alight by the two steps on the carriages.

Re-examined by Mr. Schreiner: He did not remember saying that if the accident did not happen to the lady it would have happened to someone else. The platform was rather short, and unable to hold the whole train, and people were liable to be hurt.

Thomas Alfred Mundy, chief claims clerk for the Western Province, said that he checked the number of coaches on the train from the guard's record. There were four vehicles in addition to the engine and tender. It would be 131 feet from the centre of the guard's van to the Cape Town end of the first-class carriage.

Cross-examined by Mr. Searle: Witness had simply taken the measurements from the carriages at Salt River. Witness was not sure that he had measured the carriage Mrs. Young had travelled in, but could not explain why he was certain about the matter.

Charles Frederick Croll, guard of the train, said that he was well acquainted with Faure Siding. The average number of carriages on the train was five, and on that occasion he was in charge of four vehicles. The train was usually pulled up on a level with the platform, and that would leave the door of the van at the end of the platform towards Sir Lowry's Pass. On that occasion the door of his van was opposite the ramp of the platform. Witness did not see any accident, and the first thing he saw was the lady being carried away. If the train was overdrawn, a passenger could order the foreman to back the train. Witness recollected the position of his van from the fact that he had very heavy cans of milk that morning.

By his Lordship: He had seen passengers, including ladies, get off outside the platform. With ordinary care witness believed there was no danger attached to

getting off. Passengers could use the the handrail and get down by the two steps on the carriage.

Arthur Reynolds, fireman in the employ of the C.G.R., said that he noticed a lady stepping from the train while they were slowing down into the Faure Siding. The lady fell from the carriage, and witness shouted to the driver. The open carriage door had stopped about three yards from where the lady had fallen.

Cross-examined by Mr. Searle: Witness had nothing to do at the time. The lady was picked up about three and a half yards from where the carriage was stopped.

Nicholl Russell, the driver of the train, said that he usually stopped the van at the end of the platform, and could gauge the distance to a foot. Witness stopped a little sooner than usual when the fireman shouted out, "Whoa, mate, there is a woman after falling from the train."

Cross-examined by Mr. Searle: Witness would have got off his engine had he thought there was a serious accident. Witness measured the distance the other day, and remembered the spot where the lady fell nearly twelve months ago. There was no jerking when witness stopped the train, and there was a way in bringing a train to a standstill without jerking.

The witness, having been dismissed, explained to his lordship that there were plenty of stations on the line without any platforms. If the people were only careful they could get down safely by means of the handrail and the double step.

Peter Broers, a clerk in the Savings Bank Department, Cape Town, who was a passenger by the same train, said he saw the lady fall from the train whilst it was in motion.

Lewis Henry Cochrane, district engineer of the line from Cape Town to Wellington, said that the platform at Faure Siding was 124 feet long and three feet high, and the ramp sixteen feet long. The platform was sufficient for the requirements of Faure Siding.

Cross-examined by Mr. Searle: The platform was not sufficient to enable all the passengers to alight thereon, but it was not the practice of the C.G.R. to provide such accommodation.

Mr. Searle: The Government's position with regard to the traffic at Faure is monstrous. They deliberately left passengers to fend for themselves, and their

servants devoted their attention to the parcels. They did not warn people in the slightest. It was clearly proved that the Government intended people to get out that way. The plaintiff did not know about the peculiar habits of the management of the station at Faure. This station was the only station on that line where they behaved in that extraordinary manner. If the plaintiff had known that they took the foremost carriages so far forward beyond the platform, no doubt she would have travelled further from the engine, but she did not know that, and she could not be expected to know that. As to the question of damages, the plaintiff's foot was practically deformed, and it might remain so for the rest of her life. This was a very serious matter to the plaintiff, who had a business to attend to, and had to support four children. From the beginning the Government has not treated the claim of the plaintiff in a fair and reasonable manner. It took the Government six months to find out that they knew anything about the matter at all. Then they repudiated negligence. As to defendant's liability, Government are liable at law for the injuries sustained by the plaintiff in being carried beyond the regular platform and falling on the ground upon alighting from the carriage at the station. (*Cockle v. S.E.R. Company* (41, L.J.C.P., 140), *Bridges v. N. London Railway Company* 43, L.J.Q.B., 151), *Robson v. N.E.R. Company* (46, L.J. Ex. 374). I submit that upon the authorities I have quoted there was ample evidence of negligence in this case. I contend that the conduct of operations at Faure Station is wholly unreasonable.

Mr. Schreiner: The prime issue for the jury to try is whether the Government were guilty of negligence, rather than whether the plaintiff left the train while in motion. The case is of great importance and is not limited in its bearing to this particular action. It goes to the root of Government railway administration in this country. It will depend upon the issue of this case whether the Government could, on the one hand, readily give facilities at all by way of sidings in these outlying country places such as the circumstances of the country demand, or whether, on the other hand, they must proceed to fit up stations in the most complete and approved manner. Who has been guilty of negligence in

this instance? There is not the slightest evidence against the guard or the driver or fireman. Everyone of the Government servants was doing the duty that he ordinarily performed there. The question for them to determine is whether reasonable arrangements were provided for the passengers at what was merely a siding. We have to remember that the principal traffic there was goods. The passenger was a rarity. When they ran their train to a station like that it was reasonable that the guard's van should be brought up at the platform so that the parcels and goods could be dealt with. In the country places it was constantly occurring that the trains were longer than the platforms. This was not a unique platform at all. We are told that Mrs. Young left the train immediately it reached the station. She did not wait till any of the servants of the Government came to see whether any passenger wanted to alight. We cannot apply these doctrines of old-established railway lines in England to a country where the conditions are so different in these small and remote up-country places. I do not see any necessity for the trains to draw up at these small sidings at two shifts, on the off-chance that there may be a passenger who wants to alight.

Mr. Searle having replied, His Lordship addressed the jury.

The jury retired to consider their verdict, and, after an absence of twenty-five minutes, returned with a verdict for the plaintiff for £900 damages.

Judgment was entered accordingly with costs.

[Plaintiff's Attorney: D. Tennant, jun.; Defendant's Attorneys: Reid and Nephew.]

SECOND DIVISION.

(Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).

FORDE V. ROSS.

{ 1902.
{ Nov. 5th.

Broker — Commission — Sale — Condition.

The defendant employed the plaintiff as broker for the sale of certain hotel premises at a

commission of one per cent. The plaintiff effected a sale for £6,000. The only condition of such sale being that the plaintiff should obtain a loan of £5,000 on security of the premises for the purchaser. The plaintiff in endeavouring to obtain such loan found that it would be necessary to pay one per cent. on the amount of such loan, and proposed to the defendant that he should pay it. This the defendant refused to do, but he did not repudiate the sale with the condition attached. The plaintiff then informed the defendant that the matter had been satisfactorily settled, and the defendant said he would see the plaintiff in a few days, but thereafter refused to abide by the sale. The Court having found that a binding sale had been effected through the instrumentality of the plaintiff.

Held, that he was entitled to claim the commission agreed upon.

This was an action for £60, brokerage commission in respect of a sale of certain hotel premises effected through the plaintiff on behalf of the defendant. The purchase price was £6,000, and by special arrangement the rate of brokerage was to be 1 per cent. The declaration stated that the plaintiff was a broker carrying on business in Cape Town. In the month of June, 1901, defendant was the registered owner of certain property—the Welcome Hotel, Maitland—and adjoining land. On or about the 18th July the plaintiff, acting as broker for and on behalf of the defendant, and instructed by him, and in consideration of a commission of 1 per cent., to be paid by the defendant on the sale being effected, sold the premises to one Mons for £6,000. Defendant had refused to pay the brokerage. The plea stated that in July certain negotiations took place between Mons and defendant,

through the intermediation of the plaintiff, but no sale was completed as the result of such negotiations.

Mr. Benjamin for plaintiff; Mr. Buchanan for defendant.

William Forde, the plaintiff, was called, and gave evidence in support of the allegations contained in the declaration. In March last defendant was about to leave for England, and approached witness with regard to the sale of the hotel to Mons. Witness saw Mons, who was the lessee, and in June he wrote to defendant in England laying before him an offer made by Mons. Witness found subsequently that this letter was not received, defendant being on his way to this country. After Mr. Ross's arrival, witness saw him, and a meeting was arranged. This took place in witness's office, witness, Ross, and Mons being present. It was then agreed that Mons should purchase the hotel for £6,000, Mons to pay £5,000 in cash, and £1,000 to be on bond free of interest for three years, subject, of course, to Mons being able to raise a loan for the £5,000. Witness did not pass a broker's note, because defendant was going to Natal that day, and he had no time. Defendant said that if he found when he returned that the money was raised, he would pass transfer, and witness could then make out the broker's note. Mons only agreed to pay 1 per cent. for raising the £5,000. Witness telegraphed to defendant, saying he could raise the loan at 2 per cent., and asking him if he would pay 1 per cent. There was a number of telegrams, and defendant said he could not pay 1 per cent. for raising the loan. Witness afterwards raised the loan of £5,000. It was agreed before defendant went to England that the brokerage should be 1 per cent. Subsequently a meeting was held at Maitland, where witness ascertained that there was a general bond on the whole of the property. Defendant said he wanted to raise a fresh bond for £3,000 in order to relieve the hotel of the bond. He told witness that Hofmeyr's valuation was £12,000, and witness said that on that valuation he did not think he would have any difficulty in raising the £3,000 which defendant required. Witness wrote a letter to defendant, saying he had raised this amount, and stating that that letter would be a provisional note for the sale of the property. On the back of this letter, defendant made an endorsement to

the effect that he had not consented to the sale of the hotel, and that he (plaintiff) was trying to bluff him into accepting his conditions. He definitely refused to deal with plaintiff further. The property was ultimately sold together with the remainder of the ground, for £12,000 to Mons.

Cross-examined: Witness did not undertake to raise a loan for defendant with the object of releasing the hotel from the bond before defendant went to Natal. This was not spoken of at the meeting at witness's office. Witness sent a telegram to Natal to Ross, asking him if he was prepared to give the extra 1 per cent. on "both." Witness was then only trying to raise £5,000. Witness spoke of raising "loans" in telegraphing. That must have been a clerical error. The sale on the 18th July was conditional upon the loan of £5,000 being raised. Mons had the option, under the lease, of purchasing the hotel and grounds for £12,000. Witness introduced the parties. Ross introduced Mons's name. Mons issued summonses against defendant in October compelling him to give transfer, but this action was withdrawn. Witness believed it was withdrawn on the question of Ross's solvency. The issuing of this summons was not part of the "bluff" Ross had referred to. Witness considered the sale completed before Ross went to Natal. Witness had told Ross this.

By the Court: Mons ultimately agreed to pay the 2 per cent. for raising the loan. The loan was not taken up, Mons making arrangements elsewhere when he took the whole of the property. Mons agreed to pay the 2 per cent. before Ross returned from Natal. The condition of the sale was that the loan should be arranged before Ross returned to Cape Town, and witness told him on his return that it had been arranged.

Robert Ball, partner in the firm of E. R. Syfret and Co., said that Forde approached him in August about raising a loan of £5,000 on the Welcome Hotel. Witness wanted transfer to go through. The firm was prepared to advance the money. Witness inspected the property. When he first approached witness, Forde said that Mons had bought the property.

Cross-examined: Witness would say his firm was entitled to make a charge on the £5,000, although it had not actually been advanced.

Mons was called, and gave evidence in corroboration of plaintiff's evidence. At the meeting in plaintiff's office, a sale was agreed upon subject to the raising of the loan of £5,000, upon which witness agreed to pay 1 per cent. Witness did not hear anything said about a loan of £3,000 being raised. There was some loan to be negotiated for, but no particular sum was mentioned in witness's presence. Witness regarded the sale as completed subject to the loan of £5,000 being raised.

Cross-examined: Another loan was spoken of at the meeting in July, but witness did not at the time think the sale was also conditional upon this other loan. From what occurred at a subsequent meeting, it occurred to witness that what was said about the other loan was a difficulty in the way of passing transfer.

By the Court: Witness considered the sale completed before defendant went to Natal. He did not insist upon having anything in writing at the time because defendant and plaintiff were anxious to sell, and witness thought they would look after their own interests and his.

This concluded the evidence for the plaintiff.

Mr. Buchanan read the evidence taken on commission for the defence.

In his evidence, defendant said that no sale was effected before he went to Natal. There was a chat between plaintiff and himself about it, but witness told him he had better leave it over until his return. Witness understood the plaintiff's telegram to refer to raising a loan to relieve the rest of the property of the bonds. In cross-examination, defendant said that Mons came to him in the first place about buying the hotel. Witness did not remember asking Forde to use his influence with Mons to get him to buy the hotel. At the meeting in Forde's office, before he went to Natal, it was arranged that Forde was to get a loan for witness on the property adjoining the hotel. On returning from Natal witness told Forde there was no sale. As to the alleged meeting at Maitland, that was accidental, witness and Forde happening to be there at the same time. There was some discussion there, and witness told Forde the sale was off. In re-examination, witness said Forde had no authority to sell the property before witness left for Natal.

Plaintiff (recalled) stated in answer to the Court that he did not remember whether he specifically told Ross on his return that he would not be required to pay the additional 1 per cent. on the loan of £5,000 for Mons. Witness's words, so far as he could remember, were: "Everything is satisfactorily arranged now." Witness telegraphed to Ross asking him if he would pay the additional 1 per cent. at the request of Mons.

Counsel were then heard in argument on the facts of the case.

De Villiers, C. J.: It is to be regretted that the plaintiff did not on the 18th July, when this sale is alleged to have taken place, draw up broker's notes and deliver them to the purchaser and seller. That would have been the more proper course and a more businesslike manner of dealing with the matter. But the fact that these broker's notes were not passed would not debar the plaintiff from obtaining his commission if it is clear that through his intervention a sale was actually effected between the parties, and the question to be decided is whether, on the 18th July there was such a sale effected as would entitle either the alleged purchaser or the alleged seller to enforce the sale, as against the other upon the conditions being fulfilled, subject to which the sale was made. The plaintiff's case is that on the 18th July this Welcome Hotel business was sold for £6,000 subject to plaintiff raising a loan of £5,000 upon the property. The evidence shows that the plaintiff at once set about endeavouring to obtain this loan and in the course of his endeavours he discovered that the one per cent. upon the loan which Mons had agreed to give would not be sufficient and that in order to enable him to obtain the loan from private individuals, through the intervention of another agent, he would have to pay another one per cent. Accordingly he approached the defendant by telegram, asking him whether he would consent to pay this additional one per cent. Now, if the defendant had there and then replied that he refused to pay this one per cent. and that he put an end to the whole negotiations, I am inclined to think he would have been in the right, because, although the sale was subject to a condition the fact that the plaintiff had en

amount of £60, which he claims, with costs.

[Plaintiff's attorneys: Michau and De Villiers. Defendant's attorneys: Van Zyl and Buissine.]

SECOND DIVISION.

[Before the Chief Justice, the Right
Hon. Sir J. H. DE VILLIERS, P.C.,
K.C.M.G., LL.D.]

ADMISSION.

Ex parte VONNAN. { 1902.
 { Nov. 6th.

Mr. Russell moved for the admission of Joseph Daniel Vonnau as an attorney and notary.

Application was granted, the oath to be taken before the Registrar of the Griqualand West High Court at Kimberley.

PROVISIONAL ROLL.

WILSON, SON AND CO. V. ISHMAEL.

Mr. Buchanan moved for a final order for the sequestration of respondent's estate as insolvent.

Order granted as prayed.

NICHOLLS V. GREENING.

Mr. Buchanan, for plaintiff, moved for provisional sentence upon a Natal Court judgment for a certain sum.

Application granted.

VAN DER WESTHUYSEN V. DU PLESSIS.

Mr. J. E. R. de Villiers moved for provisional sentence on seven mortgage bonds for the total sum of £1,619, together with interest at 6 per cent. from October 1, 1901, and also for £24 balance of interest due prior to February 1, 1901.

Application granted.

CAISSE V. HOWARD.

Mr. Benjamin, for plaintiff, applied that this matter stand over until the 13th inst.

Application granted.

VAN DER BYL AND CO. V. RORKE.

Mr. J. E. R. de Villiers moved for the discharge of the provisional order for the sequestration of respondent's estate, granted on October 28 last, respondent having since made satisfactory arrangements with his creditors.

Application granted.

JAGGER AND CO. V. LIKAND AND ANOTHER.

Mr. Benjamin moved for the final sequestration of respondent's estate.

Application granted.

VAN DER BYL AND CO. V. COHEN.

Mr. J. E. R. de Villiers moved for the final sequestration of respondent's estate.

Application granted.

CASSIM V. PORTRICK.

Mr. Benjamin, for plaintiff, moved for confirmation of a writ of arrest against defendant, who was leaving the Colony.

Mr. Gardiner, for defendant, asked for a postponement. He understood defendant, who was arrested on the previous day, disputed the debt and wished to enter appearance.

The motion was ordered to stand over until next Tuesday.

ILLIQUID ROLL.

COHEN V. MYBURGH. { 1902.
Nov. 6th.

Mr. Alexander moved for judgment under Rule 329 (d) for the sum of £34 2s., balance of money due, interest *a tempore morae*, and costs of suit.

Application granted.

LINDSAY V. FRIEDMAN.

Mr. Gardiner moved for judgment under Rule 329 (d) for the sum of £110 for rent due to plaintiff by defendant, together with an order for ejectment, interest and costs of suit.

The application was granted.

ZAHN V. STEPHAN.

Mr. Benjamin moved for judgment under Rule 319 for the sum of £475, together with interest from April 19, in respect of the purchase of certain property, transfer of which was tendered against payment.

The application was granted.

ESTATE OF DE SMIDT V. GATES.

Mr. Close moved for judgment under Rule 329 (d), for the sum of £81 13s. 9d.

The application was granted.

HEARNS V. GIBBON.

Mr. Buchanan moved under Rule 329 (d) for the respondent to supply a full account regarding the sum of £3,000, amount realised by the sale of a certain farm.

The application was granted, the statement to be furnished within six weeks.

REHABILITATIONS.

Ex parte HELLIG. { 1902.
Nov. 6th.

Mr. Buchanan moved for applicant's rehabilitation.

Motion granted.

Ex parte GRUNEWALD.

Mr. Alexander moved for applicant's rehabilitation.

Motion granted.

Ex parte VENTER.

Mr. Gardiner moved for the applicant's rehabilitation.

Motion granted.

Ex parte BESTER.

Mr. De Waal moved for applicant's rehabilitation.

Motion granted.

Ex parte ERLANK.

Mr. Buchanan moved for applicant's rehabilitation.

Motion granted.

GENERAL MOTIONS.

NEL V. LATEGAN.

Interdict—Security for rent.

This was an application for the making absolute of an interdict against respondent, who had hired a farm from applicant, for which rent was owing, to prevent his taking away his movable property located thereon until he had given surety for the payment of the rent. The farm is located in the Prince Albert division, and the rent is £200 per year.

Mr. Buchanan was for applicant, and Mr. Close for respondent.

De Villiers, C.J.: It is clear that an interdict should not be granted now, because there is no inclination on the part of respondent to proceed with the sale. Then as to whether the application was in the first instance justifiable, everything must depend whether the rent was actually payable at the time the application was made or not, and upon this point I must confess that the evidence is very doubtful. On the whole I have come to the conclusion that there should be no order either upon the application itself or as to costs, but that there should be leave to applicant to include a claim for costs in any action which he may be advised to bring, so that if he proceeds further with his action he can claim costs.

COETZER V. COETZER.

Contempt of Court—Alimony.

Mr. De Waal applied for an order to attach respondent for contempt of Court, by reason of his having neglected to comply with an order of Court to pay the sum of £24 per quarter for the support of his wife and her minor children.

The Chief Justice said there should be an affidavit that the respondent was able to pay.

Mr. De Waal said that evidence of means was produced at the trial.

An order was granted as prayed.

Ex parte WASSERMAN.

Mr. Buchanan applied for an order extending the return day of a citation by

which applicant was suing her husband for restitution of conjugal rights.

The return day was extended as prayed.

Ex parte THE WORCESTER BUTCHERIES CO. (IN LIQUIDATION).

Mr. Buchanan presented the first report of the liquidators, and asked that the report should be ordered to lie open in the usual manner for inspection of creditors.

Granted.

Ex parte FLETCHER.

This was an application for an order directing the High Sheriff to pay out a certain sum of money. The money in question was in the form of a bond for the appearance of one Litten, who was arrested on a writ issued at the instance of applicant, and against whom provisional judgment had been obtained.

Mr. Buchanan, who moved, said that there had been no notice on the surety, but he submitted this was not necessary.

The Master said that defendant intended to defend the case, and was expected to return from England about the middle of the month.

The Chief Justice said he thought that it would be better to grant a rule calling upon the surety, Herman Morris Shenker, to show cause on the 13th inst. why an order should not be granted as prayed.

Ex parte THE EXECUTORS OF THE ESTATE OF THE LATE FAURE.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to amend a certain deed of transfer.

An order was granted in terms of the Registrar's report.

Ex parte PILKINGTON.

This was a motion to attach a certain ship to found jurisdiction.

Mr. Close appeared for the applicants; Mr. Gardiner for the respondents.

Mr. Gardiner put in an undertaking to give security.

In terms of a consent paper, the rule was discharged, costs to be costs in the cause.

Ex parte SMITH.

Mr. Buchanan applied for an order authorising the amendment of certain title-deeds. Petitioner stated that his name was erroneously given in the will of his parents as John Johannes Smith. He applied to have his proper name substituted.

A rule was granted, calling on all concerned to show cause on the 30th November why an order should not be granted as prayed, the rule to be published in the "Oudtshoorn Courant," and to be served on Wm. Henry Smith.

IN THE MATTER OF THE PETITION OF
SANNA JACOBS.

On the motion of Mr. Russell, an order was granted authorising the payment of a certain inheritance to the applicant, she having been married in community of property to a husband, who deserted her some five years ago, and has not since been heard of.

Ex parte ROUX AND OTHERS.

Mr. Gardiner moved for an order authorising the transfer of a certain school property at Frenchhoek. The petitioners, who are the committee of the school, which was discontinued in or about 1890, wished to sell a certain donated piece of ground for £100, in order to purchase a better site.

An order was granted as prayed.

Ex parte VAN DER SPUY AND OTHERS.

Mr. Benjamin moved to make absolute a *rule nisi* authorising the winding up of the Paarlse Land Vankoop Maatschappij under the Companies Act 1892, and to appoint certain two gentlemen, Messrs. Van der Spuy and C. C. A. de Villiers as liquidators.

Mr. Buchanan appeared on behalf of certain creditors to move for the appointment of Mr. Arthur John Lewis, either as sole executor, or as co-executor, with one of the two proposed by the applicants.

After hearing counsel, the Court made the rule absolute.

The Chief Justice said: No suggestion is made that the two gentlemen nominated would not be fit and proper persons, and would not do their duty to all concerned. The rule will be made absolute.

Ex parte GROENEWALD. { 1902.
Nov. 6th.

Sale of *fidei commissory* property—
Burdened estate.

This was a motion for an order authorising the sale of certain landed property. The petition of Pieter Christian Groenewald in his capacity as executor of the estate of the late Pieter C. Groenewald, set forth that by leave of the Court, granted October 25, 1892, he had mortgaged certain property situate in Keeromstreet and Orphan-street, Cape Town, but had not been able to comply with the condition laid down in the order of Court with reference to the repayment of the bond. Petitioner's letters of administration had been lost. The late P. C. Groenewald had been instituted heir to certain property burdened with *fidei commissum* in favour of the children of his first marriage, only one of these children survived him, who had seven children. Under the will instituting the late P. C. Groenewald as heir a sum of £1,257 must be paid to the remaining heirs for the property, which sum petitioner was now being pressed by certain of these heirs to pay, but was unable to do so. Certain moneys were also due to the Colonial Government, and to the Town Council in respect of the said property. Wherefore the petitioner prayed for an order authorising him to sell the said property. The major heirs consented, and the Master recommended that the property should be sold, and the proceeds deposited with one of the Cape Town trust companies. On the motion of Mr. J. E. R. de Villiers, the Court granted an order in terms of the Master's report.

[Applicant's attorneys: Van der Byl and Van der Horst.]

Ex parte BARNARD. { 1902.
Nov. 6th.

Life policy—Assignment—Cession
to another beneficiary.

B. had taken out a certain life policy and assigned all benefits therefrom to a minor niece. Within three years thereafter he married and by ante-nuptial contract settled the benefits of the said policy on his wife. The guardian of the minor

ceded the policy to B., who then ceded it to his wife; but the Insurance Company refused to recognize these cessions without an order of Court, for which B. now prayed.

Held, that as B. had received no consideration from his niece for the policy and was under no obligation to pay the premiums, and that as it had no surrender value at the time B. ceded it to his wife, an order should be granted as prayed.

This was an application for an order authorising the registration of the cession of a certain insurance policy.

The petition of William Barnard showed: (1) That on April 27, 1903, he insured his life in the "Mutual Life Insurance Company," of New York, U.S., for the sum of £500; (2) petitioner (then a bachelor) appointed his niece, Maria E. A. Lyon (a minor), beneficiary under such policy; (3) when petitioner appointed his niece (M. A. E. Lyon) beneficiary, under the said life policy, he did so in view of his being a bachelor, and having no nearer relatives, whom he wished to benefit, but always in the belief that should he acquire nearer ties in the future, he could change the beneficiary, and appoint another to benefit under the said policy; (4) the said life policy has ever since the time when it was taken out been in petitioner's custody, and that the said Marie E. A. Lyon, or her father and natural guardian, William Harry Lyon, has never had the custody thereof; (5) after the petitioner had appointed his said niece (M. A. E. Lyon) the beneficiary under the said life policy, he was on May 20, 1895, lawfully married to one Johanna S. C. Moller, and that there are four children issue of the said marriage; (6) the said marriage was by ante-nuptial contract, by which petitioner settled the said life policy upon his said wife, and after having procured from the guardian of the said M. A. E. Lyon a full cession of any rights she might have to the benefits of the said policy, he formally ceded the said life policy unto and on behalf of his wife. (7) The

Mutual Life Insurance Co. of New York, however, refused to register the change of beneficiary in their books without an order of Court, on the ground that the original beneficiary was a minor.

Wherefore the petitioner prayed for an order authorising and directing the said company to register the said cessions of beneficiary under the said policy.

The Master's report stated, *inter alia*: If the policy had been settled on trustees for the benefit of the minor, and petitioner had undertaken to keep the policy alive, and conferred the power on the trustees to recover the premiums in default of payment, it appears that he would have had no further control over it. But no consideration appears to have been given to impose on petitioner the obligation to keep the policy in force while the minor was the beneficiary, and he could not have been compelled to pay the premiums if he had allowed the policy to lapse. If that be so, it would appear that petitioner could revoke the gift. The policy had no value at the time the petitioner contracted marriage, for a policy only acquires any value within three years, and then only a surrender value; and I venture to think that if petitioner had then allowed the policy to lapse, the minor would have had no claim on it. I have not been able to find a precedent for a similar application. . . ."

On the motion of Mr. Gardiner, the Court granted an order as prayed.

[Applicant's Attorneys: Walker and Jacobsohn.]

Ex parte BOZZETT.

Mr. Benjamin moved for leave for applicant to sue his wife by edictal citation for restitution of conjugal rights, or, failing this, for divorce on the ground of desertion.

Leave was granted, the citation being made returnable on the 1st February next, personal service to be effected.

ESTATE OF GARDNER V. PORT ELIZABETH TOWN COUNCIL.

Mr. Close moved for a commission *de bene esse* to take evidence in this matter. Granted.

FARMERS' CO-OPERATIVE COMPANY V. DELBANCO.

Mr. Benjamin moved for removal of trial to the Circuit Court at Queen's Town. Defendants consented.

Granted.

WILLEMS V. GRANT.

Mr. Benjamin applied for an order for personal attachment, defendant having neglected to comply with a certain order.

Granted.

COLONIAL GOVERNMENT V. BLOCK.

Mr. Buchanan, for defendant, moved for removal of trial to East London Circuit Court.

Mr. McGregor, for the Government, consented, and the application was granted.

Ex parte BEGG. } 1902.
Nov 6th.

The petition of Janet Begg, of Observatory-road), stated that in June, 1902, she had opened an account with the Post Office Savings Bank at Woodstock, and that the sum of £78 was there standing to her credit, which money had been earned solely by her own exertions. On 18th of December, her husband (married to her in Scotland), obtained a rule nisi, restraining her from withdrawing from the said Savings Bank the amount standing to her credit, pending an action to be instituted against her for restitution of conjugal rights. This rule was made absolute on January 13, 1902. At that time there was only a balance of £3 in the said bank in the petitioner's favour. On September 8, 1902, she placed a further sum of £75 to her credit. The Comptroller of the said bank now refused to pay to her this money, or any part thereof, until the interdict of January 13 is removed. Her husband died on September 27 last. She is now destitute, and in want of money for the maintenance of herself and two children. She therefore prayed for the removal of the said interdict.

On the motion of Mr. Alexander an order was granted as prayed.

CAMPANHIA LOURENCO MARQUES V. KLUNKER.

Joint application for a commission *de bene esse* to take evidence in the above matter was made by Mr. Benjamin and Mr. Buchanan, and was granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ROUX V. ROUX. } 19 2.
Nov. 7th.

This was an action for restitution of conjugal rights. The plaintiff was Abraham Daniel Roux, and the respondent Johanna Jacoba Roux.

The applicant said he was married to respondent in March, 1880. In September last respondent left him, stating that she would never return. He had since seen her at Woodstock, and she again refused to return.

Mr. J. E. de Villiers for plaintiff, defendant in person.

In answer to the Chief Justice respondent said her husband was a widower, and always took the part of a son by his former marriage who behaved badly towards her. She had worked hard to help her husband, but had not been properly treated.

Respondent, who went into the witness box, said she refused to go back, and would rather earn her own living. She was living at Woodstock at present.

De Villiers, C.J., said there had been nothing serious alleged against the husband, who said he was willing to take his wife and children back.

A decree was granted for restitution of conjugal rights, the wife to return on or before the 30th November, failing which to show cause why a decree of divorce should not be granted in terms of the prayer of the petition.

Postea (December 19), the rule was made absolute.

CRAMER V. ESTATE OF CRAMER.
Executor dative — Joint will —
Payments made into the estate
by the surviving spouse.

This was an action brought by Louis Cramer against Alexander John Chiappini in his capacity as executor dative in the estate of the late Georgina Sarah Kirton Cramer, to whom the plaintiff was married out of community of property at Johannesburg in February, 1896.

The plaintiff's declaration was to the effect that Mrs. Cramer died at Observatory-road on October 6, 1900, leaving a will made at Johannesburg jointly with the plaintiff in March, 1896; but the executors nominated declined to act, and the defendant was thereupon appointed executor dative. There was no issue of the marriage between plaintiff and the late Mrs. Cramer; but there were four children living of a former marriage of plaintiff and his first wife, of whom three are minors; and there was one child living, a minor, issue of a former marriage of the late Mrs. Cramer. In July, 1898, at Johannesburg, Mrs. Cramer granted a general power of attorney to the plaintiff, and the power remained in full force until a further general power was granted by her to plaintiff at Observatory-road in September, 1900, which remained in force until her death. In 1898 plaintiff and his wife were residing at Johannesburg, and plaintiff held certain shares in a syndicate styled the Wonderfontein Gold Lands Syndicate. In that year an order was granted by the High Court of the Transvaal for the liquidation of the syndicate, and Roelof van Wyk was appointed official liquidator. Amongst the assets of the syndicate were a certain contract to prospect the farm Rooipoort, in the Potchefstroom district, expiring on December 8, 1898, but with the option of renewal from time to time for a period of six months upon payment of £50, with the further option of purchase, and a contract to purchase portion of the farm Vlakplaats, in the Potchefstroom district, for the sum of £1 5s. a morgen, three instalments on the purchase price amounting to £200 having already been satisfied. The official liquidator advertised the assets for sale by public auction on December 1, 1898, and on that date the plaintiff, acting for and on behalf of his wife, purchased all the rights and interests under one contract, and a half share of the rights and interests under the other contract, and paid the official liquidator the price out of his own (plaintiff's) moneys, and took cession from him. It was agreed between the plaintiff and wife that should the options be resold, or in any way profitably disposed of by the plaintiff, on his wife's behalf, a commission of ten per cent., and one half of all option moneys should be retained by him. There

was a sum of £50 rent due to one J. P. Nortje, the owner of the portion of the farm Rooipoort, over which the contract extended, and in order that the said option might be renewed, and in consideration of one Y. Veldhuizen paying this sum of money it was agreed between plaintiff acting on his wife's behalf and Veldhuizen that the latter should have one-fourth interest in the contract, the sum was duly paid and the option renewed. In April, 1899, the plaintiff, acting in conjunction with a man named Berman, who had purchased the other half share of the rights and interests under the second contract, and with the consent of Veldhuizen, entered into certain agreements, whereunder a person named Quinton took over the rights of option under the contracts and paid certain moneys. From time to time further agreements were entered into between the plaintiff and Quinton, whereunder Quinton agreed to make further payments for a continuance of the rights of options under the contracts. Quinton had paid to the defendant £275 on the 6th and 10th November, 1901, and £275 on the 6th and 10th May, 1902, as option moneys in respect of the contracts, and plaintiff now claimed from the defendant half of that sum, £275. The plaintiff had rendered to defendant accounts showing the amount of money due by the estate to him in respect of these transactions and other items in connection with the estate. The amount due to plaintiff up to May 20, 1902, was £351 18s. 8d. The plaintiff further claimed that he was entitled to 10 per cent. on all moneys which may have been paid or which may afterwards be payable by Quinton or any other person to the estate in order to acquire the rights and interest of the estate in and to the said farms. The plaintiff claimed: (a) That the defendant be ordered to render accounts showing all moneys paid to him in respect of the options under the contracts referred to. (b) That the defendant be ordered to debate the said accounts, and the account "A," and to pay over to plaintiff such sums as may be found due. (c) That the plaintiff be declared entitled to any further amounts received by defendant in respect of options under the aforesaid contracts. (d) That the plaintiff be

declared to be entitled to 10 per cent., either in cash or in shares on all moneys or shares received or to be received by the defendant for and in respect of the purchase of the estate's rights and interests in and to the said farms dealt with under the aforesaid contracts. (e) Payment by defendant of all sums (if any) received or to be received under the contracts. (f) Alternative relief. (g) Costs of suit.

The plea stated that the defendant had no knowledge as to the syndicate referred to in the declaration. Defendant admitted that in September, 1900, the plaintiff, acting as the duly authorised agent of his wife, entered into a certain agreement with Quinton whereby in consideration of the extensions of the options Quinton had made certain payments to the late Mrs. Cramer. Defendant denied that plaintiff was entitled to any moneys received or to be received from Quinton in respect to such agreement. The replication was general.

Mr. Searle, K.C. (with him Mr. De Waal) for the plaintiff; Mr. Burton for defendant.

Louis Cramer, the plaintiff, was called. He said that he always transacted his wife's business. In or about July, 1898, she left the Transvaal for Cape Town and gave him a power of attorney. She had little property when she married. Witness had transacted business in her name on his own account. Witness was the largest shareholder in the Wonderfontein Gold Syndicate, which went into liquidation. This syndicate possessed a number of options on farms acquired through witness. There were options on farms known as Vlakplaats and Rooipoort. There was a sale of assets by the liquidator. The sale was by public auction and witness attended it. This was in December, 1898. Witness purchased the rights under the two contracts for his wife. Witness paid the purchase price out of his own money. He purchased in his wife's name to protect himself against certain vindictive former partners who imagined themselves creditors of witness. Witness wrote on the back of the receipt words to the same effect as alleged in the declaration. He did this because his wife was somewhat disappointed with the transaction, and he wished her to know he was satisfied and so under-

took half the liability. Quinton came upon the scene in May. Veldhuizen came in for a quarter share in Rooipoort in consideration of settling with the farmers over certain option money. Quinton paid certain moneys, amounting to £1,350, to Berman, Veldhuizen, and Mrs. Cramer. In October, 1900, witness's wife died. In the previous month she gave witness another power of attorney, and under this four further agreements, two in respect of each contract, were entered into with Quinton, who after her death paid certain further moneys—option moneys covered by the memorandum—of which witness claimed half. He claimed half of the option money and 10 per cent. on the value of the rights if they were purchased.

Cross-examined by Mr. Burton: Owing to the fact that the agreement was between witness's wife and himself, he did not think it necessary to have the document in strict legal form. Witness did not foresee the present difficulty.

Replying to the Chief Justice, witness said the will was drawn in 1898, and not subsequently.

Mr. Burton said that they did not suggest to the witness that he was not speaking the truth, and he put the executor in a difficult position. The circumstances were very unfortunate for the witness.

Replying to the Chief Justice, witness said he paid altogether £7 10s. for these rights out of his own pocket.

This concluded the evidence.

Counsel having been heard on the facts, the Court gave judgment.

De Villiers, C.J.: I am satisfied on the evidence that the plaintiff is entitled to what he claims, and judgment will be given for him for £351 18s. 8d. Of course, the defendant was quite within his rights in defending the case, but I quite believe the plaintiff's statement that he has paid the amounts in respect of the contracts out of his own pocket, and that he entered into the agreement with his wife to receive half of the proceeds which might accrue from the transactions as to the options, and 10 per cent. in respect to the purchase of the rights and interests.

Maasdorp, J., concurred.

[Plaintiff's Attorney: J. J. Michau; Defendant's Attorneys: Van der Byl and Van den Horst.]

SUPREME COURT

[Before the Hon. Mr. Justice MAAS-DORP.]

REISER V. AFRICAN AND
UNITED COLONIES COLD } 1902.
STORAGE AND SUPPLY CO., } Nov. 7th.
LIMITED.

Contract of service — Unlawful dismissal.

R. had been engaged by the defendants at a monthly wage of £15, the said engagement to be terminable on one month's notice. Subsequently the defendants varied the contract by making it a weekly contract. It was held by the Court that there was no satisfactory evidence that R. had consented to this new arrangement. Thereafter defendants gave R. a week's notice which he refused to accept.

Held, in an action for damages for unlawful dismissal, that as the defendants were bound by their original contract of monthly service, R. was entitled to wages in lieu of due notice, and costs.

This was an action to recover £20 damages for wrongful dismissal and £15 arrears of wages.

The plaintiff's declaration was as follows:

1. The plaintiff resides in Cape Town, and the defendants are a Joint Stock Company, carrying on business at Woodstock and Cape Town.

2. When the defendants took over the business of one Geissler, they engaged the plaintiff as manager of their shop, situate at 37, Sir Lowry-road, Cape Town, at the monthly salary of £15, and with the free use and occupation of a house of the monthly rent of £5, until the service should be determined by a month's notice on either side.

3. The plaintiff had served the defendants in the said capacity as in hereinafter mentioned.

4. The defendants on September 13 gave the plaintiff a week's notice to quit their employment; and wrongfully and unlawfully and without due or sufficient cause, although a month's notice had not been given on either side to determine the said service, dismissed the plaintiff from their employ on September 20, 1902.

5. The plaintiff has thereby lost the salary which he would have derived by continuing in the defendant's service, and has thereby lost the free use and occupation of the said house, of the monthly rental of £5, to which he was entitled when in the defendants' service in the said capacity; for all of which he claims £20 damages.

6. While the plaintiff was in defendants' service they did not pay him his agreed wages of £15 for September, 1902, which sum was due and payable on September 30, 1902, and is now due and payable to the plaintiff by the defendants for arrears of salary.

Wherefore the plaintiff prays for:

- (a) £20 damages, as aforesaid.
- (b) £15 arrears of salary, as aforesaid.
- (c) Alternative relief.
- (d) Costs of suit.

The defendant's plea admitted the allegations in paragraphs 1 and 2 of the declaration, save that it denied that it ever was part of the engagement that plaintiff should have the free use of a house, of the monthly rent of £5, or that he should have anything more than the monthly wages of £15. The plea further stated that on or about August 30, 1902, it was agreed between the parties that the terms of the engagement should be modified in so far that the hiring thereafter should become a weekly one. Thereafter, on September 13, 1902, the manager of the defendant company gave plaintiff a week's notice to quit the company's service on September 20, but plaintiff repudiated the said agreement, refused to accept a week's notice, and insisted on a month's notice. On September 22, the plaintiff, without giving any notice, abandoned his employment. Subject to the above, the defendants deny the allegations in paragraphs 3, 4, and 5 of the declaration. As to paragraph 6, the defendant company admit that it had not paid plaintiff his salary of £15 for September, but contended that its action was justifiable in view of the premises.

On October 16, 1902. the defendants tendered to plaintiff the sum of £11 5s., with costs, to date of tender, in full satisfaction of his services up to September 22, but plaintiff refused the same.

The replication was general, save that plaintiff admitted the tender of £11 5s.

Mr. Rainsford appeared for the plaintiff; Mr. Buchanan (with him Mr. Russell) for the defendant company.

In his evidence, plaintiff said that he received a week's notice on the 13th September. He left the shop on the Saturday night of the following week, and returned on the Monday, when he asked if he was to have a month's notice. This was refused, and he left the premises. He received a letter telling him he could remain until the 30th September.

The evidence for the defendant was to the effect that the plaintiff had been given the week's notice, that subsequently the letter, extending his service until the end of the month, was written, and that on receipt of that letter plaintiff neglected to return to work, and left the service of the company without giving them notice.

Maasdorp, J.: The plaintiff in this case claims from the defendant the sum of £20 as damages for wrongful dismissal, and the sum of £15 for salary due for services rendered. The plaintiff alleges that he entered into an agreement of service with the defendant whereby he was to render monthly service, and receive a monthly salary of £15, such service to be terminated by one month's notice; and that he was further to receive as remuneration free quarters, which he values in his declaration at the sum of £5 per month. The defendant admits that a contract in these terms was entered into, save the clause as to free quarters, but he pleads further that that contract was altered to the extent of making it a weekly notice instead of a monthly notice. The defendant having admitted the contract as alleged by the plaintiff, and having set up this new contract, it became incumbent upon him to prove the contract. The question, therefore, arises whether the plaintiff agreed to such an alteration in the terms of service and to accept weekly notice to determine such service. The plaintiff has positively denied that such an agreement was entered into. The defendant's evidence as to such an agreement seems to

me to be of a very unsatisfactory and very casual character. He states in his evidence that on the 30th August he asked the plaintiff if he was agreeable to accept weekly service, and that the plaintiff said, "All right." Now, I would require something far more in detail to satisfy me that the plaintiff had actually entered into an agreement of this description—something far more satisfactory than this casual remark of "All right," when a very important alteration was made in the terms of service. On the whole, I may say that it may perhaps be taken that there was some misunderstanding between the parties, and I do not say it was not improbable that the manager might have been under the impression that the plaintiff had consented to this agreement; but I come to the conclusion that his impression was a mistaken one, and that there is no satisfactory evidence before the Court that this agreement was ever altered from monthly service to weekly. That being so, the plaintiff was entitled under the circumstances to receive a month's notice. It appears that on the 13th September the defendant gave plaintiff a week's notice, and that he refused to accept it, repudiating the suggestion that any agreement had been entered into by which he expressed himself satisfied with the substitution of the weekly service for the monthly. The plaintiff was entitled to receive a month's notice, and a week's notice was therefore insufficient. But it is contended that having given a week's notice the defendant was willing that the service should be extended. Now it seems to me that the notice which was received on the 13th by the plaintiff amounted to a determination of the service under the contract on the 20th September. The defendant writes to the plaintiff: "I regret to inform you that a week's notice is given you from this date." This is a notice to the plaintiff that his service would be terminated under the contract on the 20th September. That notice is never withdrawn in terms. On the 20th a further letter is written, and therein, out of a sort of indulgence the defendant seems to think he has carried out his original contract. According to the plaintiff, he offers to let him stay on until the end of the month. He says: "Not wishing to

inconvenience you, I will retain your services until the end of the month." Now, in my opinion, that was not a continuation of the service at all, but merely an offer of a service for a few days longer outside the contract. The contract is intended to be terminated upon notice given by the defendant; consequently the plaintiff would have been obliged to leave the premises upon that day unless such notice had been withdrawn. This notice is not withdrawn, but is insisted upon in the letter of the 20th. In my opinion the plaintiff, not being bound to accept this extension of service outside the contract, it would have required a new agreement between the parties to extend this service for a few days longer. The plaintiff being unwilling to consent to such new contract he insisted that the terms of the old contract should be carried out. Under the circumstances I think plaintiff, when he arrived at the place of business on the Monday, showing he was prepared to continue the service if the notice of dismissal was withdrawn, was entitled, when he did not receive intimation that such notice was withdrawn, to leave the premises and to consider that he had no right to remain in the place any longer. After leaving, the plaintiff made every attempt to obtain employment elsewhere, but he failed. He is therefore, in my opinion, entitled to receive the salary which he would otherwise have received, in lieu of the month's notice. Now, it seems to me that the salary which was agreed upon was £15 a month, and I am also satisfied that there was an agreement that plaintiff should have free quarters, which should be part of his remuneration. On the other hand, it seems that the accommodation which was provided would not have been of the value of £5, and that must therefore be reduced. I think it would be reasonable to estimate the value of the accommodation at £2 a month. The plaintiff is entitled to receive in lieu of notice and as damages for his wrongful dismissal the sum of £17, and he is further entitled to receive as salary during the month of September for services rendered by him a further sum of £15. It is contended that the declaration should have been somewhat different in its form and that for the latter end of

the month the claim for damages should rather have been put in as a claim for salary, but I think the declaration sufficiently sets forth the case for the plaintiff and I think he is entitled to what is equivalent to his salary for the month of September, and to £17 in lieu of notice for the month of October. Judgment will therefore be given for plaintiff for £32 with costs.

[Plaintiff's Attorney: W. G. Coulton; Defendant's attorneys: Findlay and Tait.]

Ex parte THE CAPE OF GOOD HOPE SAVINGS BANK SOCIETY.

On the motion of Mr. Buchanan the Court granted an order interdicting the respondent Robert Greening—from removing certain books, etc., from his office until action was brought to recover from him certain arrears of rent, with leave to respondent to move to set aside the interdict.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

WHITE V WHITE. { 1902.
Nov. 11th.
" 18th.

Adultery.

The fact that a married man has been seen coming out of a house of ill-fame is not per se proof of adultery.

This was an action brought by Mrs. Alice White against her husband, Henry White, for divorce by reason of his adultery. The parties were married on the 3rd April, 1899, in community of property, and a boy now two and a half years of age was born of the marriage. On June 27 of this year it was alleged that defendant committed adultery with a woman of bad character.

Mr. Buchanan for plaintiff, defendant in default.

Mrs. White said her husband was a carpenter, formerly employed by the Army Ordnance Department. After marriage he ill-treated her, and was often in drink.

She had been obliged to leave him once owing to his cruelty. She had worked for a living. He had been convicted for an assault on her. Witness had seen her husband entering a house of ill-fame.

P.C. John Beaton deposed to seeing the respondent coming from the house in question with his clothes in disorder.

Similar evidence was given by one Jurgens.

The matter was ordered to stand over *sine die*, his lordship stating that he was not satisfied with the evidence as to the adultery.

Postea (November 18). Mr. Buchanan applied for an amendment of the declaration, so as to include a further charge of adultery with a person whose name was unknown.

Notice of the proposed amendment having been given defendant personally, the amendment was allowed.

Evidence having been given in support of the further charge, the Court granted a decree of divorce with costs; plaintiff to have the custody of the minor child of the marriage, and defendant to contribute £2 a month towards the maintenance of that child until it attains the age of sixteen years, the first payment to be made on December 1, and subsequent payments on the first of every month.

Buchanan, J., said that on the evidence given in support of the charge of adultery when it first came before the Court, he would not have been prepared to grant a decree. He was not prepared to hold that mere proof of visiting a house of ill-fame was necessarily sufficient proof of adultery, although taken with other facts it might induce the Court to find adultery proved. But since the first hearing an amendment of the declaration had been allowed, and the charges now made had been supported by medical evidence. In the absence of any contradiction his lordship thought the Court would be justified in holding that the plaintiff had now proved the adultery, although perhaps not with the person first-named in the declaration. His lordship therefore granted decree as indicated above.

[Plaintiff's attorneys: Silberbauer, Wahl and Fuller; defendant in default.]

MECHANIK V. LITTON.

Mr. Close moved for judgment under Rule 319.

Granted.

SMITH V. WOODHEAD AND SONS.

This was an action brought by Mr. Smith, a commission agent, against Messrs. Woodhead and Sons, for the sum of £203 2s. 6d. as commission. The plaintiff's declaration stated that he had been requested by Mr. Maynard Woodhead to obtain orders from the military for saddlery, for which he was to receive a commission of 5 per cent. There was no written contract, but through the efforts and the exertions of plaintiff, defendants had received a contract from the military for halters, bridles, etc. The defendants, in their plea, repudiated the claim on the grounds that the agreement had been cancelled, and that the contract had not been procured through the influence of the plaintiff.

Upon these pleadings issue was joined. Mr. Rowson appeared for plaintiff, and Mr. Upington, with whom was Mr. Russell, for the respondents.

George Albert Seymour Smith, the plaintiff, said he was a commission agent. He had known Mr. Maynard Woodhead for about eighteen months, and was frequently in the habit of seeing him in connection with business matters. In November last year Mr. Maynard Woodhead asked witness to endeavour to obtain military contracts for them. Witness said that would be very difficult. Mr. Woodhead gave him samples, and agreed to give him 5 per cent. on orders received from the military. Witness asked for an undertaking in black and white, but Mr. Woodhead replied, "A Woodhead never breaks his word." Witness went to the military and asked the officer—Lieutenant Findlay, who had now left—to put Messrs. Woodhead's name on the tender list. He left the samples with the military. No tender forms were given witness, but he understood they were sent direct to Messrs. Woodhead. The firm tendered for halters, but this tender was not accepted. Up to the end of January, nothing was said about cancelling the contract. Before the end of January, Mr. Woodhead asked witness to buy all the rivets he could for the first tender. This order was contained in a letter (produced). Witness did not buy the rivets. He ordered them, but did not purchase, because he found out a couple of days after ordering that Messrs. Woodhead

had not got the contract. After this witness continued his exertions. He went to the Castle several times, and saw Lieutenant Findlay. Messrs. Woodhead asked him to find out the prices of other firms in town. Witness found out the prices one firm were paying for their goods, and gave the information to Mr. Woodhead, who acted upon it. In March witness bought six sides of leather for defendants from Messrs. Fraser and Sons. He got the same amount from defendants as he paid Fraser's. (Cheques put in.) Messrs. Woodhead afterwards obtained an order from the military. Witness went to Mr. Woodhead about payment, and the latter said he did not think witness was entitled to it. Witness wrote on the 20th May claiming payment, and stating that it was purely through his exertions and influence that the orders were obtained. Defendants replied repudiating the claim. Mr. Woodhead had previously refused witness payment. The reason Mr. Woodhead gave was that the first tender was not successful. Witness told him he had never anticipated that the first tender would be accepted. Messrs. Woodhead's first tender was at 3s.: the second at 3s. 3d. The first was refused; the second accepted. The matter took up a lot of witness's time.

(Cross-examined: Witness saw the halters supplied in the order. They were supplied according to the sample submitted to the military by witness. He would be surprised to hear that the order was given for halters to be made according to specification, specially drawn up by the military. Witness contended that the order for 25,000 halters was obtained through him, and that the defendant's name was placed upon the tender book through his exertions. Unless a firm's name were on the order book they were not asked to tender. Witness got a certain amount of knowledge from two men belonging to the military, and promised them some consideration. These men had nothing to do with tenders. Witness was not aware that defendants had received orders from the military in 1899, in 1900, and in 1901. He had obtained particulars of the prices of other firms through tact and perseverance.

Roderick Wynne Lewis, formerly a captain in the S.A.M.I.F., said that plaintiff submitted patterns to him of various

articles. He asked witness if he thought they were suited to military pattern on three or four occasions at the latter end of the year.

Mr. Rowson closed his case.

For the defence, Colonel Robert White Melville Jackson, chief ordnance officer at the base, said that every tender over £1,000 was sent to Pretoria for confirmation. Witness had the power to call for tenders. Witness kept a rough list of firms who were able to supply certain goods. Tenders were not advertised for. Witness put Messrs. Woodhead down on the list of firms for halters in consequence of Mr. Woodhead coming to him in January, 1902, about it. Messrs. Woodhead were previously down for other goods, but not for halters. Witness had no recollection of having seen Smith at all. About the 18th January a form of tender was sent to Messrs. Woodhead for halters. This was immediately after the firm's name was put down on the list of firms for halters.

By the Court: The tender form could not have been sent to defendants through any possible suggestion made by Smith. A lower tender was accepted when Woodhead's sent their first tender. It was solely on the ground of price that their tender was refused. Lieutenant Findlay was in England.

Maynard Woodhead, partner in the defendant firm, said he arranged with Smith to pay him 5 per cent. on any orders procured from the military for the firm through Smith's medium.

[Buchanan, J.: How did you expect Smith to get for you what you could not get yourself?]

Witness said he understood Smith was well known at the Castle, and as he had procured orders for other firms witness thought he might get orders for his firm. He did not go into detail with Smith as to what means the latter had of getting orders. After the first tender was refused witness told Smith he had given up all intention of tendering for halters. Witness afterwards changed his mind on the advice of a certain harness maker. The halter for which witness sent in the second tender was entirely different from that which Smith had shown. Witness tendered a price solely on the harness maker's price.

[Buchanan, J.: Not on other people's prices?]

Witness: No, my lord. When Smith came and asked him for commission, he expressed surprise at the demand, and reminded Smith of a conversation at witness's office when the agreement was cancelled. Smith did not deny the cancellation.

Joseph Burney, book-keeper in defendant's employ, gave evidence as to the conversation referred to by Mr. Woodhead, in which the cancellation was alleged to have been made.

Mr. Rowson (for plaintiff): The contract between the plaintiff and the defendant was one of "Mandate." Now a contract of mandate can be terminated only by (a) the death of the *mandans*; (b) that of the *mandatarius*; (c) revocation of the *mandans*; or (d) renunciation of the *mandatarius*: "*Si res adhuc integra sit. Re non integra, præstandum id quod intesat, nisi justa revocandi causa subsit. . . . Nec regulariter mandatum in dubio præsumitur revocatum.*" (*Voet*, 17, 1, 17). Here the only question is, was the mandate of the defendant to the plaintiff revoked or not? There is neither proof from the evidence nor (according to *Voet*) any presumption of law that it was. The plaintiff continued to spend time and labour in the defendant's interests, to the great detriment of his own business. Surely he did not do this for nothing, at least he must be entitled to a *quantum meruit*. But I go further, and say that even if the plaintiff's agency had been terminated on January 31 (which we deny), he would still be entitled to his commission in respect of any order obtained through his exertions. *Woolley v. Hunt and Another* (7, H.C., 99); *Moir v. Watts* (5, H.C., 109). Here the plaintiff did use his exertions, and although the defendant may have obtained a few insignificant orders some years ago, the evidence shows that no substantial orders were obtained until the plaintiff had moved in the matter. I submit that they were obtained through his influence with Lieutenant Finlay, and that he is entitled to his commission.

Mr. Uppington was not called upon in reply.

Buchanan, J.: The plaintiff in this case is a commission agent, and the defendants are a firm of leather merchants carrying on business in Cape Town; The plaintiff alleges that in or about January last he entered into

a contract with the defendants. It is common cause that a contract was entered into, and I do not think there is much dispute as to the terms of this contract. In his declaration, the plaintiff says the defendants agreed to pay him a commission of 5 per cent. on the price of all orders obtained from the military authorities for the defendant firm by plaintiff. In his letter, after the dispute arose between the parties, the plaintiff put the case a little more broadly than that, and says that the contract was that he was to obtain commission on all orders obtained through his instrumentality. The first question which arises is not so much about the terms of the contract as about the date when this contract was entered into. The declaration fixes it on the 14th January, the plea says it was in the previous November. The plea is certainly borne out by the evidence given to-day, and by the correspondence written at the time. Plaintiff says that after the contract was made between them, he drafted a letter for defendants to write to the military authorities. The letter actually drafted was not sent to the military, but Mr. Woodhead wrote a letter on the 26th November, founded upon Mr. Smith's draft, and in this letter he offers the military authorities to submit samples of certain harness, and requests the opportunity of supplying these to them. Before this date the defendant firm were known to the military authorities. Their name was on the books containing the names of those from whom the military would ask for tenders, but during recent years the orders received by defendants from the military were very small, and though defendants had frequently tendered, they had not been successful in securing contracts. Plaintiff thought he could work the business so as to secure orders for the defendants. This letter was his first suggestion, but it, too, proved unsuccessful, and the samples mentioned were returned. Later on Mr. Woodhead himself called upon Colonel Jackson, and represented the fact that they were not given tender forms. The defendant's firm was then down on the list of firms who might be asked to tender for harness, but not for halters, and their names were then specially entered under this heading also. In consequence

of the interview between Mr. Woodhead and Colonel Jackson, application was made by the military for a tender from Messrs. Woodhead and Sons for halters. A tender was sent in, but again the defendants were unsuccessful. I do not think there is any doubt that after this unsuccessful tender, Mr. Woodhead, finding he could do nothing with the military, even with the assistance of the plaintiff, gave up all intention of further contracts, and told plaintiff so. As plaintiff says, it is hard lines on him. He has expended some time and energy, but his efforts were unsuccessful, and unless they were successful, on the principle that applies to brokerage contracts, no reward was payable to him. Months after the military asked Woodhead and Sons to send in another tender, and this subsequent tender was accepted. The question the Court has to decide is whether plaintiff is entitled to commission on the price of this subsequent tender, made in March and accepted in April, long after the contract of November had been terminated. I am clearly of opinion he was not. The cases cited by learned counsel for the plaintiff, as to an agent in one case, and a broker in another, being entitled to commission where the transaction had gone through ultimately upon an introduction or upon work done by the agent or broker, stands in a very different position to this. Had any contract been entered into in consequence of Smith's exertions, even if it had been completed after the contract had been put an end to, Smith might perhaps have been entitled to commission; but there was no such contract; but it has been shown that no contract was obtained for defendants through Smith's exertions or influence. Under these circumstances, on the facts of the case, I am bound to hold that the plaintiff has failed in his action. There is a claim in reconvention for £50 for goods sold to the plaintiff by defendants, and this is not disputed. Judgment will be given for defendants on the claim in convention, with costs, and for defendants, plaintiffs in reconvention, on the claim in reconvention, with costs.

[Plaintiff's Attorney: W. G. Coulton;
Defendant's Attorneys: W. E. Moore
and Son.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

ARISTO EGYPTIAN CIGAR-ETTES CO. V. CAISSE. { 1902.
Nov. 12th.
.. 13th.

This was an action brought by the plaintiffs, a firm of cigarette manufacturers carrying on business in Cape Town, against the defendant, an hotel-keeper, of the Hotel Metropole, Cape Town, to recover the sum of £80 8s., the value of certain cigarettes, and damages for breach of contract. The declaration set forth that on or about the 17th May, 1902, it was agreed between the plaintiffs and defendant that the former should manufacture for and supply to the defendant certain cigarettes of three different qualities selected by him. The contract was to supply 20,000 gold-tipped cigarettes at 69s. a thousand, 20,000 plain Turkish at 50s., and 10,000 Virginian at 28s. 6d. It was further agreed that payment should be made as the goods were delivered, and that the whole order should be completed within six weeks of the 17th May. On the 26th May, plaintiffs delivered certain cigarettes to the value, according to the contract price, of £56 3s. 9d., and requested payment for the same. This amount defendant refused to pay, stating that the goods were not in accordance with the contract. He tendered to return them. Subsequently plaintiffs offered delivery of a further quantity, but defendant declined to receive them. Plaintiff claimed the price of these, and the sum of £30 as damages for loss of profit on the remainder of the order, or in the alternative, £130 damages. The plaintiff reduced his demand for loss of profit to £17. The plea admitted the contract prices with the exception of the second quality, for which defendant said he agreed to pay at the rate of 45s. per thousand. He alleged that it was specially agreed that the cigarettes should be of the best quality, both as to the quality of the tobacco and papers and workmanship, and that the papers, patterns, crests, and labels, should be in accordance with instructions. Plaintiffs submitted proofs, not in accordance with instructions, and these were not at any time approved of by the defendant. At

all times defendant was willing to accept proper cigarettes if the plaintiffs would abide by the terms agreed upon.

The replication was general.

Mr. Searle, K.C. (with him Mr. Gardiner) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Wilkinson) for defendant.

Aristo Yaxalou, partner in the plaintiff firm, said he had been about 15 years in the cigarette trade. At the beginning of May last, defendant came to the firm's premises in Castle-street, and asked for samples. Witness gave him samples. On the following day he came again and asked for more samples, saying that he wanted cigarettes specially manufactured for him. Witness showed him samples. On the third day witness gave him further samples, and defendant said he wanted some of No. 1 quality with the name of the hotel on each cigarette. Witness said he could do this. The cigarettes were to be made oval. Defendant said he also wanted some of No. 2 quality, to be made round. Defendant asked how witness would put the name on the cigarettes. Witness showed him a cigarette and a box. Witness did not show him paper. Defendant said he would like the name to be put on the paper in blue ink, with similar pattern to one of the gold-tipped cigarettes witness had shown him. Witness kept paper similar to that produced in the shop. Defendant came with a piece of paper (produced) on the third day. Both witness and defendant wrote on this. Witness put the prices on in the corner; defendant wrote the rest. The paper contained lettering for the label. Defendant's instructions were to put ten cigarettes in a packet, but this was altered. The price witness put on the paper, brought by defendant, for the No. 2 quality, was 50s. The prices were given for orders above 25,000. Defendant gave an order for 10,000 of No. 1 quality. The price agreed upon for the second quality was 50s. Defendant said he wanted a plain label, and did not wish to have the name of the Aristo Company thereon. A design was shown on the paper brought by defendant. Witness had a "Cosmos" block, which he showed to defendant. He showed an impression of the block (produced) to defendant, who asked him to send a cleaner copy to the hotel. Defendant wanted his crest—a lion—embodied with the design, and witness

made a sketch of the "Cosmos" label with the lion in the middle, and sent it to defendant. The first two qualities were to be in boxes; the Virginias in paper. Defendant said he had the block of his crest at a Mr. Hahn's, and would get that gentleman to give him it. He told witness to put the crest in the centre of the label, and to send him a proof. He further said he wanted the labels in one or two colours. He wanted a smaller impression of the lion put on some of the cigarettes, and just the letters, "Specially made for the Hotel Metropole" on the rest. Defendant subsequently made arrangements with witness's brother. Witness's brother passed the proofs, and witness began making the cigarettes. On the 26th May witness sent a certain quantity of cigarettes to defendant's place, and an account for £56 3s. 9d., which was returned with the endorsement, "not correct" against the item 50s. a thousand for No. 2 quality. The account was also marked "Cancelled, A.C. goods waiting for you to fetch them away." Defendant told witness after delivery that he had received the cigarettes, and they were all right. He told witness not to send them all together, as he had no room; he would take delivery as he wanted them. This was before witness sent the account. He had already sent the delivery slip. The same day witness sent the account, and received a letter from defendant. In this letter defendant said he had examined the cigarettes and found that they were in no way what witness had represented to him they would be. He complained of the whole of the printing being bad, of the label on the gold tipped, and of the workmanship, and informed plaintiffs that the cigarettes would remain at the hotel at their (plaintiffs') risk. Witness replied that the cigarettes were as represented. Witness then stopped making cigarettes. A profit of from 30 to 35 per cent. was made on the cigarettes. 18,000 of the cigarettes ordered by defendant were not made, and witness calculated that the profit lost on these amounted to £17. The cigarettes were of no value to witness because they had defendant's name on them.

Cross-examined by Mr. Schreiner: Defendant did not tell witness that he was experienced in cigarette manufacturing in London, and that he would take nothing but the best quality. Witness did not have a block

prepared for the crest on the outside label. He gave witness leave to use the die that Mr. Hahn had. Witness accordingly instructed Hahn to use this block.

Mr. Schreiner: You will admit that these are very blarred and indistinct crests and printing?

Witness: It is his own block. In Cape Town we can't make better than this.

Further cross-examined, witness said that Mr. Caisse did not say that the gold-tipped must be gold—22 carat fine. The firm did not make the gold-tipped cigarette paper. Witness called the paper gold-tipped; it was the only kind they imported. Witness paid 2s. 6d. a thousand for gold-tipped paper in London. Witness did not tell Mr. Caisse that he would give him a blend in the Virginia cigarettes that would be superior to "Three Castles." Witness did not promise to put the Virginia cigarettes in card-board boxes. Witness considered the get-up of the boxes and packets to be good. Mr. Caisse had expressed himself satisfied with them.

Epheim Yaxalou, brother to the last witness, gave corroborative evidence. He showed the paper with the crest printed on to defendant, who said he wanted a correction in a certain detail. Some three thousand papers were printed before defendant finally approved of the design. Defendant made certain notes on proofs (produced) submitted to him.

Cross-examined: Defendant knew that his block was being used on the design. Mr. Caisse saw fancy boxes which the firm kept in stock.

Koomianus Maymia, tobacco blender, in plaintiffs' employ, said he had been for 35 years in the tobacco trade. He blended the tobacco used in the manufacture of the cigarettes supplied to defendant. He used the same quality tobacco in the gold-tipped cigarettes as was employed in the manufacture of the firm's "Aristo No. 1."

Richard Joseph McManus, photo. engraver, said he made the block of the lion printed on the cigarette paper. His model was the large die stamp crest off one of the defendant's envelopes. Witness also made a block of a label from the "Cosmos" block. Mr. Hahn, the printer, gave witness an impression of the crest, and witness made a zinco engraving from it. Witness had done

the menu-card design for the defendant previously.

Cross-examined: To get a clearer and more distinct copy of the crest, the work would have to be done by the lithographic process. To lithograph the crest would cost about £5. Witness charged £1 for making eight steel engravings of the crest.

Julius Gold, cigarette manufacturer, said the "Aristo No. 1" and the cigarette made for the hotel were of the same quality. Witness had smoked both, and thought the Hotel Metropole slightly superior, the tobacco being older. Witness considered the boxing and packing very well done for Cape Town. The paper used in the gold-tip cigarettes was known to the trade as gold-tipped, though it was only imitation gold.

Mr. Searle closed his case.

Arthur Caisse, the defendant, said he was the proprietor of the Hotel Metropole in Long-street. He had had experience of the making of cigarettes, having for eight or nine years been a partner in Messrs. Hargreave and Co., of New Bond-street, London, who manufactured cigarettes, including gold-tipped. In May last witness desired a cigarette specially manufactured for the hotel in three qualities. Witness explained to Mr. A. Yaxalou exactly what he required. Witness said he must have first-class workmanship. He ordered the crest to be put on the first two classes. In regard to the gold-tipped cigarette, witness said that it must be 22-carat gold, and that Yaxalou must not come any tricks of the trade, because he (witness) knew all about them. Witness's first order was for two twenty thousands and ten thousand, Yaxalou saying he could not do less than fifty thousand at the price. It was arranged in the first instance that there should be eight, instead of ten, in a box. Witness said he wanted his own labels, and that the crest must be printed thereon. Witness did not show Yaxalou an envelope with the crest stamped on, and did not tell him to make an engraving from that. The price agreed upon for the second quality was 45s. Yaxalou said he could make the Virginians better than "Three Castles." He undertook to pack the Virginians in tinfoil and in a card-board box, not in a packet. Afterwards the other brother came to the hotel, and showed him a de-

sign, of which witness disapproved. He subsequently brought a design in two colours. Witness told him to get a sketch in a carmine red. Witness approved of the design, subject to the crest being included, and to the paper being glazed. Witness did not approve of the proofs finally submitted to him. Witness pointed out that it was not carmine red, and also found fault with the green and the crest, but Yaxalou said it was only a rough proof, and that he would bring a finished proof. Witness never saw proofs subsequently. He approved of the design, but not of the workmanship. Witness was not shown gold-tipped paper. Witness made a note on certain paper tipped with so-called gold, but this paper was shown to him not as a sample of the paper, but of the printing. Witness told Yaxalou that he must reduce the crest on the envelope. Witness did not give plaintiffs any permission to use the block at Hahan's. He had no knowledge until recently that the block had been used. Witness refused to take the cigarettes as they were not up to stipulation. In the case of the gold-tipped cigarettes, the tip was not gold metal tips, but were injurious to health. The crests on the papers were badly printed, and the get-up of the boxes and the packing was bad. The witness pointed out what, in his opinion, were defects in the workmanship.

Mr. Searle handed to the witness tipped paper, which the witness said was gold-tipped.

Mr. Searle said that this was bronze-tipped.

Witness: There is a solution of gold in it.

In further examination, the witness denied having seen certain designs which Yaxalou said had been submitted to him.

Leo Legg, manager at the Hotel Metropole, said that the cigarettes were not such as he would put up for sale in any bar. He referred to the boxes.

Montagu Seigleman was called, and demonstrated in the box the effect of an application of nitric acid on the cigarettes called gold-tipped supplied to defendant and certain other brands of gold-tipped cigarettes. Neither the Aristo No. 1 nor those supplied to the hotel were gold-tipped. They were both of the same metal. Witness would say

the tip was made with a solution of copper and brass. It would tarnish if kept long. The gold on the tips of the cigarettes produced made by other makers would not tarnish.

Christian Bekker, of Sturk and Co., Cape Town, said he did not consider the boxes made for the hotel to be first-class. The workmanship was not good enough for the price. The second quality was hardly good enough in regard to workmanship for 45s. The third class was good enough for 28s.

Cross-examined: The boxes containing the first-class cigarettes were not showy enough, in witness's opinion. They looked too common.

Mr. De Jongh was called to give evidence as to the value of the cigarettes. He estimated the value of the gold-tipped cigarettes at 53s. a thousand, the second quality at 35s. and 36s., and the Virginia at about 25s. Had he ordered a good quality cigarette, and those produced had been sent to him, he would have refused to take them. The witness produced Virginian cigarettes which he said cost him 22s. 6d. a thousand. They were made and packed in Cape Town.

Cross-examined: Witness had not bought any locally made gold-tipped cigarettes; he got them from England. The printing on the boxes was, in his opinion, bad. Witness did not expect the same finish in locally made cigarettes as in English manufactured.

Jules Vassis, cigarette manufacturer, said the labels and boxes for his cigarettes were made in Cape Town. Witness handed in sample boxes. If witness were asked for gold-tipped cigarettes, he would supply genuine gold-tips. The difference per 1,000 cigarette papers between gold-tip and imitation gold-tip was exactly 5s. Witness paid 5s. 6d. a thousand for real gold-tipped papers. Witness considered the boxes supplied to the Hotel Metropole very defective. The printing and the impressions on the label were very smudgy, and the labels were badly put on the boxes.

Mr. Schreiner closed his case, and counsel were heard in argument on the facts.

The Court gave judgment for plaintiff for £41 15s., the value of the cigarettes made of Nos. 2 and 3 quali-

ties, and for £5 damages for breach of contract, with costs.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorney: C. Brady.]

SUPREME COURT

FIRST DIVISION.

NANNUCCI, LIMITED, V. { 1902.
TOWNSHEND, TAYLOR AND { Nov. 12th.
SNASHALL.

This was an appeal from a decision of the Resident Magistrate of Cape Town. in a case in which the appellants (Nannucci, Limited) were sued by Messrs. Townshend, Taylor and Snashall for the sum of £21, reduced to £20 for the purposes of jurisdiction, being amount due for work and labour done and material supplied by plaintiffs to defendants. After hearing evidence the Magistrate gave judgment for the plaintiffs for £20 with costs. Against this judgment the defendants appealed.

Mr. Close appeared for the appellants; Sir Henry Juta, K.C., appeared for the respondents.

The main facts of the case were given in the reasons of the Magistrate (Mr. W. M. Fleischer) for his judgment, as follows: In this case the plaintiffs are printers and publishers, and the defendant company carry on business in Cape Town. It appears that the plaintiffs were employed by the Tramway Company to print their tickets as required, the number being supplied by the company monthly. The plaintiffs also had the right to print advertisements on the back of the tickets. The plaintiffs employed a canvasser named Maxwell, who saw the managing director of the defendant company, Mr. Oreste Nannucci, some time about the end of February, 1901, and obtained a verbal order from him to print an advertisement on the back of 300,000 Tramway Company's tickets. On March 2 the written order, marked "A," was given, and the advertisement was attached. The order is signed by the secretary of the defendant company, and the advertisement is in the handwriting of the managing director, who instructed the secretary as to the

issuing of the order. The order is on a printed form used by the plaintiffs in such cases, and no date is stated as to when the work was to be done. At the time the order was signed the tickets for April had already been printed, and the advertisement on the back of the May tickets had been disposed of, so that the turn of the defendants came next, that is on the tickets for June. The tickets for June were printed with the defendant company's advertisement on the back and delivered to the Tramway Company in May, 1901. The plaintiff's canvasser, Maxwell, was aware that the defendant company's advertisement could not appear sooner than on the June tickets, but he had left plaintiffs' service and the country, and could not be produced at the trial. The defendant company contends that the agreement was that the advertisement should appear on the tickets immediately, but that contention was not proved. If such a condition had been made, surely the secretary would have so stated it in order "A." It is further contended by the defendant company that the plaintiffs' canvasser guaranteed that 300,000 tramway tickets with their advertisement on the back would be issued to the public. The plaintiffs' business was merely to print and deliver the tickets, and they could have no control over the issue to the public of such tickets. If the canvasser had given such a guarantee the defendant company's secretary would or should have the fact in the order form "A." In my opinion no such guarantee was given. The plaintiffs completed their contract with the defendant company as soon as they delivered the 300,000 tickets to the Tramway Company having on the backs the advertisement of the defendant company, and this was done in May, 1901. The manager of the defendant company says he did not see his advertisement on the Tramway Company's tickets in April, May, June, or July, but he did not communicate with the plaintiffs on the subject, and it was not till he got the account for £21 at the end of July that he raised the question. I found on the evidence that no date was fixed for the advertisement to appear, that the delay was not under the circumstances unreasonable, that 300,000 or more tickets bearing defendant company's advertisement on the backs were delivered by plaintiffs to the Tramway Company, and that as soon as

such delivery took place, the plaintiffs' contract with the defendant company ended, the work having been completed. I therefore had no difficulty in finding for the plaintiffs with costs.

The form "A" referred to by the Magistrate was as follows: "Maxwell. Advertising Department, Messrs. Townshend, Taylor, and Snashall. Loop-street, Cape Town: Please insert my (our) advertisement in the electric tram tickets for number 300,000 from ——— for the sum of £21 net, payable ——. (Signed) Nannucci, Limited, Sy. R. H. Hoskins, secretary. Date, 2nd March, 1901."

Mr. Close for the appellants; Sir H. Juta, K.C., for the respondents.

After hearing counsel in argument on the facts, the Court dismissed the appeal, with costs.

De Villiers, C.J.: It is very difficult in this case to judge from the record alone as to what the real difference was. If there was any plea at all, it must have been the general issue. There is certainly no special plea on the record. The defence is to be gathered from the record, and more especially from the evidence given by Mr. Nannucci, and that evidence goes to this: that there was a guarantee on the part of the canvasser, who had been sent in the month of February by the plaintiffs to the defendants, that all the books ordered would be issued in April. Now, on the face of it, it seems extremely unlikely that the whole number, 300,000, should be issued in the following month of April. I think that if the plague had continued, and there had been a demand for the soap, there would have been no question raised as to any guarantee for the special month of April. Besides, I don't think that any verbal arrangement of that kind ought to weigh in the face of this written document, which has been produced and upon which the plaintiffs rely. They say that their ordinary mode of dealing with their customers is to send their canvasser for orders, and the canvasser then brings back, not a verbal order, but the written instructions from the customers as to the number of advertisements or the number of publications they require. That is their ordinary mode of business, and I am not at all sure from the evidence before us that the canvasser would have any authority to enter into any such contract as alleged by the defendants. It does not appear that in any other case he

ever had any authority from his principals to entitle him to enter into any special contract. But that question is not now raised by the plaintiffs, and it seems to me unlikely that the canvasser would have offered to do what the defendants say he did. The plaintiffs say that a written order had to be given in each case, and in the present case the written order produced is wholly silent as to the time within which the advertisements were to appear. In the absence of any special contract as to the time within which these advertisements should appear I am of opinion that a reasonable time only was required. There is no evidence whatever in the present case that there has been any unreasonable delay on the part of the plaintiffs in supplying the large number of 300,000 tickets. It appears to me that the Magistrate has taken a proper view of the evidence in this case, and the appeal must be dismissed with costs.

[Applicant's Attorneys: Gus. Trollip; Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

REX V. LE ROUX.
REX V. VAN DER MERWE { 1902.
AND GROVE. Nov. 12th.

Threatening, abusive or insulting behaviour—Breach of the peace—Act 27 of 1882, section 10.

The wearing in a public place of a hat with the colours of the late South African Republic, or with the name of an ex-general of that Republic, or with a coin of that Republic, or with ostrich feathers and a puggaree, or with a badge of the Royal Artillery, does not necessarily and per se constitute threatening, abusive or insulting behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.

These were three criminal appeals. The first from a judgment of the Assistant Resident Magistrate of the Paarl and the remaining two from judgments of the Assistant Resident Magistrate of Murraysburg. The first case heard was an appeal from a decision of Mr. L. van der Poel, Assistant Resident Magistrate of the Paarl district, sitting at Wellington, in the matter *Rex v. Le Roux*, in which Ella le Roux, described as a European female scholar, was charged with contravening Section 10 of Act 27 of 1882 (the Police Offences Act), in that on October 2 last, she did wear the colours of the late Transvaal, as also a badge marked "Christian de Wet," which abusive and insulting behaviour was calculated to provoke a breach of the peace, or whereby a breach of the peace may have been provoked, in a public place, to wit, the Wellington Railway platform. The Magistrate found accused guilty, and sentenced her to pay a fine of £1. Against this decision she now appealed.

Mr. J. E. R. de Villiers appeared for the appellant; Mr. Howel Jones appeared on behalf of the Crown.

The records of the Court below showed that a special constable named B. A. Woodcock gave evidence to the effect that he saw the accused on the Wellington railway platform at 11 o'clock on the morning of October 2, wearing the old Transvaal colours—green, red, white, and blue. In the presence of Constable Christian Nel and Mr. Arthur Coaton, he asked the accused to take off the colours. Accused walked away but did not remove the colours, and he saw her after that still wearing them. He reported the matter to the head constable. The accused had also a badge on her hat, consisting of the name "Christian de Wet" printed on a ribbon. She wore that on the railway platform on the morning of October 2, and he saw her again wearing it the following day. He had seen the colours worn lately—not often. This evidence was corroborated by the constable, Christian Nel.

The Magistrate gave his reasons for his judgment as follows: In this case Miss Ella le Roux, daughter of Mr. P. J. le Roux, a teacher in the Public School, Wellington, was charged under Section 10 of Act 27 of 1882 for wearing on the Wellington railway platform a hat with a ribbon round it consisting of the colours green, red, white, and dark blue,

which are the colours of the late Transvaal, as also a badge, "Christian de Wet," printed in orange on a dark ribbon. I held that the wearing of these colours and badge is conduct abusive and insulting, and calculated to provoke a breach of the peace. It has been brought to my notice that the loyal inhabitants of this town feel sore and are much put out about such behaviour, and if the unthinking public are allowed to do this sort of thing great unpleasantness and a renewal of hostilities in the minds of the people will be the result. Mr. Le Roux and his family are known to be pro-Boers.

Mr. De Villiers said that the appeal was based on the ground that the behaviour with which Miss Le Roux was charged did not amount to a contravention of the section of the Police Offences Act under which the charge had been laid, and he submitted that the evidence did not prove her to have been guilty of any such contravention. He pointed out that the Act required the behaviour to be "threatening, abusive, or insulting, and such that a breach of the peace may be occasioned thereby." He submitted that here there was no evidence of abusive or insulting behaviour. Then even if they accepted the fact that she was a pro-Boer he presumed they had to inquire what a pro-Boer was. He submitted that there was no such thing now, seeing that the people of the Transvaal and late Free State were now British subjects. And then the wearing on her hat of the name of that distinguished General, De Wet, who was now a loyal British subject, and had been specially honoured by the King, could not be an addition to the offence. With regard to the wearing of the Transvaal colours, the Transvaal was now an extinguished State, and the wearing of the colours could merely mean that the wearer, Miss Le Roux, had friends there or had friendly feelings towards the loyal inhabitants of the King who resided in that State beyond the Vaal River. These colours could not be more than a souvenir or a political badge, such as the Primrose or the Shamrock in England, and it would be as reasonable to fine the wearers of the shamrock. There was nothing insulting or abusive in appellant's language, *Queen v. Parish* (3, H.C., 369).

Mr. Howel Jones (for the Crown) said that the simile of the shamrock made use of by his learned friend was most unfor-

fortunate for him. From time immemorial badges had been the occasion of turmoil, and the shamrock had perhaps been responsible for the most; so much so indeed that the wearing of the shamrock had been prohibited in Ireland.

[De Villiers, C.J.: By special legislation.]

Mr. Jones (continuing) said that the whole question was one for the discretion of the Magistrate of the district in which these colours were worn. He must decide whether under the circumstances the wearing of these colours was calculated to provoke a breach of the peace. In some districts it was possible that no breach of the peace would be created, because in some districts they might have the people all of one shade of political opinion, while in other places no notice might be taken of the wearers. But the Magistrate must be presumed to know the state of feeling in his own district, and in his judicial capacity he could take cognisance of the history of his district, and it was part of the history, which must be patent even to that Appeal Court, that in very many districts feeling had been running high, and was still running high, between the loyalists and the people who, up to the time the terms of peace were signed, had been disloyal, including rebels who had lately been in rebellion. One could not disguise the fact that there were many late rebels who were professedly loyal, and nobody would say they were disloyal unless they took occasion to show in some overt way their state of mind. He thought that in the case of a rebel who had taken the oath of allegiance, and went on wearing the colours of the late Republics in whose service he had been enlisted, an overt act was being committed, which was likely to cause irritation, and maintain a state of political ferment. It would be different if these badges, etc., were worn on hats which were known to be merely kept as souvenirs, but to flaunt them publicly was a much different proceeding. They were flaunted about in the public streets before the loyal subjects of the King. If anyone forcibly removed the colours or badges from such a person, one might be held to be guilty of a technical assault, but any sensible jury would recommend the assaulter to mercy on the ground of provocation. After submitting that the wearing of such badges and colours might provoke a breach of

the peace, Mr. Jones said that although a loyal man might take little or no physical notice of what he considered was an affront committed by even a girl, a loyal woman might, and thus would provoke a breach of the peace, "for we all know that feeling between the female sex is much more bitter than between men." This appellant had been warned to remove the colours. She did not do so, and therefore her conduct was wilful, if not malicious.

After hearing counsel in argument the Chief Justice said that he understood that there was another appeal case in which a somewhat similar point had been raised, and before giving judgment he would like to hear the argument in that case also.

The appeal in the case of *Rex v. Van der Merwe and Grove* was then heard. In this case Schalk Willem van der Merwe and Gabriel Grove, had been charged before Mr. H. H. Hudson, Acting Resident Magistrate, of Murraysburg, with contravening Section 10 of Act 27 of 1882, in that on October 3 last, in the public street at Murraysburg, both or one of them made use of insulting behaviour by wearing hats turned up on one side, with feathers therein and white puggarees round, and by flaunting or displaying colours or emblems on the said hats of the late Transvaal Republic, with intent to provoke a breach of the peace or whereby a breach of the peace might have been occasioned. In this case both the accused pleaded guilty, and were sentenced, each being fined £3 or one month's imprisonment with hard labour.

This judgment was now appealed against, counsel for the appellants submitting that in accordance with decisions in previous cases in the High Court of Griqualand West and the Eastern Districts Court an appeal could be lodged, even although the accused had in the first instance pleaded guilty, seeing that their plea was guilty to the facts alleged against them and not on the point of law.

Mr. De Waal appeared for the appellants; Mr. Howel Jones appeared on behalf of the Crown.

In the records of the Court below the evidence of Thomas Delaney, a sub-inspector in charge of the Cape Police stationed at Murraysburg, was to the effect that he had given orders to his

men to warn persons from wearing emblems of the late Republics. At nine o'clock on the morning of October 3 he met accused Van der Merwe in the street wearing a hat with a white puggaree, supposed to be that of the late Scheeper's commando, with ostrich feathers and the side of the hat turned up, and with a brooch, consisting of a coin of the late Transvaal Republic. The hat was a regulation military one. Witness advised him in a friendly way to desist from wearing his hat in that way, and told him that, although martial law had ceased to exist, he was liable under the Police Offences Act for provoking a breach of the peace. Witness also gave instructions to have him watched by the police, to see if he continued to wear the hat. He was arrested by Sergeant Whitaker the following morning. After Van der Merwe had been arrested, Grove passed on a bicycle. He was subsequently arrested. Witness had previously seen Grove wearing the hat produced in court.

Witness considered that these men set a bad example to the children, who were many of them wearing similar hats and puggarees, and it might lead to serious trouble. He felt certain that the wearing of these hats would cause a breach of the peace if it were continued, and he had heard people who were loyal objecting strongly against it.

Sergeant Whitaker, in his evidence, deposed to seeing the accused Grove ride past wearing the hat produced. He detailed a man to go after Grove, and was then informed that Van der Merwe was wearing a similar hat, and that he was to attend to it. He went to a shop and arrested Van der Merwe there. In the meantime the accused Grove was passing again, and then had a cap on. Witness sent two men to Grove's house, with instructions to bring back the hat which he had previously seen him wearing. They did so, and brought back the hat, which witness examined, and found the badges on it. They were those of the "Royal Artillery" and "N.Z.M.R.," and a bugle with a chain, apparently a military badge, and a brooch with the word "Letty" and one with the words "Vergeet mij niet." Witness thought the wearing of those hats was likely to cause a breach of the peace.

The Head Constable, William John Shepherd, gave evidence that before the cessation of hostilities the accused were both members of a Boer commando. He knew that from the records of their return. They were both surrendered rebels.

Mr. De Waal submitted that there was no evidence to show that in the wearing of these hats there was any threat or insult or abusive behaviour intended.

Mr. De Waal (for the appellants): The accused pleaded guilty before the Magistrate merely as to the fact, not as to the offence. They are therefore not barred from appealing. In *Queen v. Beddorne* (5, H.C., 159), the Court held that an appeal was equivalent to the withdrawal of the plea. See also *Queen v. Dragonder* (1, E.D.C., 86), *Queen v. Jim* (1, E.D.C., 93), *Queen v. Danster* (1, E.D.C., 81), *Queen v. Charlie and Another* (3, E.D.C., 366).

[De Villiers, C.J.: I suppose they were the hats they had worn on commando?]

Mr. De Waal: There is no evidence as to that.

[De Villiers, C.J.: Oh, well, that makes it worse for them. I thought they had worn them on commando, and that they had no other hats to wear.]

Mr. De Waal: That may be, my lord.

[De Villiers, C.J.: Otherwise there is no excuse for them.]

Then, again the offence must be committed in a public place. Van der Merwe was arrested in a shop, and that is not a public place, *Queen v. Stephenson* (2, H.C., 496). Or, again, a baker's tent is not a public place, *Queen v. Griffin* (3, E.D.C.,). As to a hotel yard, see *Queen v. Parish* (3, H.C., 369). Again, Van der Merwe had been warned the previous day, and there is no evidence that he again wore the hat in question in any public place. Grove had never been warned, but when he heard that Van der Merwe had, he at once changed his hat for a cap. As to the word "Letty," no lover who wore such a name publicly would be safe if it were considered as provocative of a breach of the peace. There was no more evidence of disloyalty in this case than there would be if one shouted "Hurrah" when an ex-Boer leader was passing in the street, for surely England is proud of her new subjects.

Mr. Howel Jones submitted that this was an even more flagrant case than that of Miss Le Roux. He pointed out that the gravamen of the charge consisted in wearing the headgear of Scheeper's commando and the initials "Royal Artillery" and "N.Z.M.R.," were possibly badges taken from scouts during the war and worn as trophies.

The Court allowed the appeals in both cases and quashed the sentences.

De Villiers, C.J.: The question to be determined in these cases is whether the appellants or any of them used "threatening, abusive, or insulting behaviour with intent to provoke a breach of peace or whereby a breach of peace may be occasioned in any street, road, public place or licensed public-house." In regard to Grove, the evidence against him is that he was seen riding a bicycle and wearing a hat, which, on examination, was found to be a kind of military hat with certain badges on it, these badges being those of the Royal Artillery and N.Z.M.R.—New Zealand Mounted Rifles, I suppose—a bugle with a chain, apparently a military badge, a brooch with the word "Letty" on it and another brooch with the words "Vergeet mij niet" (Forget-me-not). "This," says the witness, "is the same hat which he was wearing when I saw him previously." I confess I am wholly unable to see that there is an abusive or insulting or threatening behaviour in wearing a hat of that kind. It is a hat apparently belonging to the Royal Artillery and these badges with the words "Letty" and "Vergeet mij niet" surely do not add to the offence. Any person who takes offence at another person wearing such a hat must be very very thin-skinned indeed. There cannot be any intention to insult, abuse, or threaten anyone when a person wears a hat of this kind, and so, certainly as regards Grove, I don't see how the judgment can be supported. As to Van der Merwe, he wore a hat with ostrich feathers, with the side of the hat turned up and with a brooch, consisting of a coin of the late Transvaal Republic. I must say that if this hat had been shown to be the hat which he had worn as a rebel before the termination of hostilities—if I had been satisfied it was such a hat—I should have been inclined to hold that the wearing of such

a hat in the public streets is somewhat offensive to the loyal public. But I am not at all satisfied that it was such a hat; on the contrary, it seems to me to have been an ordinary hat with ostrich feathers. As to the puggaree, well, many persons wear puggarees of various colours for protection from the heat of the sun, and in doing so they surely do not commit an offence. I am not satisfied that Van der Merwe's hat was of the kind formerly worn by rebels. If it had been such a hat, there would have been much force in the contention that the wearer's behaviour was offensive. But I must confess I see the greatest difficulty in upholding the judgment in the circumstances against a person found guilty of contravening this section which requires that there shall be threatening, insulting, or abusive behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. In regard to the case of Miss Le Roux, she seems to have been a young school girl, who wore Transvaal colours, and a badge marked, "Christian De Wet." If such a thing had been done during the war, the wearing of the badge would have been offensive to loyal subjects, but after the war the mere fact that she wore a badge marked "Christian de Wet," ought not to give offence to anyone. The more serious question is as to the wearing of the Transvaal colours. There also, if it had been done during the war, the wearing of the colours might, under the circumstances, have been held to be abusive, insulting, or threatening; but when a silly young girl wears them now that peace has been established, it would be going very far to hold that it is insulting, abusive, or threatening behaviour with intent to provoke a breach of the peace, or from which a breach of the peace could be expected. I think it is a silly thing on the part of this young girl to do, and it would have been far better for her not to have done it. There are many other styles of hat for her to wear, and if persons are sensitive on this point, she would have shown greater sense and better taste by abstaining from giving even the semblance of offence. But the question is not whether she has given a semblance of offence, but whether she is liable to prosecution for a contravention of this section. The magistrate seems to have acted somewhat upon his own per-

sonal knowledge of matters without being entirely guided by the evidence given. I do not consider that this young girl, in doing what she did, can be held to have been guilty of abusive, insulting, or threatening behaviour. The wearing in a public place of any of the different hats which have been described in the evidence does not necessarily and *per se* amount to a contravention of the 10th section of the Police Offences Act of 1882, and the appeals must consequently be allowed and the sentences quashed.

[Appellants' Attorneys: Michau and De Villiers.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSIONS. { 1902.
 { Nov. 13th.

Mr. B. Upington moved for the admission of John Alexander Greer as an advocate of the Supreme Court.

Order granted and the oath administered.

Mr. Schreiner, K.C., moved in the application of Cornelis Jakob Langenhoven for re-admission as an attorney and notary. The applicant was admitted as an attorney and notary of the Court on August 17, 1899, and practised as such until August, 1901, when on his own application he was removed from the roll of attorneys and notaries and admitted as an advocate of the Court. He had since practised as an advocate, but for practical reasons he was desirous of having his name removed from the roll of advocates, and of being re-admitted as an attorney and notary public. Counsel said that if it pleased the Court to grant the order asked for, and it was thought necessary that the oaths should be taken again, he had to ask leave for them to be taken before the Resident Magistrate of Oudtshoorn.

The Court granted an order as prayed, and stated that the oaths having been once taken need not be taken again.

In making the order Buchanan, J., said that the Court would indicate in this case that there must be some finality, as the Court could not have constant changing from one branch of the pro-

fession to the other. Probably, if a further change was asked as far as this applicant was concerned, the Court would not look favourably upon it.

Mr. Buchanan moved for the admission of Alfred James Wadson as a sworn translator in the French, Spanish, and Portuguese languages.

Order granted and the oath administered.

Mr. Buchanan moved for the admission of Christian Zinn as a sworn translator.

Order granted and leave given for the oath to be taken before the Resident Magistrate of Beaufort West.

Mr. Buchanan moved for the admission of Abraham Robertson Truter as a sworn translator.

Order granted and leave given for the oath to be taken before the Resident Magistrate of Beaufort West.

CAISSE V. W. B. HOWARD.

Mr. Benjamin asked that this matter be allowed to stand over until November 20, as there was some prospect of a settlement.

Ordered to stand over until November 20.

Postea (November 20): The Court granted provisional sentence for £1,230 on a mortgage bond which had become due, by reason of the non-payment of the first instalment thereon.

HEROLD V. THOMAS BENNETT.

Mr. Close moved for provisional sentence for £150 due on a promissory note, less £107 10s. paid on account.

Buchanan, J., pointed out that the notice was not stamped, and said that he would have to inflict a fine.

Provisional sentence granted as prayed, subject to a fine of £10.

SELIGMANN AND CO. V. OLIVIER.

Mr. Currey asked that this matter be allowed to stand over until November 20, as the summons, although served, had not yet been returned.

Ordered to stand over until November 20.

Postea (November 20): Provisional sentence was granted for £278 12s. 4d., due on a promissory note.

CHIAPPINI BROTHERS V. HADJE OMAR
AREND.

Mr. De Waal moved for provisional sentence for £350 due on a promissory note.

Provisional sentence granted as prayed.

PIENAAR V. PIET J. VILJOEN.

Mr. Buchanan asked that this matter be allowed to stand over until November 20.

Ordered to stand over until November 20

Postea (November 20): Provisional sentence was granted for £100 due on a promissory note, and for £100 under Rule 329 d., less a certain sum paid on account.

WALKER V. BLACK.

Mr. Benjamin asked that this case should be allowed to stand over until the 20th inst.

Mr. Upington, for respondent, consented, and the application was granted.

ILLIQUID ROLL.

SHANBAN V. SCHOLTZ. { 1902.
Nov. 13th.

Mr. Gordon moved for judgment under Rule 319 for £7,000, the purchase price of certain property, plaintiff tendering transfer of the property.

Granted, subject to execution being stayed for fourteen days.

VAN DER BYL AND CO. V. ISAACS.

Mr. Close moved for judgment under Rule 319 for £32 5s. 7d. and £50, due respectively for goods sold and on a guarantee of suretyship.

Granted.

KAISER V. GLUCKMAN.

Mr. Russell moved for judgment under Rule 329 (d) for £75, for rent due.

Granted.

CAPE OF GOOD HOPE SAVINGS BANK V.
GREENING.

Mr. Buchanan moved under Rule 329 (d) for judgment for £53 6s. 3d., arrears of rent.

Granted.

MATZ V. TAYLOR.

Mr. Close moved under Rule 329 (d) for judgment for the sums of £68 (rent) and £50 4s. 11d. (goods sold).

Granted.

WILLEMSE AND OTHERS V. THOMAS.

Mr. Benjamin moved for judgment under Rule 319 for the sum of £234 9s. 9d.

Granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice) and the Hon. Mr. Justice MAASDORP.]

APPEAL CASE.

WALKER V. FENELE. { 1902.
{ Nov. 14th.

Prescription—Attorney's costs—
Judgment.

Where an attorney has been engaged for the conduct of an action to its final determination and has not been superseded in the meantime, the cause of action for his fees and disbursements accrues when judgment is given in respect of costs, and therefore prescription only begins to run from the date of such judgment.

This was an appeal from the decision of the Resident Magistrate of Engcobo, and originally before the Court on the 14th August. In the Court below appellant was the plaintiff. The plaintiff sued on a summons which alleged that he was an attorney of the Supreme Court, and that the defendant, in September, 1898, instructed him to proceed in the Court of the Resident Magistrate against one Mahoney for damages for adultery with his (defendant's) wife, and, further, to

proceed with an action for civil imprisonment. As instructed, the plaintiff did proceed with an action against Mahoney and obtained judgment. Plaintiff alleged that he had incurred costs to the amount of £14 10s. 7d., for which defendant was liable, and which he refused to pay. Defendant admitted that he was liable for the sum of £3 5s. 9d., which he tendered; but took exception to the remainder of the account on the ground that there had been prescription under section 5 of Act 6 of 1861. The Magistrate upheld the exception, and gave judgment for the amount tendered, refusing an application by plaintiff to put interrogatories as to the date when the services were performed. The bill of costs began in December, 1898, and ended on August 28, 1899. The £3 5s. 9d. was made up of two items, which were the last on the bill, being dated June 8 and August 28, 1899. The Court, when the matter first came before them on August 14th last, ordered the case to be remitted in order that evidence should be taken as to the dates on which the services were performed, and as to the dates of the different stages of the proceedings in the case of Mahoney. There was now evidence that the date of the first summons, in Mahoney's case, was February 17, 1899, judgment being given on the 18th April, 1899. There were other proceedings subsequently. The summons in the present case was dated the 18th April, 1902. During the three years appellant had issued summons against respondent, but had to withdraw the summons owing to the fact that respondent could not be found.

Sir H. Juta, K.C. (for appellant): The bill was not taxed till 24th April, 1899, and hence the debt was not prescribed. In August last the Court ordered the matter to be referred back to the Magistrate for further evidence as to the date of taxation, and the evidence of the gentleman who had been the Magistrate's clerk when the bill was taxed was taken on interrogatories. From this evidence it appeared that the summons was issued on 17th February, 1899. Judgment was given on April 18, and we took out summons on April 18, 1902. The three years had not elapsed, since the bill was not taxed till April 24th, 1899. The Magistrate clearly went

on the dates which were before him, but the evidence shows that these were incorrect. English cases go to show that prescription runs only from the date of taxation.

The respondent was in default.

De Villiers, C.J.: When the appeal was previously before the Court it was contended that the date of the taxation of costs ought to guide the Court in deciding the date from which prescription should run; but the Court then pointed out that the date of the taxation of the costs was not the criterion, but the date when plaintiff would have been entitled to recover the amount due to him. Well, that date would seem to me to be the time when judgment was given, because it could not be expected that an attorney would sue his client for each disbursement as it is made or for civil professional service as it is performed. When an attorney is appointed for the conduct of a case he is expected to conduct it to its conclusion, and to receive his fees after judgment. If his services are dispensed with before judgment, he may claim payment of his fees, but if his services are retained to the end, he could not well have the costs taxed until judgment has been given. It is only right, therefore, that prescription should only run from the date of such judgment. The appeal must be allowed with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys: Walker and Jacobsen; Respondent in default.]

REHABILITATION.

Mr. Gardiner moved for the rehabilitation of Tjaart Petrus Venter. Counsel said that the consent of the creditors had been filed with the Master.

Granted.

GENERAL MOTIONS.

Ex parte MCNAMARA.

Mr. Russell moved for an order authorising the amendment of an order granted under the Titles' Registration and Derelict Lands Act.

Granted.

STEER V. TOWN COUNCIL { 1902.
OF CAPE TOWN. { Nov. 14th.

Servitude—Road—Municipal Council.

The Municipal Council of C. transferred certain lots of land to a purchaser on condition that the Council should lay out a road between the lots and the beach. The diagram attached to the transfer showed a "proposed road" running parallel to the lots, but with a narrow strip between such lots and the proposed road. Thereafter the Council constructed a carriage road between the lots and the beach, but somewhat further from the lots than the "proposed road" as appearing on the diagram. After this carriage road had been in existence for over forty years the applicants bought the lots and sought to compel the Council to lay out the road where it was originally proposed to be.

Held, that there was no ground for the interference of the Court.

This was a motion upon notice calling on the Town Council to show cause why an order should not be granted compelling them to construct and maintain a road as laid down in a diagram attached to a deed of transfer dated December 16, 1851, and to approve of and pass plans submitted by applicant of certain proposed buildings on property, near the Flash Lighthouse at Three Anchor Bay.

The affidavit of Frederick Beecher Steer (the applicant) stated:—

1. That on December 6, 1851, the Commissioners for the Municipality of Cape Town transferred to one J. A. H. Wicht certain four plots of ground situate in the Cape Town Municipality, near the Green Point Lighthouse marked Nos. 9, 10, 11, and 12.

2. On April 2, 1853, the said Wicht transferred lots 11 and 12 to one F. L. C. Biccard.

3. The diagrams annexed to the deed of transfer indicate a road bounding the northern side of lots 9, 10, 11, and 12.

4. On January 30, 1902, petitioner took transfer of lots 11 and 12 from one J. B. Callanan, subject to the conditions mentioned or referred to in the transfer in favour of the said Biccard.

5. I have sold portions of the said two lots, retaining a remaining extent indicated on the plan of sub-division as lots Nos. 3, 4, and 9.

6. Prior to selling the sub-divisions, I submitted a plan for the approval of the Town Council, which was returned to me with the following objection thereon: "The owners of plots marked and numbered 1, 2, 3, 4, 5, have no right of access over the Municipal land between them and Beach Road."

7. In reply, I wrote on November 5, 1901, directing the attention of the Council to the terms of the deed of transfer granted to J. A. H. Wicht, by which the Municipality engaged to lay out and form a proper carriageway between the said lots and the beach in lieu of the present road running across the lots.

8. In reply, I received a letter stating that the ground in question was Municipal land, and that I had no right of access across the land.

9. Thereafter, and after having sold the portions of the sub-divided lots, I, in conjunction with my co-proprietors, and with a view to adjusting the matter amicably, made application to the Council for the strip in question, but the Council refused to sell.

10. In 1869 the Council sold and transferred to one W. de Smidt the land marked as "proposed road" on the original diagram of my land, situate to the eastward, and a wall has been erected across this portion of the road; the portion of the road to the westward has also been enclosed, and consequently the portion of the road between my property and the present Beach Road is the only portion unobstructed.

11. The want of access caused by these obstructions considerably affects the value of the property held by me, inasmuch as I am deprived of my frontage along the public thoroughfare, and am denied by the Council right of access across the land in suit, which they claim to be Municipal land.

12. On August 28 last I wrote to the Council, calling upon them to remove the obstruction erected across the road on the Eastern side of my property. In reply the Town Clerk wrote denying that any road had been closed or that there was any difficulty in obtaining access to my ground.

13. In August last I submitted for the approval of the Council plans of a proposed building to be erected on my property aforesaid, but the Council decline to pass these plans on the ground that the plans showed the houses as abutting on the Beach Road and did not show the strip of Municipal land.

14. That by reason of the premises I am compelled to apply to this honourable Court for an order calling upon the Council to restore the position of the Beach Road as originally laid down, and to pass the plans submitted by me for the buildings proposed to be erected on my said property.

There was a replying affidavit from the Town Clerk stating that since the notice of motion had been served applicant's right of access had been fully acknowledged by the Town Council, and stating that the existing Beach Road had been maintained in its present position by the Town Council for very many years before the applicant purchased his property.

Mr. Schreiner, K.C., for the applicant.

Mr. Searle, K.C., for the respondent Council.

Mr. Schreiner, K.C.: This matter can be decided on motion. The Town Council refused to accept our plans, and it was not until we had set down the motion that they acquiesced. The first question is, what are the terms of the transfer passed in 1851? Did it give a frontage on the Beach-road or not? The original road ran over the lots, and to encourage purchasers the Council promised to make a road nearer the beach. We have, therefore, a right to abut on the Beach-road. My client's property has been seriously depreciated by this contest. The Council cannot now be heard to say that as they are willing now to allow us to have access to the Beach-road we have nothing to complain of. We do not want to be there on sufferance; we claim to be there as of right.

[De Villiers, C.J.: They claim the vacant space in front of you, but are

willing to give you access to the road.]

The proprietor is very much prejudiced. His property is practically shut off from the Beach-road, save on sufferance.

[De Villiers, C.J.: Surely they may shift the position of their road?]

Yes, provided that they always give us a frontage to the Beach-road. In 1869 they fully recognised this obligation.

[Maasdorp, J.: They do not now dispute your right of access to the Beach-road.]

All they are willing to give is a precarious right, which they may revoke three days' hence. In 1869 an applicant who asked for precisely what we want now got his title. The Town Council cannot put us into a *cul-de-sac*. We do not want to build on the 4-foot strip, but we do claim a right of access to the road over it.

[De Villiers, C.J.: You bought with full knowledge of the road which the Municipality had pointed out.]

If so, we bought with knowledge also of all the surrounding circumstances, *e.g.*, that the Town Council had already given a title over their strip of land to one man, and we had every reason to believe that they would treat us in the same way.

[De Villiers, C.J.: If they are liberal with one man, are they bound to be liberal with another?]

I need not maintain that. The Court will not hold that they have re-prescribed the property.

Mr. Searle was not called upon.

The Court refused the application.

De Villiers, C.J.: At the time when the former municipality transferred the lots in question to the predecessors in title of the applicant there was a condition set forth in the deeds of transfer that "the Municipality engage to lay out and form a proper carriage way between the said lots and the beach, as marked upon the plan, in lieu of the present road running across the lots." In the diagram there is marked a proposed road, but there is a strip of land between that proposed road and the lots, which strip still remained the property of the Municipality. Subsequently the Municipality did construct a road, but instead of constructing it on the exact lines of the proposed new road they

made it somewhat nearer to the sea, and if the predecessors in title of the applicant had then objected, possibly the Court might have held that this was such a diversion of the proposed road as would justify the interference of the Court. But there is apparently no record of any such application, and the road has now been in existence for over forty years. It was in existence when the present applicant bought, but he now claims that the road shall be brought back to the line which it was originally intended to take. In my opinion there has been no such infringement of the applicant's right as would justify the Court in interfering. If there had been an allegation that the respondents have done anything to prevent free access on the part of the owners of these lots to the public road I should have been quite prepared to restrain such obstruction, but there is no evidence that there has been such obstruction. No doubt there was at one time a denial of the applicant's right to build on this property, but I think that arose out of a misunderstanding. In applying for the right to construct these houses the proposed road was treated as a road in existence, and I think the Town Council was misled into supposing that these houses would come considerably nearer to the existing road than was really the case; but when this misunderstanding was removed then all objection to the building of the houses was removed. Under these circumstances I am of opinion that the Court should not interfere, and that there is no proof that any rights of the applicant have been infringed. If there is a servitude of this kind the person who owns the servitude is always entitled to alter his servitude provided there is no injury to the dominant tenement. If at the time of the diversion objection had been made then perhaps there might have been some reason for the Court interfering. The application must be refused.

After hearing Mr. Schreiner in regard to the question of costs,

The Chief Justice said: There is nothing to show that access to the road was ever denied to the applicant, and the correspondence shows that the Town Council were quite willing to allow access. Before any notice of motion was given, it ought to have been quite clear to the applicant that access

was not denied. The application must therefore be refused, with costs.

[Applicant's Attorney, A. W. Steer; Respondents' Attorneys, Fairbridge, Arderne and Lawton.]

Ex parte STUTTAFFORD AND CO., LTD. 1902. (Nov. 14th

Company - Issue of Shares.

Where certain errors had been made in the numbering and description of the shares issued by a new company, the Court ordered that errors in the company's register should be corrected and the shares re-issued.

This was an application for an order sanctioning and confirming a certain agreement entered into between the above company and the vendors of the business to the company.

The petition of Stuttaford and Co., Ltd., Samson Rickard Stuttaford, William Thorne, Richard Stuttaford, and William John Thorne shewed:

1. On November 16, 1898, the four last-named petitioners (hereinafter styled the vendors) entered into an agreement with Thomas Edwards Lawton, acting therein as agent for a company, which was thereafter registered with limited liability in the office of the Registrar of Deeds, Cape Town, under the style of "Stuttaford and Co., Ltd.," and is now the petitioning company. The company was registered on December 8, 1898.

2. In the said agreement it was provided by clause 2 thereof that the consideration for the sale of the assets and goodwill which the vendors were disposing of should be the sum of £550,100, and the clause provides that payment was to be made to the vendors, partly in 100,000 fully paid-up ordinary shares, partly in 125,000 fully paid-up preference shares, partly by 100 fully paid-up management shares, partly by £60,000 in debentures, and that the balance of £265,000 should be paid and discharged in cash or shares, and that in the event of any part of such balance being paid in shares, a supplementary agreement should be entered into setting forth in what manner the said shares should be numbered, as the directors might decide on allotment.

3. It is provided in the said clause how the said ordinary, preference, and management shares should be numbered, but in the issue to the vendors of the ordinary and preference shares a mistake was made by inadvertence in the office of the company, and the numbering of the shares was not adhered to; some of the specified shares only being issued to the vendors, while other shares not so numbered were issued to them. On the other hand, shares ear-marked as aforesaid for delivery to the vendors were issued to other persons who had applied for shares in the ordinary way, and had duly paid for the same.

4. There was also another divergence from the agreement, inasmuch as the letters "O," "P," and "M" have not been used for the purpose of designating the different classes of shares in the numbering. The nature of these shares appears, however, on the face thereof. The number of the shares which were, as a fact, issued to the vendors in respect of the numbers referred to in the said agreement hereunto annexed and referred more particularly hereafter.

5. After the registration of the company the directors resolved to satisfy the aforesaid balance of £265,000 by the issue to the vendors of £150,774 in cash, £81,400 in debentures, and by the issue of a further 32,826 preference shares, fully paid up.

6. By inadvertence on the part of the directors of the company no supplementary agreement, as referred to in the second clause of the aforesaid agreement of November 16, 1898, was entered into, nor was any agreement come to as to the numbering of these 32,826 preference shares, and it is not now possible to say what numbers of preference shares were issued in respect of the 125,000 or in respect of the last issue.

7. The errors and omissions with regard to the aforesaid issue of shares were due entirely to inadvertence or mistake on the part of the company, and not to any desire either on their part or on that of the vendors to omit to comply with the law or with the terms of the aforesaid agreement.

8. Thereafter the aforesaid mistakes were discovered, and it was accordingly resolved by the directors and vendors to apply to the company for its approval of the necessary steps to correct the same. This the company granted

by a resolution passed at an extraordinary general meeting, held October 23, 1902, giving the necessary authority for the correction of the errors and sanctioning the entering into an agreement for the purpose of ratifying the further issue of preference shares.

9. The position of the company at that time was perfectly sound and satisfactory, as appears from the directors' report and balance-sheet of July 31, 1902.

10. On October 23, 1902, an agreement was entered into, pursuant to the resolution of the extraordinary general meeting referred to in paragraph 8, and which is hereunto annexed.

Wherefore the petitioners pray that the Court will be pleased to sanction and confirm the said agreement, and to order the same to be registered with the Registrar of Deeds under the provisions of section 97 of the Companies Act, 1892.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), for applicants: *Re Contat's Collicries* (8 Sheil, 21), shows that in England a special legal machinery has been established for dealing with cases of this description. The wording in *Contat's* case may not touch the present question, but the wording of the English Act of 1862 certainly does. According to *Contat's* case, the register should first be corrected, and then the shares should be re-issued to the vendors. This decision would be in point if we still had the shares in hand, but they have changed hands. The register must first be corrected, and then these shares can be put on again. True, I know of no precedent here for doing so, but I would ask the Court to make one, reserving the rights of creditors, if any, and to do here by Common Law what can be done by Statute Law in England.

The Court granted an order as prayed.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

REX V. DESMOND. { 1902.
{ Nov. 14th.

Appeal — Criminal conviction —
Special entry—Question of
law reserved — Attorney-
General—Act 35 of 1896.

Where no special entry has
been made or question of law

reserved at a criminal trial, in terms of the 32nd or 34th sec. of Act 35 of 1896, the Supreme Court will not allow such an entry to be thereafter made, or such a question of law reserved for the purpose of an appeal against a conviction except with the consent of the Attorney-General.

This was an application for leave to appeal. Petitioner, formerly the manager of Messrs. J. D. Logan's Refreshment-room at Worcester, was sentenced at the Circuit Court at Worcester to imprisonment for the alleged theft of a ring. Petitioner alleged that the evidence against him was obtained by threat, inducement, and promise. He excepted to the admission of this evidence before the Magistrate as irregular and illegal, but the Magistrate overruled the exception. No exception was taken at the trial in the Circuit Court. Petitioner was desirous of appealing to the Supreme Court.

The petition of the applicant was as follows:

1. Your petitioner was until lately the manager of J. D. Logan and Co.'s refreshment saloon at Worcester, and he is now a convict in the Worcester gaol.

2. On October 11 last your petitioner was tried before the Circuit Court at Worcester for the crime of theft of a ring. The jury found him "guilty," but recommended him to mercy. He was sentenced to nine months' imprisonment with hard labour.

3. The chief evidence against petitioner consisted of certain statements made at certain interviews between complainant, his agent (who was a Justice of the Peace), and petitioner, and of the fact that the petitioner offered to pay for the ring. This evidence was obtained by threat, inducement, or promise on the part of the complainant and his agent, and the petitioner protests against his conviction on the ground that the admission of the said evidence was irregular and illegal.

4. Exception was taken at the preliminary examination of petitioner to the admission of the aforesaid evidence, but the exception was overruled.

5. It was omitted to except to the admission of the aforesaid evidence at the trial, or to apply at the trial or after conviction for a special entry to be made on the record in terms of section 32, Act 35, of 1896, showing the irregularity and illegality of the proceedings in admitting such evidence.

6. Petitioner is now desirous of appealing to the Supreme Court of Appeal in criminal cases to have his conviction quashed.

7. Petitioner gave due notice (within fourteen days) by letter, dated 21st October, 1902.

Wherefore petitioner pays for an order giving to petitioner leave to appeal to the Supreme Court, as a Court of Appeal in criminal cases. The prisoner was convicted at the Worcester Circuit and sentenced to two years' imprisonment, with hard labour.

Mr. Justice Searle's reasons for his judgment were as follows:

I notice that paragraph 5 of the petition states: "It was omitted to except to the admission of the aforesaid evidence at the trial itself or to apply at the trial, or after conviction, for a special entry to be made on the Record in terms of section 32 of Act 35 of 1896, showing the irregularity and illegality of the proceeding in admitting such evidence."

It is right to bring to the notice of the Court the fact that it was not a case of omission, inasmuch as the prisoner's counsel as soon as the evidence of the interviews referred to in the petition began to be led rose, and stated that he did not wish to raise any objection to the evidence, as it was his desire that all the facts should be placed before the Court.

I have no objection, however, to reserve the point for the decision of the Supreme Court as to whether illegal evidence was admitted, and whether on that account the conviction should be set aside. I take it that the points desired to be raised on behalf of the prisoner are: Whether, in view of the fact that Mr. Oliff was acting as the attorney of the complainant Brummer and was also a Justice of the Peace, the conversations which took place in his presence, or between him and the prisoner, on the subject of the loss of the ring were admissible in evidence. Whether in consequence of plaintiff or

Brummer offering some illegal inducement, threat, or promise to the prisoner, the latter was led to make admissions prejudicial to his defence, and whether the statements made by the prisoner to the plaintiff and Brummer should have been admitted in evidence.

Mr. Schreiner, K.C. (with him Mr. Wilkinson), for the appellant; Mr. Jones for the Crown.

Mr. Schreiner, K.C. (for applicant): The admission of the evidence as to the applicant's confession at the trial before the Circuit Court was irregular, because the confession was not made voluntarily. The case of *Queen v. Margolius* (4 Sheil, 359) shows that this Court can, under the circumstances, grant leave to appeal. I take it that the consent of the judge who tried the case is sufficient, and that the consent of the Public Prosecutor is not a condition precedent. The Court will never hold that the Crown has power to bar an appeal. I would ask that the matter be referred to Mr. Justice Searle for his consent to the appeal.

Mr. H. Jones (for the Crown): I do not consent to this appeal, and I submit that no appeal having been noted at the time, the case cannot now be reopened. The wording of section 25 of Act 35 of 1896 is very strong. This is a very different case from that of *Margolius*. If the evidence was inadmissible, it should have been objected to at the time. The prisoner was defended by counsel, and no objection was taken, though an objection had been raised at the preliminary examination. All such objections should be raised at the trial in order that the prosecutor may have an opportunity of hearing them and of replying to them.

Mr. Schreiner (in reply): Counsel for the Crown seems to fear that a prisoner may get off if irrelevant evidence has been given against him, even though there may be plenty of evidence which is irrelevant; but that is not so; and it is better that the Crown should be put to the inconvenience of arguing twenty cases rather than that one man should be kept in prison on insufficient evidence.

[De Villiers, C.J.: There is no appeal from the verdict of a jury; all the Court can do is to make a representation to the Governor.]

But see *Queen v. Brandford* (7 Juta, 169). The jurisdiction of this Court is in no way restrained by the Statute of 1879 (Act 5), and I submit that the case of *Margolius* under that Act shows that if the Circuit judge who has presided at the trial of a case reports in favour of an appeal, the Court cannot oppose it. No representation can be made to the Governor, save through the Attorney-General, but surely he cannot thus restrict the operation of the jurisdiction of this Court. *Queen v. Mans* (5 Searle, 285). I contend that this Court has power, *nunc pro tunc*, to place a matter on the Circuit record, and that this right cannot be fettered by the Crown.

De Villiers, C.J.: Before the Act of 1879 there was no right of appeal to the Supreme Court against a verdict of a jury. By the Act of 1879, which was subsequently incorporated with Act 35 of 1896, appeal was allowed in certain specified cases, and in my opinion, unless this case falls within those so specified, there is no right of appeal. No doubt in the case of *Margolius*, which has been quoted by learned counsel, the Court did give leave to appeal, but that was done with the consent of the presiding Judge and of the Attorney-General. In that case the Court suggested that consent should be given, and upon that suggestion consent was given. In the present case there is not enough before the Court to justify an expression of opinion as to whether it is advisable that the Attorney-General should give his consent. Unless such consent were given, I do not think the Court would be justified in giving leave to appeal in a case where no question has been reserved by the Circuit Court at the trial, or where no special entry has been made in terms of Act 35 of 1896. The application must be refused, but if at any future time the Attorney-General should consent, the application may be renewed.

[Appellant's Attorneys, Messrs. Walker and Jacobsohn.]

FLETCHER AND ANOTHER { 1902.
V. SHENKER. { Nov. 14th.

Bail bond — Security — Sheriff —
15th Rule of Court.

*At the instance of the applicant
a certain S. had been arrested*

under the 8th Rule of Court, and thereupon had given a bail bond to the Sheriff the conditions of which were inter alia "that he should appear to answer to plaintiff's summons, and to perform the judgment of the Court, or render himself to prison in execution thereof." S. had also deposited £80 with the Sheriff as additional security. He had not, however, fulfilled the conditions of the bond. Applicant now claimed from the Sheriff (1) the assignment of the bail bond, (2) the said £80—in terms of Rule of Court 15. The Sheriff was willing to assign the bond, but refused to pay over the money without an order of Court.

Held, that by Rule 15 the Sheriff was bound at plaintiff's request—not only to assign the bond—but to pay over the money deposited with him by S. As, however, only provisional sentence had been granted against S., the Court ordered the applicant to furnish security *de restituendo*.

This was a motion to make absolute a rule *nisi* calling on respondent and one Shenker to show cause why an order directing the High Sheriff to pay out a certain sum of money should not be granted.

The motion was one affecting a sum of £80 deposited by Shenker as surety for Litten, against whom a writ of arrest had been issued at the instance of the plaintiff, who had secured provisional sentence against Litten.

It was stated on affidavit by Shenker that the defendant was returning to defend the case.

Mr. Buchanan (for applicant): The sheriff took a double security: (1) The deposit of £80; (2) the bond. We now ask that the sheriff should be ordered to pay over to us this money, which he has taken in security, and to assign to us the bond. We applied to him to

pay over the £80 which he has taken as our agent, but we did not expressly ask him to cede to us the bond.

[Maasdorp, J.: How can you take an order for execution when you have your security?]

Section 7 of Ordinance 37 of 1828 shows that we have a right to claim the money. Rule of Court 14, which is founded upon Section 7 of Ordinance 37, also applies. See also Rule 15. We only ask now for what the sheriff has taken; any further steps will be matter for future consideration.

[Maasdorp, J.: The money was not received for you; it was mere security.]

But any bond, or other obligation, should be handed over to the creditor. I cannot understand what *locus standi* Shenker has. It is the duty of the sheriff to hand over the money.

[Maasdorp, J.: What objection has he to perform his duty?]

I understand that he holds we should first proceed to get a decree of civil imprisonment, but that is not so. The plaintiff never entered appearance in the principal action. Shenker has nothing to do with this motion. The whole question is between the sheriff and the applicant, and Shenker can fight the matter only by entering appearance to the principal action, and fighting the whole question on its merits. I do not contend that we can get this money without trial. We only want to secure ourselves by such means as the law allows.

[Maasdorp, J.: What would you do with the money?]

Keep it in our possession. Again, the defendant has allowed the time for entering appearance to almost lapse, and he is practically abandoning the matter. The case of *McIntosh v. Botha* (13 S.C.R., 8) shows that we can under present circumstances get an order on the sheriff to pay over money in his hands. In this case the debtors are both co-principal, and the applicant can excuse either of them.

Mr. Benjamin (for the defendant Shenker): As to Ordinance 37 of 1828, the Ordinance provides that a bond should be given to the satisfaction of the sheriff. The sheriff did not know Shenker, so he took the £80 to protect himself. He did not take it on behalf of the plaintiff, but for his own protection.

[Maasdorp, J.: The sheriff took that money to secure the plaintiff.]

No, to secure himself, and to make sure that the surety had money. Suppose he had taken the title deeds of property, would he be bound to hand them over to the plaintiff?

[Maasdorp, J.: Title deeds are nothing.]

Well, then, take the case of a mortgage bond. In this case the bond taken can be nullified only by payment or by surrendering to imprisonment. The bond cannot be enforced against the surety unless all the steps prescribed by law have been taken. If the surety could demand the bond, he might sit quiet and take no steps to secure payment by his principal. Either the principal must discharge the bond or surrender himself to prison, unless a writ of civil imprisonment has been taken out against him. The plaintiff must, therefore, take out this writ in order that the debtor may be able to comply with the conditions of the bond. The old English procedure was very similar to our own. See *The Annual Practice* for 1902 (Order 69, Rule 1). Also the note on the Debtors' Act of 1869 in *Chitty's Archibald* (p. 1,509, library edition), *Wilmore v. Clark and Another* (1 Rayne, 156).

The Court made the rule absolute on condition that sufficient security be given for restitution of the money in case the judgment in the principal case should be reversed; Shenker to pay the costs of opposition.

Maasdorp, J., said that the defendant was arrested at the instance of the plaintiff, when he was about to leave the Colony, and he thereupon entered into a bail bond together with one Herman Morris Shenker. There was no doubt that this bond was still in full force. The bond would only become void under certain conditions, and among the conditions were that the defendant should appear to answer the summons in this case, so that he should perform the judgment of the Court thereon, or render himself to prison in execution thereof. The surety bond was still in force because the conditions had not been performed. It appeared that judgment had been given, but that defendant, being out of the Colony, had failed to satisfy that judgment. His lordship read the 15th rule

of Court, and said that the bond being in full force, the plaintiff could, after the expiration of four days from the return day of the writ, call upon the sheriff to assign this bond to him. The sheriff had been called upon to so assign the bond, and he was perfectly willing to do so; but it appeared the sheriff also held the sum of £80, which he was unwilling to hand over without order of Court. It seemed to his lordship that the £80 which the sheriff held and which appeared to have been placed in his possession by the two parties to this bond, was held as security under the bond, and he was of opinion that when the bond was ceded under this rule by the sheriff to the plaintiff, the sheriff should also cede all securities that he held by virtue of that bond. As soon as the sheriff parted with a bond he was not entitled to retain money or securities which he only held by virtue of such bond. It seemed therefore, to him that under this rule the sheriff was bound to assign this bond, as he was willing to do, and to hand over the sum of £80 to the plaintiff. This was not by reason of any execution which was taken out; it simply remained within the hands of the plaintiff as part of the securities which he held under the bond. Therefore what steps he might have to take in order to enforce his bond against Shenker, and so to obtain by virtue of execution the right to retain the £80 would be for plaintiff to consider. There was one difficulty in the matter. The Court had here to deal with a provisional case, in which final judgment had not yet been given against the defendant, and it was not altogether impossible that the plaintiff might hereafter be unsuccessful in his suit. Under the circumstances he thought some security should be given to Shenker for the return of the money in case the principal case was entered into, and the plaintiff should prove unsuccessful. The rule would be made absolute on condition that sufficient security be given for restitution of the money in case the judgment in the principal case should be reversed. Costs of the application would have to be paid by Shenker.

[Plaintiff's Attorney, — Mostert; Defendant Shenker's Attorney, W. Steer.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

IN *re* ESTATE SHORT. { 1902.
Sept. 17th.
Fidei commissary property—Leave to sell.

This was an application for an order authorising the sale of certain property.

The petition of (1) Sophia Angill Worlock Wright (born Short), married in community of property to Samuel Wright (and by him assisted); (2) Mary Ann Hammond (born Short), married in community of property to William Hammond, and by him assisted; (3) Elizabeth Ann Weeks (born Short), widow, of Newtown, near Sydney; and (4) Phoebe K. A. L. P. Reitter (born Short), married in community of property to Alfred T. R. Rutter, of Rondebosch (now in England), shewed:

1. That the petitioners are the four daughters of the late Thomas Short and Mary Short (born Worlock).

2. That the said T. Short executed his last will and testament, which was filed in the Master's Office on November 4, 1884, wherein he appointed the said petitioners the joint heirs of the residue of his estate upon the death of the said Mary Short, who has since died after the testator.

3. That $\frac{1}{4}$ -share of certain landed property, a part of their father's estate, situate in Cape Town, was transferred to each of the petitioners on January 5, 1893, and burdened with *fidei commissum* for the benefit of their lawful issue.

4. That the aforesaid property is very old, and is in a very dilapidated condition. Your petitioners have caused estimates to be framed by competent persons of the probable cost of repairs and renovations to the same, and that such estimates are for £1,124 and £1,150

5. That the petitioners have received an offer of £6,300 nett for the property, subject to a lease on the same, which will expire on November 20, 1905.

Petitioners consider that this is a most advantageous offer in the present state of the market, and that it would be better to realise and invest the capital in terms of the will of the deceased, the said Thomas Short.

6. Petitioners say, moreover, that Alfred T. Rutter, T. Short, and S. Short are the executors in the estate of the said late Thomas Short, and support the petitioners in this application.

Wherefore, the petitioners pray: (1) For an order to sanction the sale of the said property to Messrs. M. Skaist and M. Bank for £6,300; (2) that the secretary of the S.A. Association in Cape Town be appointed to carry out the sale and transfer of the property; (3) that the net capital be paid over to the said S.A. Association to be administered in terms of the will of the said Thomas Short, so far as the property now to be sold is concerned.

The Master's report was as follows: "The testator bequeathed the residue of his estate to the petitioners, subject to a *fidei commissum* in favour of their lawful issue. In the residue of the estate is included the property described in the petition. There is no restriction in the will as to the sale of the property, or to prohibit the administrators of the estate from realising and re-investing the assets. The property should, however, have been kept in repair out of the rents; but a good offer has been received for it, and I think the prayer of the petitioners that the secretary of the S.A. Association be appointed to carry out the sale and that the proceeds be paid to that institution to be administered subject to the terms of the will may be granted.

On the motion of Mr. Close, an order was granted as prayed.

[Applicants' Attorney: J. Ayliff.]

Ex parte SCHOLTZ. { 1902.
Nov. 17th.

This was an application for leave to raise money on mortgage of property, in order to meet certain obligations on the estate of petitioner's late husband.

The petition of Agnes Judith Scholtz (born Ellis) was as follows:

1. Petitioner is the widow of the late William Christian Scholtz, during his lifetime a medical practitioner in Cape Town

2. Shortly before his death the said W. C. Scholtz purchased from Joseph Shaban certain property at Woodstock for £7,000.

3. Before the purchase price could be arranged the said Scholtz died, and the said Shaban has now commenced an action against petitioner, in her capacity as executrix in the estate of her late husband, for payment of the purchase price.

4. There is not sufficient ready cash in the estate to settle this claim, but the estate is possessed of certain valuable property situate in Riebeck-square, Cape Town. The petitioner is in treaty to dispose of this property, but as the sale cannot immediately be carried through, and as she must pay for the property at Woodstock, she wishes to raise upon the Riebeck-square property a sufficient sum of money to pay the purchase price of the Woodstock property.

5. The petitioner is aware that as executrix of her late husband's estate she should liquidate the estate, but the debt which she wishes to secure is one incurred previous to her husband's death, and unless she is authorised to raise a sufficient sum of money, judgment will go against her for the purchase price of the Woodstock property, which will be sold in execution, to the detriment of her said late husband's estate, to her own detriment, and to the detriment of the minor children interested therein.

Wherefore, she prays that the Court would authorise her to raise sufficient money by way of mortgage upon the property in Riebeck-square in order to liquidate the liability upon the property at Woodstock, until such time as she can favourably dispose of both properties.

On the motion of Mr. Benjamin the Court granted an order as prayed.

[Applicant's Attorneys: Van Zyl and Buissinné.]

ALBRECHT V. ALBRECHT.

Mr. Gardiner applied on behalf of John Albert Albrecht for leave to sue by edictal citation. Applicant alleged that his wife had deserted him, and he wished to sue her for restitution.

An order was granted, the citation being made returnable on the 5th February, personal service to be effected.

Ex parte DE WET.

Mr. Currey moved for leave to petitioner, a farmer, residing at Aliwal North, to sue defendant by edictal citation for an amount alleged to be due to him, and to attach certain property *ad fundandam jurisdictionem*.

Granted, the citation being made returnable on the 5th February.

FILMATER V. FILMATER.

Mr. Rowson moved to make absolute a rule *nisi* giving leave to petitioner to sue *in forma pauperis*.

The application was granted, Mr. Rowson being appointed to act as counsel and Messrs. Dempers and Van Reynelvelde, attorneys.

OFFICIAL LIQUIDATOR OF CONTAT'S COLLIERIES, ESTATE AND RAILWAY CO. (LIMITED) V. CONTAT.

Mr. Benjamin moved for removal of bar.

Mr. Upington appeared for respondent, the defendant in the action.

The Court ordered the removal of the bar, the applicant to pay costs.

Ex parte HERBERT.

Mr. Bisset moved for the amendment of a certain deed of transfer, in which petitioner's name had been incorrectly stated.

Granted.

APPEAL CASES.

REX V. BURNS. { 1902.
Nov. 17th.

Theft—Treasure—Rebel.

During the recent war the prisoner formed part of a rebel commando which attacked Sheldon Station. The prisoner, without the knowledge or authority of his superior officer, took the watch of a railway guard and appropriated it to his own use. Although the prisoner was described in the charge sheet before the Resident Magistrate as a "convicted

rebel," there was no plea or evidence of his having been convicted of treason.

Held, that the prisoner was rightly convicted of theft of the watch.

This was an appeal from the decision of the Resident Magistrate of Cradock, in a case in which the appellant was convicted of robbery and sentenced to three months' imprisonment, with hard labour. In the indictment, appellant was described as a convicted rebel, and was charged with having, on the 13th April, 1901, stolen the sum of 4s 8d. from one Holme, stationmaster at Sheldon Station, and with having stolen a watch and a field-glass belonging to one Trollip. He was convicted of robbery in respect to the watch, and found not guilty on the other charges. It was stated in evidence that accused surrendered with Fouché's commando. He claimed to be a Republican, but on investigation it was found that he was a rebel. Percival Holme, the stationmaster at Sheldon, deposed that accused came with a patrol to the station, and threatening to shoot him, compelled him to open a safe containing 4s. 8d., which accused abstracted. He afterwards broke the telegraphic instruments. The foreman at the station gave similar evidence. Trollip, who was a farmer, said that accused was one of a patrol sent to his farm from Kritsinger's commando. Accused came to the farm with the patrol on the 13th April in British uniform. He (Trollip) saw accused put strychnine in certain butter in the house. He saw accused take the watch and field glasses. For the defence accused said he did not personally take the money from the safe at the railway station. He denied putting strychnine in the butter, and also denied the allegation that he took the watch. He had no recollection of having visited the farm. Kritsinger gave instructions to his men not to take the personal belongings of British subjects. Johanna Cornelius Smith said he was a member of the Republican forces, and served with Kritsinger's commando. He was in charge of the patrol which visited Trollip's farm. So far as he could remember prisoner remained outside the

farm. Everything that was taken was taken with his (Smith's) orders. If prisoner took the watch he did so without his (Smith's) orders, but accused would have been justified in taking the field glasses. A man named Day (also a member of the commando) said he took the money from the safe at the railway station. The magistrate, in his reasons, stated that he found as a fact that accused took Trollip's watch. Trollip was a respectable person, and he (the magistrate) believed him. He was satisfied that the accused took the watch under circumstances which constituted an act of robbery. The appeal was brought on the ground that the conviction was not supported by the evidence given in the Court below, and was contrary to law.

Mr. Gardiner (for the appellant): The first point to which I would call attention is the form of the charge which is clearly bad and in contravention of section 19 of Act 3 of 1861. The charge set forth that the accused was a convicted rebel. The conviction should be set aside on that ground.

[Buchanan, J.: Before the indictment was drawn up the prisoner had admitted at the preliminary inquiry that he was a convicted rebel. How, then, could he be prejudiced by this statement in the indictment?]

The words of the section are imperative that there must not be any allegation of a former conviction in the indictment. Then as to the evidence. The only evidence as to the taking of the watch is that of Trollip. He had never seen these men before. He was no doubt very excited at the time, and he could hardly be expected to recognise them after three or four months. All he can say is that he missed a watch. Then what a conflict of evidence there was as to the taking of the 4s. 8d. from the safe. Holme swears that the appellant took it; but the evidence of the other witnesses shows it was taken by Day. Smith, who was in charge of the commando, and would naturally keep a sharp eye on his men, never saw Burns enter Trollip's house at all. None of the members of the commando ever saw appellant either take a watch or wear one. Even assuming, for the sake of argument, that he did take the watch, he was not guilty of robbery (the crime with which he was charged), but of theft. No violence or threats were used.

[De Villiers, C.J.: The only question is, were the men on commando ordered by their officers to take things?]

I argue that the evidence does not prove that the accused took the watch, but in any case the head of a commando would not be likely to give specific orders as to what should be taken.

[De Villiers, C.J.: If the commandant had given orders that no private property should be taken the prisoner would be liable.]

The evidence does not show that Smith forbade the taking of watches even if he did not order them to be taken. A man may take anything from the enemy which is useful for military purposes (*e.g.*, field-glasses), a watch is necessary in warfare, particularly in the case of men who commonly act in small detached parties and arrange to meet at a rendezvous at a certain time.

[De Villiers, C.J.: Does not a conviction of treason merge all previous convictions arising out of the same set of circumstances—*e.g.*, the taking of arms?]

Certainly, it merges all acts done in the ordinary course of the war or rebellion which are not contrary to the usages of civilised warfare.

Mr. H. Jones (for the Crown): The evidence of Trollip was very clear. He was not cross-examined; the Magistrate believed his evidence, and I submit that the Court will not reverse the decision of the Magistrate as to the credibility of a witness.

[De Villiers, C.J.: The question is whether in war it is not allowable to take property from your prisoners?]

Not unless such property can be used for military purposes. Hence in this case the Magistrate convicted of the theft of the watch, but not of the field-glasses. See *Queen v. Smit* ((10 Sheil, 372), *R. v. Hatting* (15 E.D.C., 109).

[De Villiers, C.J.: But in these cases had the accused been convicted of treason?]

In this case no question was raised of *antrefois convict*. As to the form of indictment the words "a convicted rebel" are merely descriptive. See *R. v. Wilson* (tried at the E.D. Court Criminal Sessions and reported in the "Grahamstown Journal" of August 5, 1902).

[Maasdorp, J.: Had the prisoner there been convicted of treason?]

I do not know, but robbery and treason are crimes of a different nature.

[Maasdorp, J.: If the robbery constituted treason, surely it could be dealt with under a charge of treason?]

Sheil, J. (who presided at Wilson's trial) went into the matter very fully, and referred to a considerable number of authorities.

[De Villiers, C.J.: It is murder for a rebel to shoot a man in battle, but after being tried for treason, could he be again punished for murder?]

[Maasdorp, J.: What were the special acts of treason with which this man was charged?]

He did not plead *antrefois convict*, nor did he show that this robbery came under the treason with which he was charged.

[Buchanan, J.: A man may be tried twice for treason.]

Certainly.

[Maasdorp, J.: What is his remedy if he thinks he has been punished twice for the same offence?]

To appeal to the clemency of the Governor.

Mr. Gardiner (in reply): No doubt it would have been better if *antrefois convict* had been pleaded, but the Court will take notice of the former trial, and I presume that the treason of the accused would cover the whole period of his treason.

[De Villiers, C.J.: Suppose that at the first trial he had not been found guilty of treason, but guilty of stealing a watch, could he have thereafter been found guilty of treason?]

Certainly not. The cases cited by counsel for the Crown do not cover cases of treason. I submit that theft by a rebel on commando is treason, that the appellant has therefore been tried and convicted twice for the same offence, and that the conviction should be quashed.

The Court dismissed the appeal.

De Villiers, C.J.: If in the present case there had been a plea of *antrefois convict* and evidence of such conviction, some difficult questions might have arisen as to whether the appellant could have been charged with any act which fell within the scope of such previous conviction. But here there was no such plea, nor was there any evidence that the prisoner had been found guilty of high treason which would be capable of embracing the offences with which he has now been charged. In the description

of the prisoner, he is described as a convicted rebel, but when or where he was convicted does not appear, and it would be quite consistent with the description that he might have been convicted of an offence which had nothing to do with the offences now charged. Therefore, we must leave out of consideration the fact that the prisoner was described as a convicted rebel and we have only to deal with the fact that the prisoner has been found guilty upon the evidence of taking a watch from Mr Trollip when the prisoner, along with some other members of a commando, was at the Sheldon Railway-station. There is evidence that what prisoner did was done without any instructions from his superior officer. There is evidence that there were instructions to take such things as field-glasses and smash the railway instruments, and in respect of these acts the prisoner has been acquitted, because they are looked upon as acts of regular warfare. Then it appears from the evidence of the prisoner's superior officer that this watch was not handed to him, and that he was not aware of the taking of this watch at all. What the prisoner therefore did was to appropriate the watch to his own use. It does not appear that it was done at all for the purposes for which the military commando was there, but that it was done for the private profit of the prisoner, without any corresponding benefit to the commando with which he was connected. Under these circumstances, the Court must uphold the decision of the Magistrate and the appeal must be dismissed.

Buchanan, J., said that he would not now express an opinion as to a previous conviction for treason covering a case where the prisoner was charged with theft. Anything he could say on that subject, under the circumstances of the present case, would be a mere *obiter dicta*. He therefore preferred expressing no opinion on that now, but would rest his decision upon the question raised before the Court, and he concurred in the judgment of the Chief Justice.

Maasdorp, J., also concurred.

[Appellant's attorneys: Sauer and Standen.]

REX V. RODNEY.

{ 1902.
Nov. 17th.

This was an appeal from a decision of the Resident Magistrate of Sutherland in a case in which one, Rodney, a private in the Cape Police, was charged with contravening section 30 of Act 12 of 1882, by disobeying the lawful order of, and using abusive language towards, his superior officer.

From the records of the Court below it appeared that Rodney was ordered to turn out for a parade by his superior officer, Lieutenant Bowden, but refused to do so on the ground that as a farrier, he was exempted by special orders of the commanding officer from other duties. It further appeared that on the day when it was said the offence was committed he had just returned from shoeing two horses, and had not had time to wash his hand or have his lunch when ordered to turn out for the parade. It was alleged by the officer in question that appellant, when seen by him personally, used abusive language towards him. This evidence was corroborated by another witness. For the defence witnesses said that they did not hear appellant using any abusive language, and also that the officer had said that appellant was drunk. The matter was entirely one of credibility of witnesses.

After hearing Mr. Gardiner (who appeared for the appellant), and without calling on Mr. Howel Jones (who appeared for the Crown) for argument, the Court dismissed the appeal.

De Villiers, C.J.: It is entirely a question of credibility of witnesses. In this case there is evidence to justify the verdict. The Magistrate had an opportunity of seeing the witnesses and the manner in which they gave their evidence, and as he believed the two witnesses who swore positively that the accused used this abusive language, this Court will not disturb the verdict.

Their lordships concurred.

[Appellant's Attorneys: Walker and Jacobsohn.]

NAUDE V. ESTATE MAL- { 1902.
COLM. { Nov. 17th.

Lease—Option to purchase—

Notice of exercise of option

—Purchase for cash.

G. and H. leased certain farms to the defendant with a condi-

tion that "at the expiration of the lease, or at any time during the existence thereof, the lessee shall have the right of purchasing from the lessors, who shall be bound to sell to him the property leased for the sum of £1,400, payable one half in cash and one half in six months." Before the expiration of the lease G. died, and no executor was appointed to his estate. H. went to England, and the defendant, wishing to exercise his option, gave notice by letter, addressed to the only address of H. which he had been able to ascertain. Sixteen days after the expiration of the lease the lessor's attorneys gave notice to the defendant that as he had not paid £700 in cash, the option was at an end. The letter addressed to H. was returned from the dead letter office.

Held, reversing the decision of the Magistrate, that there had, under the circumstances, been a sufficient notice of the defendant's intention to purchase, and that the non-payment of the £700 was not a sufficient ground for cancelling the option.

This was an appeal from the decision of the Resident Magistrate of Matatiele.

In the Magistrate's Court appellant was sued by respondents for ejectment and damages. They alleged that certain farms had been leased to the appellant, and that after the expiration of the lease he had unlawfully refused to give up possession. Appellant claimed to have purchased the farm in terms of an option given to him in the lease. In reconvention he claimed transfer of the farms. The Magistrate gave judgment for the plaintiff in convention, and for defendants in reconvention, holding that the defendant (Naude) had failed to carry out the terms of his contract for the option

of purchase within the time stipulated in the lease.

The summons in the Court below called upon Christian Petrus Naude, of the farms Charles Brownlee and Harry Ebdon, in the district of Matatiele, Griqualand East, to answer Harry Malcolm, of Friar-street, Reading, England, and Isabella B. Crighton, of Matatiele, in her capacity as executrix dative of the estate of the late George Malcolm, in an action for ejectment and for £20 damages.

The plaintiffs alleged (*inter alia*):

1. That the first-named plaintiff and the late George Malcolm had carried on business at Matatiele as Malcolm Bros.

2. That amongst the assets of the partnership estate were the two aforesaid farms.

3. That on November 3, 1897, Malcolm Bros. leased to the defendant the said farms for four years, terminating November 1, 1901.

4. That though the said lease has terminated by effluxion of time, yet the defendant neglects and refuses to give possession of the said farms to plaintiffs, though requested to do so.

5. That owing to the said refusal of defendant, plaintiffs have sustained damages in the sum of £20 sterling, which sum defendant neglects and refuses to pay.

Wherefore, the plaintiffs pray:

1. That defendant may forthwith be ejected from occupation of the said farms.

2. That the said defendant be adjudged to pay £20 as and for damages.

3. That defendant be adjudged to pay the costs of the suit.

To this summons, defendant pleaded as follows:

He admits paragraphs 1, 2, and 3 of the summons. He admits that the lease has expired by effluxion of time, but pleads specially that under the lease he had the option of purchase of the said farms, and that he did purchase the same and is and always has been ready and willing to carry out and perform the terms and conditions of purchase.

And for a claim in reconvention, defendant prays that the plaintiffs may be ordered to give him transfer of the said farms, and to accept payment from him of the balance of the purchase price thereof. And thereupon defendant (now plaintiff in reconvention) says:

1. That under the lease aforesaid, he had the option during the term thereof to purchase the said farms for the sum of £1,400, payable one-half in cash and one-half in six months from the date of purchase.

2. That upon the said farms there are two bonds amounting to £744 in favour of the Colonial Government, for securing to them the payment of the balance of the purchase price.

3. That it was agreed between the firm of Malcolm Bros. and the defendant that defendant should take over these bonds as part of the purchase price.

4. That on October 14, 1901, defendant wrote to Harry Malcolm giving him notice of his intention to purchase in terms of the lease, which letter was returned through the Dead Letter Office.

5. That on November 1, 1901, defendant paid the sum of £400 to the credit of Malcolm Bros. at the Standard Bank, Matatiele, though the amount he considers he ought to have paid in was £328, being half the difference between the purchase price of the farms (1,400) and the amount of the bonds to Government (£744).

6. That sometime thereafter he received a letter from plaintiff's attorneys giving him notice that as he had not complied with the terms of the lease by paying £700 on November 1, 1901, he had forfeited his right to purchase. No demand was made upon him to pay this amount.

7. That thereafter on December 6, 1901, defendant offered to pay the further sum of £300 with interest *a tempore moræ* to make up the first instalment of £700. This offer was refused.

8. That at the expiration of the said lease on November 1, 1901, plaintiffs had no legal representatives in this country to the defendant's knowledge.

9. That on April 25, 1902, defendant repeated the foregoing offer and tendered the balance of £700, which was refused. Defendant also offered to take over the Government bonds, which offer was also refused.

10. That defendant has done all in his power to comply with the terms of purchase.

11. That the said farms, etc., are now worth £3,000.

Wherefore defendant (now plaintiff in reconvention) prays for judgment accordingly, with costs of suit.

The Magistrate gave judgment for the plaintiffs in convention, with costs and for the defendants in reconvention with costs. Against the judgment the defendant in convention now appealed.

The Magistrate's reasons were as follows: "The Court sustains the exception taken by the plaintiffs to paragraph 3 of defendant's plea. The defendant having failed to carry out the terms of his contract within the time stipulated in the deed of lease, plaintiffs must succeed in their action for ejectment and damages, the latter being approximately at the rate of rent hitherto paid by defendant. Judgment for the defendants in reconvention must necessarily follow. It does appear very hard on the defendant under the circumstances disclosed, but owing to his own action in failing to comply with the terms of the lease in his possession, and again subsequently supplied to him, he forfeited his right of option of purchase by the due date (*viz.*, on or before November 1, 1901), after which date the plaintiffs were legally acting within their rights in refusing to sell the property leased.

Mr. Benjamin (for the appellant) was not heard.

Mr. Close (for the respondent): The pleadings show that the position taken up by the plaintiff was in strict accordance with his legal rights.

[De Villiers, C.J.: But the purchase price was to be paid in cash. What is cash?]

The clause of the agreement means that within the time specified the defendant could claim to exercise his option on tendering his money. This he did not do. It is true he made an offer, but an offer requires to be accepted in order to complete a contract.

[De Villiers, C.J.: Here there is no question of contract. Suppose that the person who has given the option keeps out of the way?]

If a person does that it may be that if the other party does all he can to complete the contract, it will stand good. The agreement was that the defendant was bound to do all he could to communicate his offer to the plaintiff. That he endeavoured to do.

[Maasdorp, J.: If an offer is made and accepted, as soon as the acceptance is received the contract is completed.]

I cannot find any cases which go quite so far as that. *Leake on Contracts* (p.

23); *British Telegraph Company v. Colson* (L.R. 6, Ex. 118). My contention is that there may be an offer of a contract without a contract being necessarily completed. If in this case a proper acceptance had been given the respondent could not have backed out.

[Maasdorp, J.: If Malcolm posted the letter and then wished to withdraw it before it reached Naude, could he not have withdrawn it?]

I submit not.

De Villiers, C.J.: In 1897 George Malcolm and Harry Malcolm leased two farms to the defendants for four years at a rental of £40 per annum, and the agreement of lease contained the following clause: "At the expiration of this lease, or at any time during the existence hereof, the lessee shall have the right of purchasing from the lessors, who shall be bound to sell to him, the said lessee, the property hereby leased for the sum of £1,400 sterling, payable as follows: one half in cash and one-half in six months from date of purchase." Before the expiration of the four years one of the lessors, George Malcolm, died, and no executor was appointed before the expiration of the lease. Harry Malcolm went to England, and the lessee, wishing to exercise his option of purchase in the month of October, a month before the expiration of the lease, took every possible step to ascertain where the lessor lived, and whether he was still alive. He at length discovered from Temple, who had been collecting rents for Mrs. Malcolm, that the address was 66, Hornsey Rise, London, and he accordingly, on the 14th October, 1901, addressed a letter to that address. That letter, however, seems never to have reached Harry Malcolm. He has not been called at all to say that that was not at one time his address. He does not appear to explain whether it was or was not his address. All we know is that this letter was returned from the Dead Letter Office, which simply means that at the date the letter reached its destination in England he had left the place and no longer lived at that address, and had left no address for letters to be forwarded to him. But the defendant was not content with writing this letter to England, because he also on the 1st November deposited a certain sum of money with the Standard Bank, believing the Standard Bank to be the bankers of the

lessors, and in the receipt which he received for that deposit it is expressly stated that this deposit is in respect of the purchase under the lease from Malcolm Brothers. Then on the 16th November, that is only 16 days after the expiration of the lease, a letter was written to Naude on behalf of the lessors in the following terms: "I am directed by Mr. Harry Malcolm and Mrs. J. D. Crichton, to give you notice, as I hereby do, that as you failed to pay the sum of £700 sterling, being half of the purchase amount of the above-mentioned farms, upon the day the same became due, they consider you have forfeited your right to avail yourself of the option of purchase given you in terms of the lease entered into between yourself and the late firm of Malcolm Brothers, and further to advise you that it is their intention to institute an action against you for ejectment as soon as an executor is appointed in the estate of the late George Malcolm." Now it is clear to me from this letter that if after the 16th November a letter had been addressed to the proper quarter it would have had no result, because the lessor took the view that because the money was not paid on the 1st November, the provisions of that clause were void. Now supposing the defendant had not been able to ascertain any address before the expiration of the lease he would have had to be allowed a reasonable time after the expiration of the lease in order to ascertain the address, and if on the 17th November he had ascertained the address I do not think it would have been too late for him then to give this notice that he intended to exercise this option. But on the 17th such a notice would have been of no avail, because there was a letter written to him that it was no use doing anything further in the matter, the money not having been paid on the expiration of the lease, and that therefore there was an end to the clause. Then further, no objection was taken on the ground that no notice had been given by the 1st of November. The ground simply is that the money had not been paid. Now, in my opinion, the defendant did everything that could reasonably be required of him to give the required notice. He had to give clear notice before or at the expiration of the lease that he intended to exercise

this option, and that would complete the contract. Having done all that was required of him under the contract, I am of opinion that he was entitled to insist that this contract of purchase for the sum of £1,400 shall be completed. But the Magistrate held that, inasmuch as the sum of £700 was not paid on the 1st of November, the whole arrangement fell through. In point of fact, the sum of £400 had been paid, and that was paid instead of £700, because the defendant understood that, inasmuch as there were bonds on the property which he had to take over, he should reduce the amount to that extent. Well, possibly, he was wrong upon this point; but in my opinion the non-payment of the £700 on the 1st of November did not put an end to the contract. It was said that one-half was payable in cash, but that cash could not have been claimed without giving transfer, and there was no tender of transfer. By half in cash, I think is meant cash on transfer. Just in the same way as when a horse has been sold for cash the money is not payable unless the seller is prepared to deliver the horse, so in the case of immovable property, the cash is not payable excepting there is a tender of transfer. Supposing the full amount of £1,400 had been payable in cash, the defendant surely would not have been bound to pay this £1,400 without tender of transfer, and the fact that only one-half was payable is not, I think, any substantial reason why transfer should not have been tendered. For these reasons, I am of opinion that the Magistrate misunderstood the law as applicable to the case, and that his judgment must be reversed, and judgment entered for the plaintiff in reconvention, and that the defendant in reconvention must be ordered to give transfer of the farms, upon payment of the balance of £1,000 on the purchase price, with interest on £300 from the 1st November, 1901, and on £700 from the 1st May, 1902. Defendant in reconvention must pay the costs in this court and in the court below.

Their lordships concurred.

[Appellant's Attorneys: Van Zyl and Buissinné; Respondents' Attorneys: Findlay and Tait.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice) and the Hon. Sir JOHN BUCHANAN.]

SCHENKE V. GODDARD. { 1902.
{ Nov. 18th.

Promissory note—Indorser—Presentment for payment.

A promissory note was made payable at the office of W. and was indorsed by the defendant. At the due date W., who was an attorney and notary, was employed by the holder to present the note for payment, and recover the amount from the parties thereto. W. presented the note at his own office to himself, and replied, as the fact was, that there was no funds to meet the same.

Held, that there was a valid presentment for payment.

This was an appeal from a decision of the Assistant Resident Magistrate of East London, in a case in which the plaintiff Schenke (now appellant) sued R. T. Goddard (now respondent) for the recovery of the sum of £15 3s. 9d., due on a promissory note endorsed by him, of which note plaintiff was the legal holder. The note was made by one Kinzie, in settlement of a debt due by him to Schenke. The main question was whether there had been a due presentation of the note. The note was made payable at the office of Mr. Wynne, the plaintiff's attorney, and on the due date Mr. Wynne presented it to himself. The Magistrate held that this was not a due presentation, according to law, and that the presentation was a fictitious one. He therefore dismissed the case. Against this judgment plaintiff now appealed.

Mr. Schreiner, K.C., appeared for the appellant; Mr. Benjamin appeared for the respondent.

Mr. Schreiner, K.C. (for appellant): I submit that the Magistrate was in error. If a note is held by an attorney at whose office it is presentable he can

present it to himself. He had done all that was required by section 50, sub-section 4, of Act 19 of 1893. Nay, he had done all that could reasonably be required to be done, and in such cases presentation of the bill is not really necessary at all. Section 44 sub-section 2 of Act 19 of 1893.

Mr. Benjamin (for the respondent): Section 43 sub-section 4 of the Act shows that the bill was not duly presented. I cannot take the case further than the Act, but see *Chalmers on Bills of Exchange* (p. 144 and p. 146, illustration 5).

Mr. Schreiner was not heard in reply.

The appeal was allowed with costs in this Court, and also in the Court below.

De Villiers, C.J.: it appears to me that the Magistrate has quite mistaken the law. The words of the Act are perfectly clear, that a bill is presented at the proper place, where a place of payment is specified in the bill, and the bill is there presented. That is what has been done here. The place of payment was at Wynne's office, and it was presented at Wynne's office. It so happened that Wynne himself was employed by the plaintiff as his attorney to make the presentment, but that does not affect the principle. The Magistrate said it was a fictitious presentment. No doubt in one sense it was fictitious. It could not be otherwise, because as attorney for the plaintiff Wynne had to present the note to himself. It was fictitious in one sense, but it was perfectly real in the sense that his office was the office at which the note was payable. The appeal must, therefore, be allowed, with costs in this Court and in the Court below.

Buchanan, J., concurred.

Appellant's attorneys, Silberbauer, Wahl and Fuller; Respondent's attorneys, Faure and Zietsman.]

ROBERTS V. ALLEN. (1902.
(Nov. 18th.

Claim in reconvention—Unliquidated demand.

The plaintiff sued the defendant in a Magistrate's Court on a promissory note for £20, and the defendant claimed in reconvention for breach of warranty in respect of articles bought from the plaintiff.

Held, on appeal, that the Magistrate was wrong in refusing to entertain the counter claim in an action on a liquid document.

This was an appeal from a decision of the Resident Magistrate of Maclear in a case heard there. The present respondent sued the present appellant upon a promissory note for the sum of £20. The appellant's agent, when the case came on for final judgment, wished to enter a plea to the effect that the consideration for which the note had been given had failed. The Magistrate, however, held that evidence as to that could not be allowed, as the promissory note purported to be given for value received. The defendant then pressed his claim in reconvention. It appeared that the promissory note had been given in payment of the purchase price of two machines—a butter washer and a cream separator—which were guaranteed to be sound and in good working order, and a desk. It was alleged that the cream separator was useless, and as to the desk it had never been delivered to defendant. The latter therefore claimed in reconvention the sum of £17, being the purchase price of these articles. The Magistrate declined to entertain the counter-claim as being an illiquid claim, while the claim in convention was founded on a liquid document. Judgment was therefore given for the plaintiff. Against this decision the defendant now appealed.

Mr. B. Upington appeared for the appellant; the respondent was in default.

Mr. Upington: The defence of no consideration was a good one, and the Magistrate was wrong. A case almost on all fours with the present is *Raubenheimer v. Campher* (Buch., 1874, p. 7). In that case a promissory note was given for the price of certain ostriches, which were warranted sound. Soon after some of them died. Here was an entire failure of consideration. The cream separator was worthless, and the butter washer very nearly so. Practically speaking, the appellant had received nothing.

The Court allowed the appeal, and remitted the case to the Magistrate to take evidence on the claim in reconvention.

De Villiers, C.J.: The Magistrate seems to have somewhat confused the two points. No doubt for the purpose of compensation it is necessary that the demand should be a liquidated one, but the same requirement does not exist in regard to a claim in reconvention. In a claim in reconvention the plaintiff is entitled to make an unliquidated demand whether the action be for a liquid or illiquid claim. This case must therefore be remitted to the Magistrate to take evidence on the claim in reconvention; appellant to have his costs in this Court, and the question of costs in the Court below to be remitted to the Magistrate.

Buchanan, J., concurred.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton; Respondent in default.]

STABLEFORD AND CO. V. (1902.
BRADY. (Nov. 18th.

Exception—Plea in abatement—

Joint-stock company—Power to sue—Managing director.

It is not a good ground of exception to a summons issued on behalf of a joint-stock company in a Resident Magistrate's Court that the power to sue is signed by the managing director of the company. If the right of the managing director to sue on behalf of the company is denied this should be done by plea in abatement, in which case evidence, such as the production of the Articles of Association, should be taken as to the managing director's powers.

This was an appeal from a decision of the Acting Resident Magistrate of Wynberg in a case heard by him in July last, in which the present appellants sued the respondent Brady for the sum of 15s., being charge for work and labour done and materials supplied in connection with the repair of a typewriter. The summons had been issued under a power of attorney granted by W. Stableford, as managing director of the plaintiff company, to W. B. Shaw, but at the hearing of the case Mr. Lancaster appeared for the plain-

tiffs, and put in a power of attorney by Mr. Stableford authorising him to do so. Defendant, before pleading, asked for Mr. Lancaster's power of attorney, and Mr. Lancaster then put in the power signed by Mr. Stableford. Mr. Brady objected to that, on the ground that the plaintiffs were a limited liability company, and that, therefore, the articles of association must be produced, as also the articles authorising Mr. Stableford to sign the power. This point was reserved. Mr. Brady had a second exception to the summons, on the ground that it was irregular and improperly issued; that the person signing the power of attorney was not the lawful agent of the plaintiff, but that, if the Court was of opinion that he was, then that the person in whose favour the power was given was not now in the Colony, and was not in the Colony when the power was signed or the summons issued, and no other person was lawfully entitled or authorised to summons. This exception was upheld, and the summons dismissed. Against this decision the plaintiffs now appealed.

The Magistrate gave his reasons for his judgment as follows: The question raised in this matter is somewhat peculiar. The plaintiff, by power of attorney, appointed W. B. Shaw as his agent to sue defendant in this Court. Shaw took legal proceedings, issued summons, filed power, and so forth. There was no power of substitution granted to Shaw in favour of another person, nor did Shaw appoint any such person. No notice was filed that plaintiff had withdrawn Shaw's power of attorney. On the day set down for hearing Shaw does not appear, and on the case being called, Mr. Lancaster stated that he appeared for the plaintiff. On being asked for his power, he was unable to produce it. He therefore turned to someone in court, presumably the plaintiff, and after a brief delay, handed in the document marked B (the power of attorney granted to him by Stableford). This was found to be unstamped, was handed back, and again tendered insufficiently stamped. The real position I take to be this: Plaintiff appointed Shaw as his agent; Shaw issued the necessary legal proceedings, but granted no power to any other person to appear on his behalf,

On the case being called, Shaw does not appear, and a stranger to the proceedings is then appointed by plaintiff in court. Can such stranger demand or avail himself of the documents of proceedings which clearly belong to Shaw? If he cannot, how does he bring defendant before the Court? It seems clearly not a case falling within the meaning of section 13 of Act No. 20 of 1856, or of the decided cases under the section.

Mr. Gardiner for the appellants; Mr. Schreiner, K.C., for the respondent.

Mr. Gardiner: In this case two exceptions were taken in the Court below, (1) that the appellant had no authority to sign a power of attorney in the name of his firm unless such authority were proved by putting in the Articles of Association; (2) that the person in whose favour the power of attorney was given was not in this colony at the time, and had not appointed in his stead any duly authorised representative. The Magistrate held that nobody could appoint a substitute to Shaw, but surely his client could revoke the power given to him and appoint Lancaster. The Magistrate's "reasons" show that Lancaster was so appointed. The Magistrate's "reasons," however, seem rather to go on the ground that Stableford had no authority to sue, and then on this paltry matter of 15s. it is asked that the deed of association of the company should be produced. It would be absurd to suppose that a mere agent, such as Stableford, should have property in such an important document as a deed of association entrusted to him. How then could he produce it? I submit that the appeal should be allowed, with costs.

Mr. Schreiner, K.C.: Shaw was not in the Colony when the power to him was signed, and the exception is that he received no valid power from Stableford. This is a sound exception.

[De Villiers, C.J.: The original power authorised "all lawful proceedings"; that might refer to proceedings at Wynberg as well as in Cape Town.]

I submit not; but am quite content to leave that point in the hands of the Court. As to the power of a company to sign a power, see Sections 14, 57, and 100 of Act 25 of 1892. No man can sign as a managing director a power to authorise proceedings in this Court. It is true that the rules affecting Magistrate's

Courts are not quite so rigid, but I submit it should not be allowed even in these. As to the Circuit Courts, see Rule 209. It would be very dangerous if any man could put himself forward as a managing director. The first exception was that the summons was wrongly issued. That was a good exception. The clerk of the Resident Magistrate should have insisted on the seal of the company being attached. As exception had been taken to the "power," the Resident Magistrate should have alluded to that point in his reasons. The second exception is that the agent was not in this colony.

[Buchanan, J.: You do not rely on that point?]

I do strongly. The agent must sign the summons and he did not. It is true that the evidence does not show that Shaw was out of the jurisdiction, but that is not denied. Every summons must be signed *propria manu* by the agent issuing the same. He cannot have a number of printed papers struck off each bearing a *facsimile* of his signature. I quite admit that the Magistrate's reasons are bad, but as the Magistrate was not called upon to give these reasons until a month after he had heard it, he must almost have forgotten the case (*e.g.*, he says the "power of attorney" was insufficiently stamped). It was at first, but it was afterwards stamped sufficiently, Rule 13.

Mr. Gardiner (in reply): The original power given to Shaw is said to have been given in Cape Town. It is a general power. Another point is that Shaw did not sign the summons, but that exception was not taken in the Court below, and litigants cannot be allowed to take all kinds of new exceptions in a Court of Appeal. Again, there is nothing to show that a company must sue under its seal. Proceedings in the Resident Magistrate's Court are not so rigid as in this Court (Rule 13). There are three exceptions, cast really in the form of two: (1) That the plaintiff was not authorised to sue; (2) that neither Lancaster nor Shaw was the lawful agent of the plaintiff; (3) that Shaw was not in this colony when the power was given.

The Court allowed the appeal, with costs of appeal, and remitted the case to the Magistrate to try on its merits, and to take evidence on the plea in abatement as to the authority of Mr.

Stableford to sign the power on behalf of the company.

De Villiers, C.J.: The Magistrate in his reasons seems to assume that when once a person has appointed an agent or attorney to conduct a case for him he is bound to continue to employ this agent. Well, that is a wholly mistaken notion. A principal may at any time revoke his power and appoint any agent to conduct his business for him. In the first instance the plaintiff in the present case had appointed Shaw, but Shaw did not appear before the Magistrate. Instead of him Lancaster appeared. Lancaster had no power at first, but when objection was raised, William Stableford, who happened to be in court, at once gave a power to Lancaster, which was duly stamped, so far as I can judge, and which authorised him to conduct this case. Now, whatever defects there were in the first power, these defects were removed by the second power and under that second power I consider Lancaster ought to have been allowed to conduct the case. It is true that the first power is in the Court of the Resident Magistrate of Cape Town, and the second power in the Court of the Resident Magistrate of Wynberg. In my opinion the subsequent power was sufficient to ratify what had previously been done by Shaw in bringing the case in the Court of Wynberg. I am of opinion that the appeal should be allowed, and that the case should be remitted to the Court of the Resident Magistrate for the purpose of trying the plea in abatement. Mr. Schreiner, abandoning the ground upon which the Magistrate based his judgment, argued that there is nothing to show that William Stableford had any authority on behalf of a limited liability company to sign their power or attorney, but there is nothing in the Companies Act which directs that powers of attorney for the purpose of instituting actions shall be authenticated with the seal of the company. If the right of the managing director to sue on behalf of the company is denied, this should be done by plea of abatement, in which case evidence, such as the articles of association, should be produced as to the managing director's powers. It is quite possible that at the trial plaintiffs may produce articles of association showing that William Stableford is perfectly entitled to sue on behalf

of the company, and an opportunity ought to have been given them to produce that proof. But, instead of doing that, this defence is treated as a matter of exception. It is really not a matter of exception; it is a plea in abatement, upon which evidence should be given in the ordinary manner. The appeal will therefore be allowed, with costs of appeal, and the case remitted to the Magistrate to try on its merits, and to take evidence on the plea in abatement as to the authority of Wm. Stableford to sign the power on behalf of the company.

Buchanan, J., concurred.

[Appellant's Attorney: J. Brady;
Respondent's Attorneys: Michau and De Villiers.]

VORSTER V. HODGSON. { 1902.
Nov. 18th.

Vindication—Ownership—Possession—Martial law.

A summons in a Resident Magistrate's Court alleged that the plaintiff was the owner of a horse which during the existence of martial law was placed under the protection of the military authorities, and afterward came into the possession of the defendant.

Held, that the summons disclosed a good ground of action, and that the existence of martial law during the period intervening between the delivery of the horse to the military and its coming into the defendant's possession did not affect the plaintiff's right of ownership.

This was an appeal from the decision of the Resident Magistrate of Aliwal North.

From the summons issued in the Court below it appeared that the appellant brought an action on a summons calling on respondent to show cause why he should not deliver a certain horse, or pay £20, the value of the same. It was alleged in the summons that, in accordance with the provisions of a certain martial law order, the plaintiff, on April 28, 1901, took

certain nine horses to the Military Protection Camp, and left them under the protection of the military. The horse claimed was one of the nine. On the 8th June, 1901, a martial law order was issued directing farmers to proceed to the Protection Camp to take delivery of their horses. On the 13th June, and on a subsequent occasion, he went to the camp, but failed to find his horses there. The horse in question was now in the custody of the defendant, who refused to give it up. To this summons, the defendant's attorney filed a document, in which he took exception to the jurisdiction of the Magistrate. He stated that the horse was one of a number delivered to an Orange River Colony refugee named Van der Merwe in or about June, 1901, in place of certain horses removed by the troops from his farm. This horse, with 30 others, was purchased from Van der Merwe by defendant in a fair and *bona fide* manner. Defendant contended that the horse was taken during martial law and in the exercise of martial law, and that the Magistrate had no jurisdiction to inquire into the manner in which martial law had been administered. He further contended that the summons disclosed no cause of action. The Magistrate allowed the exception, no evidence being called. In his reasons, the Magistrate said the horse was taken under the authority of martial law, and the property constructively passed from plaintiff to the military. He held that he had no jurisdiction. Mr. Schreiner argued that the summons could not be excepted to on the ground stated. The exception was in reality a plea.

Mr. Schreiner, K.C. (for appellant—plaintiff in the Court below): The plaintiff's horses were taken for protection by the military authorities to their camp. By the said military authorities they were handed over to Van der Merwe, who sold to Hodgson. The appellant has clearly his rights to a *vindicatio*.

Mr. Upington (for respondents): *Mobilia non habent sequelam*. If the plaintiff has any right of action, it must be against the military authorities. Martial Law had been proclaimed within the district of Aliwal North when this action was brought. The latest case of a fraudulent alienation is *Heydenrich*

v. Saber (10, Sheil, 133). If a bailor bails his goods and they thereafter are found in the possession of A, B, and C, can he vindicate them?

[De Villiers, C.J.: Under special circumstances he may not be able to do so.]

I cannot take the case further than to say that unless the Court holds that there has been an allegation of fraud or of theft on our part, we are entitled to judgment.

The Court allowed the appeal.

De Villiers, C.J.: There is no doubt whatever as to the right of the owner of movables to vindicate his rights of ownership and to claim such movables from any person in whose possession they are found, whether they came into such a person's possession rightfully or wrongfully. This is a general rule, but it is subject to certain exceptions, some of which I have indicated during the argument. The present case certainly does not seem to me to fall under these exceptions. We must treat this case from the point of view of the summons, and in the summons nothing is disclosed to show that the plaintiff has lost his ownership of the horse. The military had taken this horse under their protection. Martial law had been proclaimed, but this circumstance does not deprive plaintiff of the ownership of the horse. In my opinion, the exception to the summons was wholly wrong. As to the plea, there is no allegation that there had been expropriation by the military and a sale by the military to Van der Merwe. However, there is no need to discuss that point. The only questions raised by the exception is whether the summons discloses a ground of action. In my opinion it discloses the fact that the plaintiff is the owner of the horse, and that nothing has been done to deprive him of the ownership. The case will be remitted to the Magistrate to try the case on its merits.

Buchanan, J., said it was quite clear that all the Court had to decide was whether the summons disclosed a cause of action. He thought it did. Defendant might have a good defence to set up, but the Court was not at present concerned with that.

[Appellant's Attorneys: Friedlander and Du Toit; Respondent's Attorneys: Walker and Jacobsohn.]

HOTZ V. SHAPIRO. { 1902.
Nov. 18th.

Magistrates' jurisdiction—Surety.

A Resident Magistrate has no jurisdiction in an action on a guarantee of suretyship, even though the guarantee has been given for the payment of the price of movable goods, where the sum sued for exceeds £20.

This was an appeal from the decision of the Acting Assistant Resident Magistrate of the Paarl, in an action in which the appellant sued respondent, Daniel Hotz, for the sum of £50 8s., which he said the latter owed him in connection with the sale of certain goods. He alleged in the summons that on the 17th May he sold to one Philip Hotz 42 goats for £50 8s., for which defendant guaranteed payment. He had been unable to recover from Philip Hotz, and sued the respondent as surety. Exception was taken on the ground that the amount sued for was beyond the Magistrate's jurisdiction. The Magistrate overruled the exception, holding that although defendant was not the purchaser, the case came within the provisions of section 5 of the Act of 1885, which gave magistrates power to deal with illiquid cases up to an amount of £100.

Mr. Schreiner, K.C. (for appellant): The whole point in this case turns upon the interpretation to be given to sub-section (b), section 5 of Act 43 of 1885. The plaintiff was a guarantor for the purchase price of forty-two goats and the case of *Randall v. Lawrence's Trustees* (5 E.D.C., 174) shows that in such a case the Magistrate has no jurisdiction.

Mr. Uppington (for respondent): The terms of section 5 of Act 43 of 1885 are very wide, and I submit that a guarantor is just as liable as his principal, and is just as subject to the Magistrate's jurisdiction. It has been argued for the appellant that though the principal in this case might have been sued in the Magistrate's Court, the surety can be sued only in the Supreme Court. As far as I know, this point has never been definitely decided in our Courts. Exception was taken to the jurisdiction in the Court below, and the case might have been removed, but no application for removal was made.

[Buchanan, J.: But had the Magistrate jurisdiction?]

Yes; in such a case he has jurisdiction up to £100, but within that sum the defendant may select his *forum* and apply to have the case removed to the Supreme Court. See section 3 of Act 21 of 1876. It is very difficult to distinguish between the respective liabilities of principal and surety. I submit that under the term "price" (sub-section b section 5 of Act 43 of 1885) the obligations of a surety are included.

Mr. Schreiner was not heard in reply.

The Court allowed the appeal.

In giving judgment, Buchanan, J., said that the Courts of Resident Magistrates were Courts of limited jurisdiction. Act 20 of 1856 fixed the limit in all cases commonly called illiquid at claims not exceeding £20, except in matters specially excepted. Act No. 43 of 1885 extended the jurisdiction of the Magistrate to demands not exceeding £100, where the suit was for the recovery of the price of any goods or movable property. The action brought in this case was for recovery of £50 8s. on a contract of suretyship. No doubt the contract between the principal and the plaintiff was a contract for the sale of movable property, but the contract between defendant and the plaintiff was not one of the sale of movable property. It was an action on a guarantee, and in his opinion the exception contained in Act 43 of 1885 did not apply to such a case. Exception was taken in the Magistrate's Court to the jurisdiction of the Magistrate, but the Magistrate overruled the exception. The Magistrate was wrong in so deciding, and the appeal must be allowed with costs. His lordship referred to the case of *Randall v. Lawrence's Trustees*, in the Eastern Districts Court, in which the Court held that in an action against defendant as surety for the judgment of a promissory note, where there was no liability apparent *ex facie*, the note was limited to a claim not exceeding £20. The appeal would be allowed, and the exception in the Court below sustained, with costs.

[Appellant's Attorney: J. Brady; Respondent's Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Sir JOHN BUCHANAN.]

FRIEDLANDER BROTHERS V. (1902.
GRUNDLINGH. (Nov. 19th.

The plaintiffs, Wulf Friedlander and Isaac Joshua Friedlander, carrying on business in partnership at De Aar, stated in their declaration that on or about October 1, 1899, the plaintiffs purchased from the defendant, for the sum of £9,000, a certain portion of the remaining extent of the perpetual quitrent farm called De Aar, the property of the defendant. It was agreed between the parties that full and free possession and occupation should forthwith be given to plaintiffs, and an agreement in writing was drawn up to that effect, but the document was accidentally destroyed by fire when the plaintiffs' premises at De Aar were burnt down. Plaintiffs occupied the portion of land, save certain portions of which one McIvor and one Tinkham had possession; these persons remained in occupation without the plaintiffs' consent. On June 16, 1900, plaintiffs purchased from defendant for the sum of £2,000 the remaining portion of the remaining extent, possession to be given on October 1, 1900. On November 15, 1900, an agreement was drawn up and signed by plaintiffs and defendant setting forth the conditions upon which the remaining extent was purchased, and setting forth the conditions as to payment of purchase price. By this agreement it was provided that the plaintiffs should be put in full occupation and possession of the whole of the property on or before October 1, 1900; that the plaintiffs should pay and defendant be bound to receive the whole of the purchase price, £11,000, at any date after the expiration of three months' notice by the purchasers to him in writing; and that the defendant should hold himself liable for any compensation which McIvor and Tinkham might be entitled to. Plaintiffs alleged that McIvor and Tinkham (tenants of the aforesaid farm) were still in occupation of a portion of the farm, upon which they had erected

certain buildings. Plaintiffs had paid a portion of the purchase price (£3,000) and had given notice in writing to defendant with regard to the payment of the balance. The three months' notice referred to in the agreement had expired, and the plaintiffs had tendered to pay the same, upon defendant placing them in full occupation and possession. Defendant had tendered transfer of the property, but neglected and refused to give full occupation and possession or to take any steps to do so. Plaintiffs had called upon the defendant to account to them for all moneys received by him in respect of the said property from the dates of the purchase. Plaintiffs further alleged that by reason of defendant's breach of contract they had sustained £2,000 damages. They claimed full occupation and possession, and tendering payment of the balance of the purchase price, an account, and £2,000 damages. In his plea, defendant referred the Court to a copy of a draft agreement, not executed, drawn up on the 29th September, 1899, which, he said, set forth the terms upon which the parties agreed. This draft agreement was in the same terms as the document executed on the 15th November, save that there was a provision that the deed should be embodied in a document executed before a notary. The defendant admitted that McIvor and Tinkham, after the 1st October, 1899, had occupation of certain portions of the land, but said that such occupation was with the consent of the plaintiffs, and under agreements of which the plaintiffs had notice. He further alleged that the agreement of lease with Tinkham of a certain portion of the property sold had long subsisted to the knowledge of the plaintiffs. Defendant annexed to his plea a copy of this agreement of lease, and a copy of a clause in the lease under which plaintiffs previously held the land from him. It was stipulated in the former document that Tinkham should hire the ground for ten years certain commencing on the 1st July, 1895. The clause in the plaintiffs' lease, dated the 5th February, 1898, was as follows: "It is admitted between the lessor and lessees that the portion of the farm De Aar, at present occupied by one John Tinkham, has been leased to him at a date subsequent to that of the agreements which this contract supersedes and

takes the place of, and under the express understanding that, should Friedlander Brothers or their assigns desire to select stands or erect buildings upon any part of the said land so leased, that they shall be at liberty to do so upon giving the said Tinkham six months' notice to quit, but without being liable to pay compensation to the said Tinkham." There was a further stipulation in the lease with Tinkham to the effect that in the event of any part of the ground leased to him being required for the erection of business premises by plaintiffs, Tinkham would give up the ground on the understanding that he would be recompensed for any outlay in fencing in the ground. The defendant further stated in his plea that McIvor and Tinkham did remain in occupation of portions of the farm, and that another tenant, of whose agreement of lease the plaintiffs were also aware at the time of sale, also remained in occupation. He said as to McIvor's and Tibbett's occupation that the plaintiffs consented thereto, but as to Tinkham's continued occupation, that they raised objections thereafter; and upon their request, in April, 1901, defendant gave Tinkham notice to quit after one month the portion occupied by him, and was willing to pay him such compensation as might legally be claimable; but Tinkham refused to quit, relying on the terms of his lease and upon the fact that the plaintiffs do not state that they require the ground occupied by him for the erection of business premises. Defendant contended that, according to the true construction of the contract, he did not undertake or become bound to give occupation to the plaintiffs on the last day of October, 1900, of those portions of the property sold which on that date were occupied by McIvor, Tinkham, and Tibbett, but undertook and became bound to give, and did give, full possession and occupation at that date of the property purchased, except as to the portions so occupied, and undertook and became bound to pay such sums, if any, as the plaintiffs might legally be required to pay by way of compensation to McIvor or Tinkham, subject to and with knowledge of whose leases and occupation the plaintiffs purchased the property. He denied that the plaintiffs had ever tendered to pay the balance of £8,000; the

plaintiffs gave him notice on the 27th March, 1902, that they would pay the said sum on the 30th June, 1902, but they failed to make such payment; and on or about the 14th July, 1902, they wrongfully and unlawfully demanded from him, as a condition of paying the £8,000, a transfer free from the agreements of McIvor and Tinkham, and also demanded an account of rents alleged to have been received and payment of £1,000 as damages. He denied that he had neglected and refused to place the plaintiffs in full occupation and possession, in accordance with the contract; he was at all times ready and willing to pay such compensation as might be legally payable to McIvor or Tinkham on termination of their occupation. He denied that the plaintiffs were entitled to claim any account before the 1st October, 1900, up to which date the rents were by special agreement received by the defendant for his own account. Since the 1st October, 1900, the sum of 30s. was paid by Tinkham to the defendant, being for rent for the period 1st July to 31st December, 1900. Defendant was willing to pay this sum to the plaintiffs in account.

In reconvention, defendant claimed judgment for £8,000, with interest, he tendering to pass transfer.

Mr. Searle, K.C. (with him Mr. Upington) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Benjamin), for defendant.

Mr. Searle called

Wulf Friedlander, who said he was one of the plaintiffs. He carried on a general business at De Aar, where he had resided since 1883. Witness had hired property from time to time from defendant for business purposes. In October, 1899, witness bought a portion of the ground (marked green on the plan produced) from defendant. No document was then executed. A document was drawn up and submitted to witness. Tinkham and McIvor were then on the property; witness did not know the terms between them and defendant. Witness told defendant that he would have nothing to do with these parties, and defendant said he could turn them off at any time. On the 29th September, 1900, an agreement was drawn up between witness and defendant referring to the whole property. This was in the same terms as the notarial document executed on November 15. Witness was anxious that these peo-

ple should leave. The principal reason why witness bought the ground was to lay out a township. Witness had already sold a portion of the property. There was no agreement that from October, 1899, until October, 1900, the rent received from Tinkham and McIvor should be paid to Grundlingh. It was never agreed that Grundlingh or McIvor should get anything from the military for running horses on the property. Witness gave Grundlingh consent to let to the military. Witness did not know the arrangements between Grundlingh and McIvor or Tinkham. The former had told witness that McIvor simply paid him by the month, and that he could turn him off at any time. There was no difficulty about Mrs. Tibbett, who had now left. After the first agreement in 1899, defendant told witness he had given notice to McIvor and Tinkham, and asked witness to also give them notice. That was after the first purchase. Witness believed that the first document, which was never executed, was accidentally burned in a large fire at witness's property on December 21, 1901. Witness's safe, containing a number of documents, was burned. The whole of Tinkham's ground had been in the occupation of the military from the beginning of the war. Witness's main object in this action was to get full occupation of the ground. After some correspondence witness met Mr. Grundlingh about the middle of June last. There was nothing said then about the conversation being without prejudice. Mr. Grundlingh and his attorney, Mr. Raath, came to witness's private house on June 18 or 19. They had a conversation about the transfer, and as to how the money was to be payable. Mr. Grundlingh then said, "You could not expect that I would sell you a property which did not belong to me." Witness replied: "I don't know whether the property belongs to you or not. I don't know the conditions under which McIvor and Tinkham occupy the property. I have simply to do with our conditions. If anything has to be paid to them for improvements, you must pay." He also told Grundlingh to go and see McIvor and Tinkham and square with them. Mr. Grundlingh then asked, "Will you be satisfied if I clear out Tinkham?" Witness replied, "No, McIvor must go too." In further conversation, witness said that then his claim would be very

easily squared; that it would not be 2½d. He did not want to quarrel with Mr. Grundlingh, with whom he had lived on the farm for nineteen years. Mr. Grundlingh then said they would go to McIvor's house and see whether it could be removed. Witness saw them next day inspecting McIvor's house. On July 14 last a letter was written by witness's attorney tendering balance of purchase price, and demanding transfer of the property, and the ejectment of McIvor and Tinkham, so that witness could have full occupation.

[De Villiers, C.J., asked what the real dispute was.]

Mr. Searle said that defendant must eject Tinkham and McIvor from the property and give them full possession.

Mr. Schreiner said that the defendant's position was that the agreements with Tinkham and McIvor were referred to in the contract of November 15, and the plaintiffs were to take the property subject to that agreement. The agreement with Tinkham had been running since 1895. The final clause of the agreement was that the defendant had only a right to oust Tinkham should plaintiffs wish to erect or grant a right to others to erect business premises. Plaintiffs had never said they required the ground for the erection of business premises, their letter asked for the ejectment of Tinkham on the ground that they required the land for business purposes. As to McIvor, he would have to leave on a month's notice being given, but the position defendant took up was that McIvor stayed on with plaintiffs' consent.

Mr. Searle said that as to Tinkham there was no distinction between business purposes and business premises.

Cross-examined by Mr. Schreiner, witness said that he wanted the ground for business premises. He intended to cut the ground up for a township, and other parties would erect business premises there. He himself intended to build two shops there. Witness did not at the time see any distinction between business purposes and business premises. At the time the agreement of November 15 was signed witness had not seen any copies of the leases between Grundlingh and Tinkham and McIvor. Witness, in a conversation with McIvor, after the latter received notice, told him he could stay on at a rent of £2 10s. Witness had not received that rent. He had never asked

for it. When witness had the conversation with Raath in June he said he could not take an oath that he required the ground just then for business premises. He could say he required the ground for business premises now, as he had received notice from the Government that he must remove his shops from their ground.

C. D. Cillier, an attorney practising at Britstown, deposed to Friedlander and Grundlingh coming to him in regard to the contract. While there Mr. Grundlingh told them he could turn off the people on the land at any time. Mr. Friedlander remarked that he had heard these people allege that they had certain rights, and Mr. Grundlingh thereupon said that that was all nonsense, and that he could turn them off at any time. The inference witness drew from that was that there was no written agreement, or that Friedlander did not know what the agreement was. All that witness had to do with the agreement was to fill in the extent of the property and the date.

Cross-examined: He was never consulted in any way in regard to the conditions of contract.

This closed the evidence for the plaintiffs.

Mr. Schreiner called,

David Francois Grundlingh, the defendant, who said that plaintiffs had been on De Aar, which was his farm, since 1883. In 1895 Mr. Tinkham leased a piece of land from witness. Tinkham built a stable there, and Mr. Isaac Friedlander pointed out that Tinkham was putting up an expensive building, for which witness might have to pay compensation by-and-bye. Witness said that when the contract expired Tinkham would have to remove the building. Witness during conversation told Mr. Wulf Friedlander that he (witness) could make Tinkham quit at any time, provided Friedlander gave him notice he required the land for the erection of business premises. At the time the contract with plaintiffs was entered into, witness had a running lease with Tinkham. McIvor came on the farm in 1892, but witness could not remember having any conversation with plaintiffs about that. McIvor was a monthly tenant, and paid a rent of £1 per month. In 1899, when the contract for the sale of the first piece of land was made, the agreement produced was drawn up by the late Mr. B. J. de

Villiers, when both witness and Mr. Friedlander were present. Until September, 1900, no other document was drawn up. In June, 1900, witness mentioned to Friedlander his intention of selling the remainder of his farm, he having bought Rietfontein. Friedlander eventually agreed to purchase the remainder of the farm for £2,000. Nothing was then said about the manner of taking possession. It was on October 4 that witness saw Mr. Cillier and Friedlander. Witness might then have said that he would give possession, but only in the same way as before, viz., that notice was to be given by plaintiffs that they required the land for the purpose of erecting business premises thereon. On November 15 the notarial document was drawn up. Friedlander never asked to see the copy of the lease with Tinkham, and witness never showed it to him. Witness had, after the first sale in 1899, given, at the request of Mr. Friedlander, six months' notice to Mr. Tinkham to quit the land. Correspondence passed between them on this matter, and also as to the amount of compensation to be paid. After the sale in October, 1900, witness, by agreement with plaintiffs, remained on the portion of the farm he had occupied until January, 1901, paying a rent of £10 per month. In January, 1901, witness went to his farm Rietfontein. With regard to the conversation at the time Mr. Raath was present, witness had come from Rietfontein with Mr. Raath to see Mr. Friedlander. Witness asked Mr. Friedlander if he expected him to pay damages for the time he had not had possession. Friedlander said he did not want damages, but that he wanted the ground. Witness told him: "I cannot let you have the ground, unless you give notice that you want it for the erection of business premises. If you do that, you can have it within a month." Witness had always been on friendly terms with Mr. Friedlander, except that the latter would make a row now and again, but nothing serious.

Cross-examined: Witness did not regard the ground in the occupation of Mr. Tinkham as valuable. He had only just heard that for some time past Mr. Tinkham had been getting £12 a month for the ground. It was 300 or 400 yards from the railway platform.

Tinkham wanted £500 as compensation, but witness said that was absurd, and offered £15. Very likely if witness had paid what Tinkham wanted, the latter would have left.

Re-examined: The lowest Tinkham consented to take was £150.

By the Court: Tinkham claimed for rights he possessed as well as for the fencing. At first witness had regarded the notice given as proper notice, but he had afterwards found out that there was a difference between "business purposes" and "building premises."

Jacobus Raath deposed that the conversation between Friedlander, Grundlingh, and witness was stated at the time to be without prejudice.

John Tinkham said he was the lessee from Grundlingh of part of the ground referred to. On his piece of ground he had a well, cottage, cultivated land, etc. The military had occupied the land since January 1, 1901. At first they took a small piece of ground, for which they paid him 30s. a month, afterwards taking more ground, and increasing the rent to £5 a month. At present, from the ground for which he paid £3 a year, he drew £11 a month as rent, viz., £5 from the military, £5 from the Colonial Government for the hire of another piece of ground, and £1 a month for the cottage. Witness took the view that if notice were given him that Friedlander required the ground for business premises, he would have to quit, but he would have to be paid compensation. The military had taken down the fence on the ground, but they were to replace it.

By the Court: The fencing cost him £65. If he were allowed to remove the buildings and received £65 as compensation for the fencing he was ready to quit.

[De Villiers, C.J., suggested that a settlement might be arrived at by defendant giving Tinkham £65 as compensation, and allowing him to remove his buildings, and then transfer and full occupation of the ground could be given. If the parties could not agree at once as to the costs of the action, that might be reserved until some future date, so as to give them an opportunity to consider the matter.]

James B. McIvor deposed that he had occupied a stand on the ground for the last ten years. For the first three years

he paid no rent, and after that, until September, 1900, he paid £1 a month rent to Mr. Grundlingh. In that month he was informed by Messrs Friedlander that they had bought the property, and it was arranged that he should pay a rent of 50s. per month, but Mr. Friedlander said that until a dispute he had with Grundlingh was settled he would not accept the rent. Witness's house was a sectional one, which could be taken down and removed without damage to the building or the soil. He would have to remove the house and quit the ground if he received notice to do so.

This closed the evidence.

[De Villiers, C.J., suggested that the defendant should give transfer of the land on payment of the balance of the purchase price, viz., £8,000, with interest from the 1st July, 1902, the defendant undertaking (a) to pay plaintiffs the sum of £27, being moneys received by him on plaintiff's behalf; (b) to pay Tinkham the sum of £65 as compensation for the fencing, and to allow both Tinkham and McIvor to remove their buildings; McIvor and Tinkham to pay to plaintiffs any rent that might be due. Probably the parties could come to some terms, and also arrive at a settlement as to costs. If not, the case would have to stand over to be argued at some subsequent date.]

Postea, Dec. 1st.

The hearing of this case was resumed.

Mr. Schreiner said that since the previous hearing the defendant had written to the plaintiffs offering to submit to judgment in terms of the suggestion made by the Court, each party to pay his own costs. The plaintiffs had declined to agree to this settlement. Tinkham had been paid the sum of £65 as compensation, and had undertaken to give plaintiffs possession on the 4th December. There was no difficulty about McIvor.

Mr. Searle said the plaintiffs were prepared to accept the suggestion of the Court, provided the defendant paid the costs.

Counsel were then heard in argument on the facts.

[De Villiers, C.J.: It would have been very much better in this case if McIvor and Tinkham had been made co-defendants, and it is only because these

gentlemen were called as witnesses, and fully explained their position to the Court, that the Court is now able to give judgment at all in the present case. Tinkham has consented to receive a certain sum of money, viz., £65, as compensation, and McIvor has practically admitted that, beyond the right to take what he has erected, he has no right to any compensation whatever. The real question is whether compensation is payable to Tinkham and McIvor, and whether the defendant had done everything that was necessary in the matter of compensation to justify him or the plaintiffs in calling upon Tinkham or McIvor to leave. So far as Tinkham is concerned, I am satisfied that the defendant had not done everything that reasonably could be required of him, as seller of the property, to induce Tinkham to leave. He had made a wholly inadequate tender. He was bound to pay, at all events, compensation for fencing which had been erected on the premises, and the tender which he made of £15 is, in my opinion, wholly inadequate, and after hearing Tinkham, the Court came to the conclusion that £65 would be a fair amount of compensation for him. I understand from what counsel says that Tinkham has since accepted that amount, and he has been induced to leave the premises. What the defendant did after the intervention of the Court, he ought to have done before, and therefore, as I said before, as regards Tinkham, the defendant is to blame. But then, again, in regard to John McIvor, it appears to me that the plaintiffs have made demands which cannot be substantiated. Throughout the correspondence, which has been put in, the plaintiffs have placed McIvor and Tinkham on exactly the same footing. It is all along said that compensation should also be paid to McIvor, and it is also alleged that the defendant has not done everything required of him to induce McIvor to leave. In my opinion the defendant has done everything that could be reasonably expected from him. He has given the month's notice to McIvor, and after receiving the month's notice McIvor went to the plaintiff and with the plaintiff's consent McIvor remained on the premises after that. It is true that the plaintiffs did not receive rent from McIvor,

but they knew McIvor was there, and they raised no objection to his remaining. Therefore, they cannot in my opinion make a claim as against the defendant that McIvor is still on the premises. No compensation is payable to McIvor, and the defendant is not, therefore, in any way in default in regard to McIvor. So that upon the question of costs, which is really the important question in the case, I think it is only right that each party should pay his own costs, and I hold this view the more strongly, seeing that on the claim in reconvention, at all events, the defendant was entitled to succeed. Now, certainly there is this to be said, that there has been no tender by the defendant of the sum of £27, but this item is so small compared with the other interests in the case, and bearing in mind also that the defendant has succeeded in his claim in reconvention, I think justice will be done between the parties if each is ordered to pay his own costs. The order will, therefore, be that the defendant give transfer to the plaintiffs of the land in question on payment to him of the balance of purchase price, viz., £8,000, with interest from the 1st July, 1902, less the sum of £27, for moneys received by defendant on behalf of the plaintiffs. With respect to the claim in reconvention judgment will be for the defendant (plaintiff in reconvention) for the sum of £8,000, with interest from the 1st July, 1902, less the sum of £27 received by him on behalf of the plaintiffs.

Buchanan, J.: I concur in this judgment. It is an equitable conclusion to come to, neither party having fully succeeded on their claims. Both parties are more or less in the wrong. I think the suggestion contained in the defendant's letter, which was made after the suggestion thrown out by the Court, was a equitable means of settling the case.

[Plaintiff's Attorneys: Van Zyl and Buissinne; Defendant's Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D) and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1902.
(Nov. 20th.

Mr. C. de Villiers moved for the admission of Charles William Slaughter as an attorney.

Order granted, and the oaths administered.

PROVISIONAL ROLL.

SLINTER V. BEUKES.

Mr. Close moved for provisional sentence on a mortgage bond for £800, and also that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

THERON AND CO. V. LE SUEUR.

Mr. C. de Villiers moved for provisional sentence on a promissory note, less £5 paid on account.

Provisional sentence granted as prayed.

ILLIQUID ROLL.

BISHOP V. HANSEN.

Mr. Benjamin moved for judgment, under Rule 319, in default of plea, for £130 2s. 6d., balance of account of money due in respect of certain shares purchased by plaintiff on behalf of defendant.

Judgment granted as prayed.

SAVAGE AND SONS V. JAGIRDAR.

Mr. Russell moved, under Rule 329d, for judgment for £190 4s. 10d., goods sold and delivered.

Judgment granted as prayed.

SKINNER V. WESTMINSTER LIGHTING CO.

Mr. Buchanan moved, under Rule 329d, for judgment for the sum of £75, for work done.

Judgment granted as prayed.

DE VILLIERS V. MYBURGH.

Mr. De Waal moved, under Rule 329d, for judgment for £70, being balance of money received by defendant on plaintiff's behalf.

Judgment granted as prayed.

REX V. VAN VUUREN. { 1902.
(Nov. 20th.

Martial law—Resident Magistrate.

A trial by a Resident Magistrate for a contravention of martial law regulations is not rendered valid by the fact that the charge sheet on which the proceedings are recorded is headed "Martial Law jurisdiction," or that the magistrate was specially deputed by the commandant to try such case.

This was an application, under Rule 90, for review of proceedings in a Magistrate's Court, brought by Christoffel van Vuuren and Nicholas Albertus van Vuuren, who had been tried by the Resident Magistrate of the district of Colesberg, specially deputed by the Commandant. On 10th July, 1901, the accused were charged with the crime of contravening martial law regulations, in that, on February 11, 1901, the accused wrongfully failed to report to the military authorities the presence of the enemy in the vicinity of or on their farm. Prisoners pleaded not guilty, but were found guilty, and each sentenced to pay a fine of £30, or in the alternative, undergo three months' imprisonment.

Mr. Buchanan (for applicants): This case is very similar to a number of others which have come before the Court, and in which it has quashed convictions. The Resident Magistrate cannot be deputed to act as such by anybody.

Mr. Nightingale (for the Crown): It is true that the record in this case is very similar to that in *Van der Merwe's* case (12, C.T.R., 786). In both cases the Magistrate signed as "R.M.," but in this case the record was headed "Martial Law Regulations," and states that the proceedings were before "the D.A.M.L. specially deputed by the Commandant."

The Court quashed the conviction.

De Villiers, C.J.: The only circumstance distinguishing the present case from cases already decided is that the charge sheet in the present case is headed "Martial Law Jurisdiction." It then proceeds thus: "In the Court of the Resident Magistrate of Colesberg, before Frederick Wrensch, Resident Magistrate of the said district, specially deputed by the Commandant," and it is signed "F. Wrensch, R.M." The fact that the Magistrate purported to exercise Martial Law jurisdiction does not render valid what he did in his capacity as Magistrate. In that capacity he had no martial law jurisdiction whatever, and could not be specially deputed by the Commandant to decide cases of contravention of martial law. Therefore the conviction must be quashed.

Maasdorp, J., concurred.

[Appellant's Attorney: Trollip.]

GENERAL MOTIONS.

Ex parte UMOVVO AND OTHERS.

Mr. M. Bisset moved that the rule *nisi* granted under the Derelict Land Acts be made absolute.

Rule made absolute.

Ex parte JONES AND ANOTHER.

Mr. M. Bisset moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute.

Ex parte STROEBEL.

Mr. Gardiner moved for leave to the petitioner, as natural guardian of his minor son, to raise a sum of £250 on mortgage of certain property held in trust for the son.

Order granted as prayed.

LEVIN V. BRAUN. } 1902.
 } Nov. 20th.

Lessor and lessee—Rent—Interdict.

It was agreed between a lessor and a lessee that in case the former should sell the land, he might put an end to the lease,

and that in such case the lessee should receive half the profits of the sale. Among the benefits enjoyed by the lessee was that of removing stones and clay from the land. The lessor having sold the property, gave notice of such sale to the lessee, but permitted him to remain three months longer, he continuing to pay rent during that period.

Held, that the lessee could not be interdicted, pending the expiration of the three months, from removing stones and gravel.

This was an application for an interdict restraining the respondent from removing clay and stone from the Mount Prospect estate, situated on the Devil's Peak. It appears that Julius Levin had sold the estate, which he bought for £4,500, to Messrs. Walsh Brothers, for £10,500. The respondent has a lease of the property, under which he can make bricks there, cut timber, remove soil and clay and other material found or growing on the estate. It was further provided by the lease that should the property be sold at any time during the continuance of the lease, the lease could be cancelled, but respondent was to receive one-half share of the profits, with the further proviso that such half share should not be less than £750.

The affidavit of the applicant detailed the transactions he had had with respondent in regard to this estate for a number of years past. After applicant had sold the property to Walsh Brothers he met Braun, and on the latter pointing out that it was rather hard on him to have to vacate immediately, although he did not deny that under the lease he would have to do so, it was agreed that he should be allowed to remain there for four months, that was until the end of this year, so as to get time to remove his working plant, tools, etc. It was contended now, however, that respondent was damaging the property by removing clay and stone from it in large quantities, and therefore the application for the interdict was made.

In his replying affidavit, respondent denied that he was removing large quantities of clay and stone from the ground. He denied that he had ever admitted that he was bound to vacate the property, but he had consented to vacate the property if he were given four months' time. Nothing was ever said about restrictions as to his occupation of the ground.

In a further affidavit the applicant said that the respondent had since admitted that he was taking the clay away and storing it. He had hired two plots of land for that purpose.

Sir H. Juta, K.C. (for the applicant): Under the agreement of 1898 Levin was entitled to cancel the lease at any time he might sell the farm. He was willing to allow Braun some time to remove, as an act of grace, but that does not entitle the respondent to go on denuding the property of clay and stone.

Mr. Schreiner, K.C. (for respondent): There is a conflict of evidence in the affidavits. According to respondent, the lease was never cancelled: it was to run on till the end of the year. Then the respondent pays no royalty on the clay and the stone, but on the bricks. Moreover, he has to pay rent at the rate of £275 per month till the end of the year. The price at which the property sold shows that the applicants have ample security. My client is continuing his works simply for the purpose of supplying old orders, for which he is legally liable. I submit that there is not sufficient evidence before the Court to enable it to decide this matter. Possibly the purchaser from Levin may have threatened to cancel the sale, on the ground that the property was being depreciated, but that point is not before the Court, and there is no proof of any irreparable damage to the applicant.

Sir H. Juta (in reply).

[De Villiers, C.J.: The lease continues till the end of the year, and Levin gets his rent?]

Yes, but the purchasers get nothing, and surely they would have a right to object?

[De Villiers, C.J.: How can you claim rent if you have cancelled the lease?]

For the occupation of the land in the meantime. If Braun had gone out Levin would have been drawing interest on the purchase price of the land all this time. Surely, then, Braun must

give a *quid pro quo* in the shape of rent. If the sale does not go through Levin will suffer irreparable damage. If it does go through, Braun will have ample security for the costs in any action he may be advised to bring, as he could attach the purchase money.

De Villiers, C.J.: In order to obtain this interdict the applicant should make a perfectly clear case, which, in my opinion, he has not done. Braun had under this contract of lease all the rights which Levin originally had, and among these rights was the right to make bricks, cut timber and oak trees in the avenue behind the house remove soil and stone, and other material found or growing upon the property. Now it appears to me that so long as the lease was in operation Braun was entitled to these benefits. When Levin sold the property there was a communication with Braun, and it was arranged that Braun should remain on until the end of the year. There is some conflict of testimony as to what took place, and unless there was clear and undoubted proof that it was agreed that notwithstanding the continuation of the lease Braun should not take away any stone or clay, I am of opinion he was entitled to take such away. So long as he paid any rent under the lease he was entitled to all the benefits which the lease gave him, and I am of opinion that he cannot be interdicted from removing stone and clay in the absence of clear proof of any agreement that he was not to do so. Proof of such an agreement could possibly be given if the plaintiff proceeded to trial, but at present I am not satisfied that there was any such special agreement. For these reasons I am of opinion that the application must be refused with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys: W. E. Moore and Son; Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

IN re VAN DER WESTHUISEN.

Sir Henry Juta, K.C., mentioned this matter, which was not on the roll, but was of some urgency. It was an application by both parties in a will case for the appointment of a *curator ad litem* to certain minor children interested.

The Court granted an order appointing Mr. G. W. Steytler *curator ad litem*.

GREENSLADE V. ESTATE OF MCGRATH.

Mr. Benjamin applied for the appointment of a commissioner to take the evidence of certain witnesses at East London.

Mr. Schreiner, K.C., appeared to oppose the application. He said that on October 20 the present applicants got leave from the Court to intervene, and that was given on the special understanding that the case should come on for trial this term. If the Court did grant the application he had to ask that the commission might be a joint one.

The Court granted the order asked for, appointing the Resident Magistrate of East London as commissioner; the commission to be a joint one; the case to be set down for trial on December 4; costs of the commission and of this application to be costs in the cause.

Ex parte CHERRINGTON.

Mr. Buchanan moved for an order as to the service of certain articles of clerkship. It was stated in the petition that on the 18th May, 1898, petitioner entered into articles of clerkship with Mr. Trolip, attorney. He served continuously up to the 17th October, 1899, upon which date he was called out on active service, he being a member of the D.E.O.V.R. He was released from active service on the 3rd June, 1902, since which date he had been studying for the matriculation examination. Petitioner had served under the articles for 17 months. He was now desirous of entering into fresh articles, but wished his previous service to count.

An order was granted as prayed.

Ex parte BRUCE.

Mr. Bisset moved for an order authorising the Registrar of Deeds to amend a certain deed of transfer granted at various dates in 1858, and in which the property of the late Edward Bruce was incorrectly described. The applicant was one Shaud in his capacity of executors of the late E. Bruce.

Granted.

Ex parte DE JOND, SONS AND COMPANY
(IN LIQUIDATION).

Mr. Searle, K.C., presented the liquidator's report.

The usual order was made.

WENTZEL V. WENTZEL.

Mr. Alexander presented the Official Receiver's report for confirmation. The direction of the Court was asked in respect to debts contracted between the date of the summons and the date of the judgment, in the action for judicial separation brought in 1900. The liquidator said in his report that he thought he could successfully arrange a compromise to liquidate the claims.

The Chief Justice said that no order could be made upon this application. The Court could not give any directions without having defendant in court. But he thought there was sufficient indication as to what the Court would suggest, and as to what would ultimately be the order of the Court; that was, to include all debts up to the date of judgment.

MASTER OF THE SUPREME COURT V.
WILSON.

Mr. Howel Jones moved for an order directing respondent to file the liquidation account of the insolvent estate of John Cumberland Carbarus.

Granted.

Ex parte RADEMEYER.

Mr. Buchanan applied for the appointment of a *curator bonis* in the estate of Johannes Theodorus Rademeyer. The application was made on the ground that Rademeyer was a prodigal. The medical evidence was to the effect that his mind was deranged, and that he had a mania for purchasing everything he saw.

A summons was ordered to issue, to show cause why Rademeyer should not be declared to be of unsound mind. The summons was made returnable on the 26th November.

ESTATE OF GARDINER V. PORT ELIZABETH TOWN COUNCIL.

Application was made on behalf of Margaret Sheller, Charles Ward, and Herbert Elgood for leave to intervene as defendants in this suit.

Mr. Searle, K.C. (with him Mr. Benjamin), appeared for the applicants; Mr. Schreiner, K.C., represented the plaintiff in the action, the executor in the estate of Gardiner.

Mr. Searle asked that the case should be allowed to stand over until the next

day, in order to reply to an affidavit which had just been filed.

Mr. Schreiner said that the case was down for hearing next Tuesday. In order that the present motion should be decided, he would withdraw the affidavit to which the other side wished to reply.

The affidavit was accordingly withdrawn.

Mr. Searle read an affidavit in which the present applicants claimed to be the owners of certain lots, and to be interested in the action. These persons claimed to own the property, and counsel contended that this could not be disputed, there being no allegations on affidavit to the contrary.

Mr. Schreiner submitted that the Court would look at the pleadings in the action, as against the allegations of the applicants.

Mr. Searle said the applicants claimed property which adjoined that in question.

The Chief Justice said the statement of the applicants was somewhat vague, but still there was enough evidence before the Court to justify them in allowing the applicants to intervene, especially as plaintiff could not be prejudiced by such intervention. It must, however, be understood that, in making the order, there must be no delay in the trial of the action. Costs would be costs in the cause.

Ex parte FATAAR.

Mr. Alexander moved in this matter. The petitioner was married to Abdullah Hamet according to Mahomedan rites, and there were children of the marriage. Hamet had become insolvent, and there was a balance in the hands of the Master, after paying all claims. Portion of this money petitioner wished to be paid to her for the support of the children. Respondent, who had not been rehabilitated, was now in Bombay. Counsel said that the marriage was not such as was recognised by the law of the Colony, and the children was therefore illegitimate, but a father was responsible for the maintenance of his illegitimate children.

A rule was granted calling upon Abdullah Hamet to show cause on the 12th March next why the Master should not be ordered to pay to the petitioner, out of the money in his (the Master's)

hands, such sums as he should deem necessary for the support and maintenance of the children mentioned in the petition, the rule to be served personally.

ROSENSTEIN V. ROSENSTEIN.

Mr. Benjamin moved for an order extending the return day of citation until the 1st May next, and for an order for substituted service.

Granted.

APPEAL CASES.

REX V. JANSEN. { 1902.
{ Nov. 20th.

Appeal—Evidence—Criminal Case.

The evidence for the defence before a magistrate in a criminal case being found by the Supreme Court to preponderate in clearness, precision and probability over the evidence given for the prosecution, an appeal against the conviction was allowed.

This was an appeal from the decision of the Resident Magistrate of Kenhardt, in a case in which appellant, Victor Cornelis Jansen, was convicted of being in unlawful possession of a horse, and not being able to give a satisfactory explanation for such possession, and was sentenced to six months' imprisonment with hard labour. The appeal was brought on the grounds that the evidence given did not disclose any criminal intent or conduct on the part of the accused, that the conviction was not supported by the evidence, and that, seeing that a reasonable doubt existed as to the guilt of the accused, he should have been given the benefit of that doubt. The accused was charged before the Magistrate under Act 35 of 1893, with the theft of a bay gelding, the property or in the lawful possession of one Muzasi, and was found guilty under section 2 of the Act. The evidence for the prosecution was that Muzasi, who was a sergeant in charge of the remounts, who bought the horse in question at a sale by the military on July 16. He gave it into the charge of another person, and subse-

quently he found it in accused's possession. Accused first said he bought the animal from Muzasi, but afterwards stated that he had made a mistake, having bought it from an individual named Groenewald. For the defence several witnesses deposed to having seen the accused purchase the horse from Groenewald and pay him, and Groenewald himself said he sold it to accused for £9.

Mr. Searle (for the appellant) reviewed the evidence, and submitted that there was a sufficient element of doubt in the case to show that the defendant ought not to have been convicted. He pointed out that the accused was not convicted of theft, but of unlawful possession of the horse.

The Chief Justice asked if the Magistrate had given any reason for the conviction.

Mr. Searle: No, my lord. The case was purely one of suspicion, and the accused could not satisfactorily be proved to have been in unlawful possession.

Mr. Howel Jones (for the Crown) contended that the verdict of the Magistrate showed that he must have believed the five witnesses for the prosecution that this horse was the one which had belonged to Muzasi.

De Villiers, C.J.: The evidence in this case is so unsatisfactory that I think the Magistrate ought to have given the prisoner the full benefit of the doubt. I certainly think no jury would have convicted on a charge of theft or not being able to give a satisfactory account of the accused's possession of stolen property. It is by no means clear to me that this horse belonged to Visagie at all. If the horse had been sent to Leeuwekuil, there was no time for it to be back again on the following day, or for it to be found in the possession of the prisoner, but, assuming that it was Visagie's horse and that the horse did come back and was in the possession of Jansen, there is the clear evidence of Groenewald that on the Thursday he purchased this horse and that he sold it to the accused. He gives his evidence with precision and clearness, and is not in the least shaken in cross-examination, and he is supported by other persons, who identified this horse that the prisoner is charged with stealing as the horse which the prisoner bought. No doubt there is evi-

dence for the prosecution also, and the fact that the prisoner did give somewhat conflicting accounts as to his possession of the horse is certainly a circumstance to be borne in mind, but, notwithstanding that circumstance, I consider that the evidence for the defence was so precise and so predominating that the Magistrate ought to have been guided by that evidence. The conflict in the accounts given by the prisoner is not so great as to throw discredit upon his evidence and upon his case, because the horse had been bought from the Government and he had bought it from Groenewald, and there seems to have been no intentionally false statement on the part of the accused. He had mentioned Visagie as being the person from whom he bought the horse, but such a mistake might easily have been made without his intending to tell a falsehood. It is a kind of falsehood which would have been easily found out. There were persons who could at once have shown that it was the horse which he had got from Groenewald, and if he had made a mistake upon a matter like this it certainly would be a serious miscarriage of justice if he is to be found guilty of theft or of being in possession of stolen property. It seems to me a case in which the evidence for the defence is so strong that more weight ought to have been given to it, and I think this Court, after hearing the evidence, ought to give the prisoner now the full benefit of the doubt and order that he shall be set at liberty. The appeal is allowed and the conviction quashed.

Maasdorp, J., concurred.

[Appellant's Attorneys: Walker and Jacobsohn.]

REX V. SMITH. { 1902.
{ Nov. 20th.

Insulting, abusive, or threatening behaviour—Breach of the peace.

The wearing of a hat with a red puggaree does not constitute insulting, abusive, or threatening behaviour, merely because it formed part of the headgear, along with other distinctive badges, of a rebel commando.

This was an appeal from a decision of the Assistant Resident Magistrate of Aberdeen in a case in which Johannes Smith was charged with contravening section 10 of the Police Offences Act by wrongfully and unlawfully displaying the colours or emblems or badge of a commando of the late Free State or Transvaal Republic, being the colours of Commandant Malan's commando. The accused was found guilty, and sentenced to pay a fine of £3 or suffer one month's imprisonment.

The most important of the records of the Court below were as follows:— S. J. Moore, a member of the Aberdeen Special Police, stated that on October 13 last, he arrested accused for wearing a red puggaree round his hat. The Chief Constable, in his evidence, stated that after being duly cautioned, accused admitted that he knew that the red puggaree was the colours of Malan's bodyguard. A sergeant in the Aberdeen Special Police deposed that accused was a surrendered rebel. Last July, witness had warned accused against wearing any distinctive mark or badge of the commando to which he had belonged. The Resident Magistrate also deposed to having warned accused against wearing any distinctive badge or marks. Accused gave evidence in his own defence, and said that he was not aware that the red puggaree was any distinctive badge. The colours of Malan's commando was a blue puggaree with white spots, although some of the bodyguard wore red hatbands. Accused had some letters, "T.B.K." stitched into his hat, and when he had been warned he had removed these. The accused's father gave evidence somewhat similar.

Mr. J. E. R. de Villiers for the appellant; Mr. H. Jones for the Crown.

After hearing counsel, the Court allowed the appeal and quashed the sentence.

De Villiers, C.J.: The only charge against the accused is that he wore a red puggaree round his hat. That is all, and on that evidence the Court was asked to say that the accused was guilty of insulting, abusive, or threatening behaviour, tending to a breach of the peace or whereby a breach of the peace might have been occasioned. In my opinion that is not sufficient. If in the present case the accused had worn

anything else distinctive of Malan's commando, then a great deal more might have been said for this conviction. But accused had removed the badge "T.B.K." and there was no other badge that would make this a distinctive emblem of a rebel commando. Besides, it is by no means clear that the red puggaree constituted the colours of Malan's commando. According to the prisoner the colours of Malan's commando were blue and white. He says that some of the bodyguard wore red, but this does not seem to have been distinctive of this bodyguard. Even if Malan's bodyguard wore red, it does not follow that the wearing of a red puggaree is done with the object of insulting, abusing, or threatening anyone. In the present case the accused had removed the distinctive emblems of Malan's commando and only continued to wear the puggaree because he assumed that no one could take offence at his headgear. For these reasons I am of opinion that the sentence must be quashed.

Maasdorp, J., concurred, and said that here the evidence was altogether too meagre for proof that this was insulting behaviour. He would not go so far as to say that badges and certain headgear might not, under certain circumstances connected with the conduct of the person concerned, be carried to such an extent as to constitute insulting and abusive behaviour, but in this particular case there was no proof that this particular headgear was worn in such a way as to constitute abusive and insulting behaviour.

REX V. JOPLIN.
REX V. WEBER.

1902.
Nov. 20th.
" 25th.

Liquor licence—Native—Condition.

J. was licensed to sell liquor, but a condition was attached to although not actually indorsed in his licence "that no liquor shall be sold to any native unless under written authority from a field-cornet or magistrate." He was charged with selling liquor in contravention of section 73 of Act 28 of 1883, as amended by Act 28 of 1898.

Held (1), that as there was a contravention of the Act of 1898, the fact that the Act of 1883 was mentioned did not invalidate the charge; (2), that the evidence that the defendant had sold to a native was sufficient without further proof as to the particular tribe of natives to which the purchaser belonged; (3), that as the defendant had knowledge of the condition attached to the licence, the non-indorsement of the condition on the licence in terms of the Act of 1898 did not relieve him from liability to prosecution.

These were appeals brought against convictions by the Resident Magistrate at Queen's Town for supplying a native with brandy in contravention of section 73, part 7 of the Act of 1893, and contrary to the conditions endorsed on the licences of the appellants.

The facts were that a native policeman named Zana was sent as a "trap" by Sergeant Thisley, to purchase brandy at Joplin's Hotel and Weber's canteen. At both places he was supplied with six-pennyworth of brandy. Joplin was fined £25, and a fine of £15 was imposed upon Weber. A point in Joplin's defence was that Zana when he asked to be supplied was asked if he was a registered voter, and that he replied that he was.

Mr. Schreiner, K.C. (for appellants). Both of these prosecution were brought under section 73 (sub-section 7) of Act 28 of 1883. This section refers to the point of time only. *Queen v. Dam* (3, Juta, 63.) With this very clear authority I do not think I need take the case further. The appellants had a right to sell at the time specified. If charged at all they could have charged only under section 2 of Act 28 of 1898, but even that section does not apply unless the conditions are indorsed on the licence. Again the Magistrate imposed a penalty in excess of the jurisdiction conferred by section 73 of Act 28 of 1898. The Court will insist on some proof that the native constable, who was served, was a native in the sense of the Act. *Queen v. Parrott* (9, Sheil, 480).

In such cases the accused is not in the possession of peculiar knowledge as to the descent of the supposed native. The onus is on the Crown to produce some evidence on this point.

[De Villiers, C.J.: Does not the admission 'I am a native constable' settle the matter?]

I submit not. There are many native tribes not included in the definition of "native" given in the Act.

Mr. H. Jones (for the Crown): As to the conditions not being indorsed on the licence, that is not necessary. The provisions of section 2 of Act 28 of 1898 on that point are merely directory and not imperative.

[Maasdorp, J.: How can conditions be imposed if they are not indorsed on the licence?]

The appellant was told about them.

[De Villiers, C.J.: The conditions seem to have been attached to the licence.]

I submit that that was quite enough. If there were many conditions it would be impossible to get them all on the licence form.

[De Villiers, C.J.: What do you say about the native?]

The cases in which Sheil, J., quashed certain convictions, are not in point. There there was no evidence that the men were natives, here there is the statement of the native himself. He also speaks of other natives being present. Then the Magistrate saw the man, and could judge from his appearance. *Queen v. Parrott* (9, Sheil, 480); *Queen v. Kirsten* (9, Sheil, 544).

Mr. Schreiner (in reply): *Queen v. Kirsten* was decided under the law of British Bechuanaland. That law did define a native, our law does. Even if the conditions of these licences were attached to the licences, that does not comply with the law. Attachment is not indorsement.

Cur. adv. vult.

Postea (November 25). The Court gave judgment.

De Villiers, C.J.: As these two cases are almost identical the Court will deal with them together. The charge against the two appellants was that they being duly licensed to sell liquor with the following exception: "That no liquor should be sold to any native unless under written authority from any field-cornet or Resi-

dent Magistrate," had, contrary to the terms and conditions of their licence sold, or exposed for sale, liquor to a native, in contravention of section 73 of Act 28 of 1883, as amended by Act 28 of 1898. In both cases the appellants pleaded not guilty, and Joplin was fined £25 and Weber £15. These convictions were appealed against on the following grounds: That the appellants were improperly charged, that the second native was the agent of one Sergeant Thistley, that no evidence was led to prove that the native was a native within the meaning of the Act, and that the magistrates had no power under the section that the prosecutions were brought under to impose such penalties because the licences had not been endorsed with the conditions alleged to have been broken. Mr. Schreiner, who appeared for the appellants, relied only on three of these grounds of appeal. The section mentioned in the charge was No. 73, but the summons did not stop there, for Act 28 of 1898 was specially mentioned, and that mention removed any objection so far as that ground was concerned. This ground of appeal in my opinion falls to the ground. The next objection relied on is that there was no evidence to prove that Frank was a native in the meaning of the Act, beyond a statement in the summons that he was a native constable. But there was more than the statement in the summons. The native himself was called, and said he was a native on the police establishment. Another witness says that Zana was a native. It is said that there should have been evidence that he was one of the natives referred to in the fifth section. I certainly think it would have been more in order if the witness had been asked to go into details as to the tribe of natives to which he belonged. But in my opinion this objection should not be treated as fatal to the conviction. There was a statement that he was a native, there was no cross-examination whatever as to his being a native, and the Magistrate would presumably be in a position to judge from appearances as to whether he was a native or not. I think the statement that he was a native is sufficient evidence for the purposes of a conviction. The third objection relied on is that the condition as to selling to natives was not indorsed on the licence. No doubt the second section does direct that there shall be an

indorsement on the licence; but, in my opinion, the words "that the conditions shall be indorsed on the licence," were directory and not imperative in the sense that the licensee—who has full knowledge of the terms of the licence, and who takes the licence subject to certain conditions—shall not be held liable if he contravenes these conditions. The essence of the offence is selling contrary to the conditions, and in order to prove the guilt of the person charged it is sufficient to prove that he knew that the licence was granted upon certain conditions, and that he accepted the licence subject to such conditions. As to the knowledge of the accused, there can be no doubt whatever that both had full knowledge of the conditions. The conditions were attached to their licences; they were on a separate piece of paper; they were not endorsed on the licences, but were tached to the licences and signed by the Resident Magistrate as Chairman of the Licensing Board. Not only that, but in the body of the licence are the words, "Conditions attached." That ought to be sufficient to show that the appellants had knowledge of the conditions upon which the licences were granted. That being the essence of the offence, in my opinion, the contention as to the non-indorsement of the licences should not be upheld. The appeals will therefore be dismissed.

Maasdorp, J., concurred.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

OOSTERBERG V. WEIDNER. { 1902.
Nov. 21st.

This was an action to recover: (1) money lent by plaintiff to defendant; and (2) the interest as *per* agreement on these sums. The plaintiff was one A. W. Oosterberg, and the defendant one Charles Weidner.

The plaintiff's declaration was as follows:—

1. The plaintiff resides at Kenilworth, and the defendant resides at Claremont.

2. On or about May 21, 1900, the plaintiff lent to the defendant the sum of £80, on the conditions that defendant should, on the 10th of each month, pay to the plaintiff interest thereon at the rate of $2\frac{1}{2}$ per cent. *per mensem*, and that either party might terminate the loan by giving one month's notice at the expiration whereof the said sum and unpaid interest, if any, should become due and payable.

3. On, or about August 3, 1900, plaintiff lent to defendant the further sum of £100 on the same conditions as are set forth in paragraph 2 hereof.

4. The plaintiff has given due notice terminating the said loans, but defendant refuses to pay the said sums of £80 and £100 respectively, or any part thereof, and has never paid any interest as agreed.

The plaintiff claims:—

(1) The sums of £80 and £100 with interest at the rate of $2\frac{1}{2}$ per cent. *per mensem* from May 21, 1900, and August 3, 1900, respectively; (2) alternative relief; (3) costs of suit.

The plea of the defendant (drawn by himself) was as follows:—

1. The defendant admits paragraphs 1, 2, and 3 of the declaration, save that he says it was agreed upon between plaintiff and himself that, should defendant's business take a turn for the worse, plaintiff would be satisfied with interest at 6 per cent. *per annum*.

2. Defendant admits having received notice, but has never refused to pay the amount claimed.

3. Defendant has paid interest amounting to £62.

4. The defendant formerly carried on a business as importer, but, owing to the difficulty of landing goods, he had to discontinue this business and in September, 1901, became a maker of Silica Land bricks. Having suffered heavy losses in this said business in October, 1901, defendant informed plaintiff that he (plaintiff) must be satisfied for the time being with interest at 6 per cent. *per annum*.

5. Defendant has paid his longer creditors, and would have paid plaintiff, if he had reduced his claim to £180, and interest at 6 per cent. from October 10, 1901, as the former interest was all paid.

6. Defendant's business has lately improved, and promises to further improve, so that he will not be insolvent when once his factory begins to work, but if

a judgment were given against him before that time he would lose all, as he has no other means save his factory.

7. The defendant agrees to pay costs of suit up to this date, if the above arrangement is accepted, and should he fail to pay on any instalment day, he agrees to judgment being taken against him, without further notice from the plaintiff.

In his replication plaintiff denied the variation in the terms of the original agreements alleged in paragraph 1 of the plea. He admitted that he had received £62 as interest to the end of September, 1901. He said that plaintiff's tender was insufficient and joined issue.

Mr. Nightingale appeared for the plaintiff. There was practically no defence, except that defendant said that it was agreed that the interest should be 6 per cent. *per annum* instead of 30 per cent., as arranged when the loans, amounting to £180, were granted by plaintiff to defendant. It appeared that plaintiff had agreed after the money became due, on notice being given, to reduce the rate of interest to 6 per cent. on condition that defendant paid off the debt in four instalments, but defendant had not paid any of the instalments, and the interest from November 10, 1901, was also owing. Plaintiff therefore claimed £180, the money lent, and interest at the rate of 30 per cent. from November 10, 1901.

After hearing the evidence of plaintiff the Court gave judgment for the plaintiff for the amount claimed, with interest from October 10, 1901, and costs of suit.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant in default.]

WOLTERS V. SNIDER.

Brokerage—Viewing order.

This was an action for the recovery of brokerage, viz., a sum of £45, being brokerage on £1,800 in respect of the sale of certain property undertaken by the plaintiff on behalf of the defendant. The declaration set forth that the plaintiff was a licensed broker, carrying on business in Cape Town. On September 3 last defendant instructed plaintiff to sell, on his behalf, a certain property situated between the Main and High Level-roads, Sea Point.

This property he sold to one John Freeman for the sum of £1,800, and he therefore claimed that he was entitled to £45, being a fair and reasonable sum for brokerage, with interest and costs. In his plea defendant admitted that he had instructed plaintiff to sell the property, and that the property was sold to John Freeman for £1,800, but denied that the property was sold by plaintiff. He admitted that $2\frac{1}{2}$ per cent. was the usual brokerage, but denied that plaintiff was entitled to any such brokerage.

Mr. Benjamin for plaintiff. Mr. Gardiner for defendant.

Mr. Benjamin called Frederick Charles Wolters, the plaintiff, who said that he was a licensed broker carrying on business in Cape Town. On September 3 last defendant asked him to sell a property of his, whereupon witness obtained particulars and entered them, in defendant's presence, in a book kept for such a purpose. The property was situated at the back of the Girls' High School, between the Main and the High Level-roads, Sea Point. In consequence of that witness advertised the property five or six times in the "Cape Times." On Saturday, September 13, Mr. Slattery, a book-keeper to the firm of Messrs. Freeman (which included Mr. Charles Freeman, sen., Mr. Charles Freeman, jun., and Mr. John Freeman) called on witness about the property. Witness gave him particulars and a viewing order. On the Monday following witness posted to the address given him by defendant a letter, informing him of the issue of the viewing order, etc. The same day, about twelve o'clock, witness heard something about the sale of the property and made communication with Mr. Freeman. The latter subsequently sent his clerk to witness and in consequence of what he heard from the clerk witness wrote a letter asking defendant to bring in his papers.

Cross-examined: Slattery said he was acting for Freeman, and witness made out the viewing order for Mr. Freeman, jun.

Francis Slattery said he was a clerk in the firm, and was instructed by Mr. John Freeman, a member of the firm, to go and see plaintiff and get from him an order to view the house in question. On the following Monday Mr. John

Freeman told witness to tell plaintiff that he had purchased the house. Witness sent the message to plaintiff's office.

Mr. Benjamin closed his case.

Mr. Gardiner called

John Freeman, who said that on September 17 he purchased the house in question from Snaeder. He first knew about the house through seeing Mr. Wolters's advertisement in the "Cape Times." When he received the viewing order through Slattery he went to try to see the house, but could not find it. Later on he found out through one of the workmen on the house that it belonged to Mr. Snaeder, and as the latter was a customer of witness's firm he dealt with him direct. Snaeder had not previously told witness that he intended to sell the house. When witness could not find the house he tore up the viewing order. He did not inform Snaeder's attorneys that he had anything to do with plaintiff.

Reuben Snaeder, the defendant, admitted he gave several brokers, including plaintiff, instructions to sell the house in question. On Monday, September 15, witness went to the property, and his glazier told him that on the Saturday Mr. Freeman had been to see the house, and had asked that witness be sent to him. Witness saw Mr. Freeman, and in the negotiations, which resulted in the sale, Mr. Freeman told witness that he had not been sent to the property through any broker. Witness never received the letter referred to by plaintiff. He had left the address at Woodstock on September 8. He received the letter of demand sent to that address. His wife, after he had seen his lawyers, tore the letter of demand up, and he never sent any reply.

After hearing Mr. Gardiner in argument on the facts, the Court gave judgment for plaintiff with costs.

Buchanan, J., said that in this case the defendant went to plaintiff and put the property into his hands for sale. The plaintiff took particulars and advertised the house in the "Cape Times," and in consequence of that advertisement Freeman sent his clerk to plaintiff and obtained a viewing order. Freeman went out to see the property, but says that he could not find the house on that day. He tore up the viewing order, but the next day he found the house. This house was the same as the one mention-

ed in the viewing order. After Freeman discovered that the owner was Snaeder, a customer of his own firm, he dealt directly with him, but he sent Mr. Slattery to inform Wolters that he had purchased the property. His lordship held that under all the circumstances it was clear that Wolters was entitled to his commission, and accordingly judgment must be given for plaintiff with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney: C. W. Herold;
Defendant's Attorneys: Friedlander and Du Toit.]

MENZEL AND COMPANY V. { 1902.
MCNAUGHTON. { Nov. 21st.

Landlord and tenant—Damages.

This was an action for damages for breach of contract.

The plaintiffs' declaration alleged that on November 28 they hired from defendant certain premises in Sir Lowry-road, Cape Town, for a year, at a monthly rental of £18 a month, possession to be taken on the completion of the premises, which were then in course of erection. Defendant undertook to make certain alterations with regard to a chimney, and to provide new boards for the floor above an oven. The plaintiffs took possession on December 20, and defendant failed to carry out his agreement with regard to the chimney, etc. At the end of December the defendant or his servants, in the course of building operations next door, through negligence, caused a beam to be pushed through the wall of the premises occupied by plaintiffs, with the result that damage was done to the contents of the premises. Defendant wrongfully and unlawfully took out a writ of attachment against the goods of the said Menzel, and in consequence of this damage was suffered by the plaintiffs. Damage had also been sustained through free access to the premises being hampered by building operations carried on by defendant. Altogether £500 damages were claimed. The only damage admitted by defendant in his plea was that caused by the beam, which he put down at £1, which was tendered. In reconvention defendant claimed two sums of £36 and £90 respectively as rent of the premises.

Mr. Searle, K.C. (with him Mr. Close) for plaintiffs. Sir Henry Juta, K.C. (with him Mr. Rainsford) for defendants.

Mr. Searle called

George Menzel, one of the plaintiffs, who said that about the end of November last he entered into an agreement with defendant to lease a shop and four rooms at a rental of £18 per month. The building was not quite completed at that time, and the agreement was that he should enter into occupation as soon as he could. He went in on December 18.

By the Court: The receipt produced was given on November 30. He paid the rent before he took possession.

Examination continued: On December 18, when witness went in, the place was not quite completed, the oven not being built, the ceiling had not been put up, two windows had to be made for ventilation, and the chimney was too small. The defendant said that the moment he had the time he would finish off the ceiling. Defendant did not do anything about the chimney. Before witness went in he pointed out to defendant the chimney and the ceiling, and the defendant said he would do everything required. Defendant knew witness was to carry on a cafe and confectionery business. From December 18 to 26 they could use the oven, but not very well, owing to the chimney being too low. A new chimney was a necessity, as there was no draught with the existing low chimney. The new chimney was never built, and witness had to buy his confectionery from a baker. Building operations were being carried on by defendant next door, and in January a beam came through the wall into witness's shop, and resulted in damage to witness's stock. Witness asked defendant for £2 as damages for this. Defendant promised to pay that amount, but did not do so. Witness was summoned for rent in February. Service of the summons was effected by nailing it to the door, witness not being at the premises on that day. On February 11 witness and his partner shut up the premises in the morning, and went to the Court. Witness returned about one o'clock, and found a Sheriff's officer there and everything taken away to one of defendant's shops next door.

Mr. Searle, in answer to a question put by the Court, said that these things were taken away under a writ of attach-

ment, granted on an affidavit made the day before the case came before the Court. The attachment was to provide security for rent.

[Buchanan, J.: But surely the goods should not have been removed?]

It was only when the tenant refused to comply with certain things set forth in the Act that the goods could be removed.

Further examined, witness said everything in the place was attached and taken away. The whole value would be about £70. In addition to the articles mentioned in the list of goods attached, other goods were taken, including cigars, meat, gingerbeer, a pair of boots, his wife's gold brooch, his diamond ring, gold chain, etc. The jewellery was in a small box in the chest of drawers. He never got these goods back. The box was left, but the jewellery had been taken out. The value of the things not returned would be about £30. Of the things returned, many were damaged. By the attachment, witness's business suffered great damage. Proceeding, witness gave particulars of the damage alleged to have been caused through there not being free access to the premises owing to defendant's building operations.

Conrad Hoffman stated that he was a partner with the previous witness, and was present when the agreement was made about the hiring of the shop from the defendant. They said they wanted the place for a confectionery and cafe. McNaughton promised to put the chimney in order, but never did so. They only used the oven once.

Frederick Powersby said that in January last he was at the shop, the entrance to which was dirty, and littered with debris.

Ishmael Harris deposed that he knew the premises in question. Witness helped to build the oven there. Afterwards Mr. Menzel got witness to come to the place, and he then saw that the oven would not work. There were cracks in the chimney, through which the smoke came, and ascended through the ceiling to the floor above. That was a week or two before Christmas.

Mr. Searle closed his case.

Sir Henry Juta, in reply to the Court, said that to settle the case and to save calling a large number of witnesses, his client was quite prepared to give up the

whole of his claim in reconvention, and he would put it that the plaintiff had made out no case on his own evidence.

[Buchanan, J.: Mr. Searle, your claim is one altogether for damages, and have you substantiated that claim, except perhaps as to a couple of pounds?]

Mr. Searle submitted that they had substantiated their claim to damages for illegal attachment. The writ had been granted on an affidavit made to the effect that there had been a demand for rent, and the evidence for plaintiffs showed that there had been no demand made.

Sir Henry Juta said he could call Mr. Villet, defendant's agent, to give evidence as to the demand for rent having been made.

Henry Arthur Villet, a partner in the firm of R. Villet, said he acted as agent for defendant in regard to the hire of these premises to plaintiffs. On December 20 witness sent a demand for rent to plaintiffs. He wrote the letter himself, but he had not a copy of it. It demanded the rent from December 15 to January 15. The letter was sent to the post with the other letters, as usual. Some days before that witness had asked for the rent.

Cross-examined: Witness did not of his own knowledge know when plaintiffs took possession, but from defendant's instructions, he understood that plaintiffs were in occupation when the receipt of November 30 was given. Witness kept no record-book of demands for rent.

Re-examined: Until he came into court, witness had no idea that any question would be raised as to the demand for rent.

After hearing Mr. Searle in argument, the Court gave judgment for the defendant, with costs, on the claim in convention, the claim in reconvention not being pressed.

Buchanan, J.: The plaintiffs sue as a partnership. They allege that the defendant, who is the owner of a house in Sir Lowry-road, Cape Town, let this house to them, and they allege certain breaches of contract on the part of the defendant, and for these claim £500 damages. They allege that the house, which was then unfurnished, was let to them on or about the 28th November, but that after they entered on pos-

session on December 20, after which date the defendant promised to provide a proper flue to the chimney, and to put new deal boards on the floor over the oven, and that he failed to do so. They also complain that the defendant improperly and unlawfully took out a writ of attachment against their property, and further that they had not free access to their premises during the time of occupation. For these breaches on the part of the defendants, they say they have been compelled to cancel the lease, which was for one year, and to leave the premises. The plea states that the tenancy commenced in November, not in December, and the evidence of the plaintiffs themselves supports the allegation of the plea. There is also the receipt dated November 20 for £18, being one month's rent, and if the plaintiffs' contention that they did not take possession until December 20 is correct, it is certainly extraordinary that they should pay a month's rent in advance on that date. There are, further, the proceedings in the Magistrate's Court, when plaintiffs were sued for the month's rent from December 15 to January 15. That action was brought against Menzel alone, but after his partner had been joined, on an exception being taken, Menzel and his partner admitted the debt, and tendered payment with costs to the date of tender. The plaintiffs were represented in the Magistrate's Court by their attorney, and if they had only taken possession on December 20 one cannot imagine their legal adviser advising them to take that course. I am therefore driven to the conclusion that the occupation must have commenced about November 15. As to the allegation that defendant did not carry out his undertaking with regard to the chimney and ceiling, it appears that plaintiffs wished to have a special oven, built on the premises, to enable them to carry on the trade of bakers, and they agreed that the defendant should supply the materials if they would put in what was wanted. Afterwards, when it was found that the existing chimney did not draw properly, the defendant said that when he had time he would have a proper flue put in, but I think that was not such an obligation as to entitle the plaintiffs to claim damages or to cancel the lease. The most im-

portant ground on which the plaintiffs rely is that the defendant took out a writ of attachment against the property of the first-named plaintiff (Menzel) to secure payment of his rent. That was taken out on February 11. The affidavit on which this writ was taken out was in strict compliance with the statute. It was alleged in the affidavit, upon which it was granted, that one month's rent was overdue, that it had been demanded more than seven days, and that it had not been tendered or paid. When that writ was taken out there was a suit in the Magistrate's Court for the recovery of that very month's rent, and in consequence of the attachment of his goods plaintiff Menzel gave security for the payment of the rent, whereupon his goods were restored. The question is whether that attachment was illegal. The only ground, looking at the record before us, on which it could be said that the writ was illegal, is that it was taken out against Menzel instead of against both partners. But we have it that it was Menzel alone who lived on the premises. The other partner certainly was not mentioned in the writ, but defendant did not treat him as liable for the rent, and it was only on the exception being taken in the Magistrate's Court that he was joined with Menzel in the action. On that technicality I am not prepared to say that the issuing of the writ against Menzel was illegal. The partners admitted in the Magistrate Court that they owed the rent, and besides the landlord had a lien for his rent on any property on the premises, and this was the only property there. In addition to that, in a case of partnership, execution could be issued against the property of either of the partners. As to the allegation that besides the articles mentioned in the writ of attachment a number of articles had been taken and not restored, including some jewellery belonging to Menzel and his wife, this amounts like a charge of theft against the messenger, but no proceedings have been taken against him. If the writ was legally issued, and I hold it was, the defendant could not be held responsible for the misdeeds of the messenger. As to the damage caused by the beam coming through the wall owing to the building operations being carried on for defendant next door, there was no doubt

some little inconvenience and damage caused to the extent of a pound, or almost a couple of pounds. There was clearly some rent due to defendant—although defendant did not wish to prolong the case by pressing his claim—amounting to considerably more than the amount of the damage done by the beam, and therefore that need not be considered. The plaintiffs have brought their action for damages, and their grounds for damages having failed, the Court is bound to give judgment in this case for the defendant with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Silberbauer, Wahl, and Fuller.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr Justice MAASDORP.]

HAWKINS AND THOMAS V. { 1902.
EDWARDS. { Nov. 24th

Mr. C. de Villiers appeared for the plaintiffs; Mr. Uppington for the defendant.

Mr. Uppington applied for a postponement until next term, offering to pay the costs of postponement. Defendant had gone to Madagascar.

Mr. De Villiers objected, and said that one of the plaintiffs had shortly to return to the Transvaal.

[De Villiers, C.J.: The plaintiffs' witnesses' evidence can now be taken, and the case then postponed.]

The plaintiffs alleged in their declaration that on the 18th February, 1902, they entered into a contract with defendant whereby, in consideration of a sum of £40 to be paid by defendant, plaintiffs undertook to remove and stack certain ship's timber from the wrecked S.S. Hermes. That they performed other work, for which it was agreed that reasonable remuneration should be paid. They claimed £15 in respect of this. Certain sums had been paid by defendant, and plaintiff's claimed that £31 7s. 7d. was still due. They

applied for judgment for that amount. Defendant admitted the contract, but denied that plaintiffs had properly performed their part thereof. Defendant tendered the sum of £4 7s. 7d.

Ockwell Hawkins, one of the plaintiffs, said he was a mining engineer at Mid delburg, Transvaal. In February last witness went with Edwards to the wreck of the Hermes. They went on board, and made a contract to take up the plank-ing and hatches, and to take them ashore and stock them for sale. The remuneration agreed upon was £40. Mr. Edwards pointed out what was to be done. He told witness to make out a written contract. Witness made a draft contract (produced), in which alterations were made by defendant. Witness and his partner did all that was there indicated. Mr. Edwards asked witness to make a neat copy of the contract, as altered by him, and to give the same to his agent on board the Hermes. Witness gave a copy to the agent, and did not see it subsequently. Later witness did work in salving a lighter. They worked from the 18th February until Good Friday, when defendant gave witness the note on board the Hermes. He was then satisfied with the work which had been done. Witness told him that he wanted to go to Durban on the following Wednesday. Defendant came to the vessel on the Monday or Tuesday, and found Thomas assisting a man named Keelding to fix up some timber. Defendant made out that the man had not bought the timber. He was annoyed, and refused to pay the money owing by him to witness.

Cross-examined by Mr. Uppington: He did not know that another shipwright had been employed in April to take away the planks that they ought to have removed. They took away all that they contracted to do.

Mr. Uppington: Yes, I see the contract here, but it was never signed.

Witness replying to further questions, said that the draft produced was in his handwriting. They had contracted to remove certain loose timber from the hold, and they did so. They received a certificate from Mr. Edwards. It was not for salving the gear. There was a lighter sunk and they assisted in salving that. They were working at the Hermes ten days according to the account, but this was for the lighter. There was £40 for the contract alone. The trouble

about the teak arose because his partner was accused of taking teak that did not belong to him. He did not know how much he had actually been paid; it might be £23 10s. 5d. He could not say when the last payment was made to him. It was made before any fault was found with the work.

Mr. Upington, in answer to the Chief Justice, said that Mr. Edwards was called away in a hurry about ten days ago.

[De Villiers, C.J.: But surely his evidence might have been taken on commission. It is a paltry sum that is in dispute and it is unfortunate that there should be these postponements.]

Mr. Upington said that the defendant had been prepared to go on with the case last term, but the plaintiffs were not ready.

[De Villiers, C.J.: The case will be postponed, defendant to pay costs of the day and to give security for the amount of the claim to the satisfaction of the Registrar.]

Plaintiff's Attorney : J. J. Michau;
Defendant's Attorney: A. W. Steer.

CLARKE V. EXECUTORS OF { 1902.
CASTRAY. { Nov. 24th.

Donatio mortis causa—Will.

C., being seriously ill, signed a document, which was duly attested as a testamentary writing by two witnesses, by which she made a gift as a donatio mortis causa to the plaintiff, who accepted the gift. A few days afterwards C. made a will by which, inter alia, she confirmed the gift to the plaintiff; and thereupon H., who held C.'s general power of attorney, and had the custody of the deed of donation, destroyed the deed. Upon the death of C. a few days afterwards it was found that the will had not been duly attested, and was consequently invalid.

Held, that the plaintiff was entitled to the benefit of the donatio mortis causa.

This was an action for a declaration of rights to certain immovable property, or in the alternative for damages. The plaintiff was Catherine Henrietta Clarke (born Brandt), wife of Frederick Charles Clarke, and by him duly assisted. The defendants were Edward Ridge Syfret and Johannes Henock Neethling Roos, in their capacities as executors dative of the estates of the late Mary Isabella Graham Fielding Beale (born Castray) and of the late Henrietta Sturgeon Castray.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Wynberg, and is lawfully married with community of goods to one Frederick Charles Clarke, with whose consent and by whose assistance she brings this action.

2. The defendants are the executors dative of the following estates, to wit: (a) The estate of the late Mary Isabella Graham Fielding Beale (born Castray), hereinafter called "the Sister Beale." (b) The estate of the late Henrietta Sturgeon Castray, hereinafter called "the Sister Castray."

3. The two deceased ladies were sisters and the Sister Beale was during her lifetime for many years a widow and adopted the plaintiff when a child.

4. The two sisters carried on a boarding-house and lived together at Wynberg, and there the plaintiff lived with them until 1899, in which year she married her husband, a sergeant of police at Wynberg.

5. Thereafter in May, 1902, the two sisters, then of advanced age and infirm health, specially requested the plaintiff to return with her husband and child to live with them at the house and premises in their occupation known as "Mon Repos," situate in Sussex-road, Wynberg, and promised and agreed that if the plaintiff would so return to live with them and nurse and take care of them during their old age they would make over and give to the plaintiff the said house and premises.

6. The plaintiff complied with their request and agreed to the said arrangement, broke up her then home, and with her husband and child returned to and resided with the two sisters, and nursed, cared for and attended to their wants to their satisfaction until their respective deaths which took place as follows, the Sister Beale died on the

11th June, 1902, and the Sister Castray, on the 19th June, 1902.

7. The said house and premises was and is registered in the name of the Sister Beale.

8. The Sister Beale left a last will and testament, of date 4th July, 1882, and on or about the 5th June, 1902, at her request a codicil to the said will was prepared for her execution whereby she would specially bequeath the said house and premises to the plaintiff, but at no time thereafter was she in a condition of health to permit of her executing the same, and she died without giving effect to the undertaking to make over and give to the plaintiff the said house and premises.

9. Under her will the Sister Castray was appointed her sole heir and executrix.

10. The Sister Castray was at the time of the death of the Sister Beale seriously ill, but perfectly conscious and sensible, and on the 13th June, 1902, she duly made and executed in the presence of two witnesses a certain deed of *Donatio Mortis Causa* of the said house and premises in favour of the plaintiff.

11. A true and correct copy of the said deed is hereunto annexed and marked "A," the original having been destroyed under the circumstances hereinafter set forth.

12. After making the said deed and on the 17th day of June, 1902, the Sister Castray made and executed her last will and testament in the presence of witnesses whereof a true and correct copy is hereunto annexed and marked "B," but the execution thereof was by mistake faulty and not in accordance with law in that the same was not signed by her and the witnesses upon the first leaf but only at the foot or end thereof.

13. Upon her execution of the said document as her said last will and testament her attorney without special instructions from her but deeming the aforesaid deed to be of no further use destroyed the aforesaid deed, as well as a former will of the Sister Castray made in 1882 whereby her predeceased Sister Beale was appointed her sole heir and executrix.

14. After the death of the said Sister Castray the informality in the execution of the said document as her last will and testament was discovered and the defendants were appointed in due form of

law as executors dative of both estates, and were by order of this Honourable Court granted upon the application of the Plaintiff and with the consent of the defendants restrained from selling, disposing of or otherwise dealing with the said house and premises until the plaintiff's claim should be adjudicated upon.

15 By virtue of these premises, and specially by virtue either of the agreement set forth in paragraph 5, or by virtue of the deed of *donatio mortis causa* whereof a true copy is annexed the plaintiff claims that she is entitled to the said house and premises, and to a declaration and order for transfer accordingly either direct from the defendants as executors of the estate of the Sister Beale or from the defendants as executors of the estate of the Sister Castray after transferring the said house and premises to themselves as her executors.

16. In the alternative, if the above claims should be held invalid, but not otherwise, the plaintiff claims damages in the sum of one thousand pounds (£1,000), as and for damages for breach of the agreement set forth in paragraph 5, which agreement she in all respects fulfilled and completed.

Wherefore the plaintiff prays for (a) an order declaring her to be entitled to the said house and premises and compelling the defendants to transfer the same to her in such mode as this Honourable Court shall direct, or, in the alternative and only in case such order (a) shall not be granted; (b) judgment for the sum of one thousand pounds (£1,000) as and for damages as aforesaid, or that she may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

"A."

Know all men whom it may concern that on this, the 13th day of June, 1902, that I the undersigned Henrietta Sturgeon Castray, a spinster, of Wynberg, near Cape Town, in the colony of the Cape of Good Hope, in the presence of the subscribing witnesses, do hereby declare that being sick and ailing and in great bodily infirmity and contemplating the probability of my death, do hereby give and grant, if I may lawfully do so and the same is in my legal power, authority and right as a *donatio*

mortis causa unto and on behalf of Catherine Henrietta Clarke (born Brandt) a certain dwelling-house and premises now in my occupation and known by the name of “Mon Repos,” situate at Wynberg aforesaid, with the land on which the same is erected and the appurtenances thereto as her sole and exclusive property and to her absolute use and benefit in case I, the said Henrietta Sturgeon Castray, shall not survive and recover from my said sickness, desiring that due effect may be given hereto as a *donatio mortis causa*.

Thus done and executed at Wynberg, the day, month and year first aforesaid, in the presence of the subscribing witnesses.

The mark X of
HENRIETTA STURGEON CAS-
TRAY.

As witnesses:

(Signed) C. SHAW NICHOLSON.
“ VICTOR G. MOLTEÑO.

“B.”

This is the last will and testament of me, the undersigned Henrietta Sturgeon Castray, of Wynberg, in the Colony of the Cape of Good Hope, spinster.

I give, devise, and bequeath unto Catherine Henrietta Clarke (born Brandt), now residing with me, all that a certain dwelling-house and premises now in my occupation, and known by the name of “Mon Repos,” situate at Wynberg aforesaid, with the land on which the same is erected and the appurtenances thereto, or in lieu thereof such part of my estate and effects in money as shall be equal in value to the said dwelling-house and premises known as “Mon Repos” aforesaid in case it shall be ascertained after my decease that such dwelling-house and premises is not in my own absolute disposing power, the same to be her sole and exclusive property and to her own absolute use and benefit, and for her heirs for ever in consideration of the love and affection I bear for her and for her kindness and attention in attending and administering to me during my old age and infirmity.

Thus done and passed at Wynberg, Cape of Good Hope, this 17th day of June One Thousand Nine Hundred and Two, in the presence of the subscribing witnesses.

The mark X of
HENRIETTA STURGEON CAS-
TRAY.

Signed and declared by the testatrix as and to be her last will, in our presence, who in her presence and in the presence of each other altogether have herunto subscribed our names as witnesses.

(Signed) C. BRADY.
W. H. HORNE.

Defendants first plea was as follows:

1. They admit the allegations in paragraphs 1, 2, 7, 9, and 14 of the declaration.

2. They also admit that the said late Mary Beale and Henrietta Castray were sisters, and that the said Mary Beale left a will dated July 4th, 1882.

3. They have no knowledge of the other allegations in the declaration, and do not admit the same, but refer to such proofs as the plaintiffs may adduce.

4. They deny the contentions of the plaintiffs as set forth.

To this plea, the plaintiff's replication was general.

A further plea (filed November 24, 1902) was as follows:

1. Defendants crave leave to refer to the matters above pleaded.

2. The late Mary I. G. F. Beale (born Castray) and Henrietta S. Castray were the daughters of one Luke Castray, who died at Wynberg on October 31, 1847, leaving four sons and five daughters him surviving.

3. The said Luke Castray left a last will and testament, whereunder he left all his property to his children in equal shares, and appointed his wife, Elizabeth H. Castray, together with his eldest son, Luke R. Castray, his executors.

4. Thereafter the said children entered into certain two contracts, whereunder it was agreed that the daughters of the said Luke Castray should enjoy the whole of the property left by their father, during lifetime; but that after death the proceeds should be equally divided, the said Mary I. G. F. Beale (born Castray) and the said Henrietta S. Castray signed the said document as accepting the above conditions, to which the defendants crave leave to refer.

5. The property in the estate of the said Luke Castray consisted of a certain house at Wynberg, which after his death the said Mary I. G. F. Beale and Henrietta S. Castray occupied under the aforesaid agreement.

6. Thereafter, on or about May 28, 1897, the executor in the said Luke Castray's estate, to wit, Luke R. Castray, one of the sons, caused the said property to be sold; and the proceeds were handed over to the said Mary I. G. F. Beale to be dealt with in accordance with the said agreement.

7. The said Beale purchased land at Wynberg and built four houses thereon with the said proceeds, and one of the said houses is the one claimed in this suit.

8. The defendants submit that under the above circumstances neither the said Mary I. G. F. Beale nor the said Henrietta S. Castray was entitled to deal with the property claimed by the plaintiff, whether by way of gift, *donatio mortis causa*, or any other ground; but that the said property must be dealt with in accordance with the terms of the aforesaid will.

Wherefore they pray that plaintiff's claim may be dismissed with costs.

As to the filing of the further plea, Mr. Schreiner, K.C. (for plaintiff): This further plea opens out to us what is a novel and no doubt a very difficult aspect of the case. We have evidence that Mrs. Beale and Miss Castray were possessed of means not derived from the estate of Luke Castray, but I submit that if any questions as to the interests of his estate are to come before the Court, the estate should be represented. The present defendants have nothing to do with that. I would submit that it would be better that the case should proceed as if the further plea had not been filed, or if that course is objected to, that it should stand over to give us an opportunity of replying to this plea.

Mr. Searle, K.C. (for the defendants): Certain documents on which our further plea is based were not discovered till last Friday, but we thought it better to put the plea on record. I will only say that we are prepared to show that Mrs. Beale and her sister received some £2,500 from their father's property at Wynberg, and within a year after this money was handed over the new property was purchased. Our suggestion

is that it was purchased with this money. We are quite prepared either to go on with the case on the original plea or to consent to a postponement, as the Court may think best.

De Villiers, C.J.: The Court is of opinion that it would be impossible to do complete justice in the present case without entering into all the questions raised by the plea, and the plea must, therefore, be allowed to be filed, but if either plaintiff or defendant considers it is necessary to have further time to meet the fresh questions raised by the plea, then the case must be postponed. The parties should say now whether they are prepared now with that plea filed to proceed. It would be impossible to give judgment in this case without hearing the evidence on the plea.

Charles Shaw Nicholson, R.M., Paarl, said that he formerly resided at Wynberg, and he knew the old ladies, Mrs. Beale and Miss Castray. Mrs. Clarke before her marriage lived with them for some years. She was the adopted daughter of the two ladies. He called at the house in Sussex-road, accompanied by Mrs. Nicholson, to pay a respectful visit upon the death of Mrs. Beale. Mrs. Horne, who was also present, showed him a document, *donatio mortis causa*, and said that the attorney was too ill to attend, and asked him if he would mind explaining the document to Miss Castray. He did so. Miss Castray said the document embodied her wishes. She was quite capable of understanding. She said she wanted Kate (Mrs. Clarke) to have the house. Miss Castray made her mark on the document in his presence. It was attested by himself and Mrs. Horne.

Cross-examined: He did not know by whom the document was drawn up. He did not know how Dr. Molteno's name came to be mentioned.

Dr. Victor Molteno said he attended during their last illnesses Mrs. Beale and Miss Castray. An operation was performed on Mrs. Beale's foot. She died a few days afterwards. He witnessed a power of attorney given on the 10th June by Miss Castray, empowering Mrs. Horne to look after her affairs. Both ladies were too ill to deal with their own affairs.

Henry Philip van Wyk, attorney, practising at Paarl, said that between December, 1881, and February, 1886, he boarded with the deceased ladies at Wyn-

berg. They carried on a successful boarding-house business. They had seven or eight boarders, each of whom paid over £8 a month. Miss Castray was also in receipt of a pension from the Indian Mutiny Fund of between £40 and £60 a year. He knew Mrs. Clarke, who was at that time a girl, and who resided with the old ladies as their adopted daughter.

Cross-examined: He once invested, about eight or nine years ago, between £100 and £200 on behalf of Mrs. Beale. That was after he ceased to board with the two ladies.

Mrs. Wm. Hy. Horne, of Wynberg, said she had known the late Mrs. Beale and Miss Castray since 1866. She had known Mrs. Clarke when she was Katie Brant, as their adopted daughter. She left them in 1899. Witness visited the old ladies frequently at Wynberg. They received boarders when they lived in Ottery-road. She was at the house in Sussex-road every day when Mrs. Beale was ill. Miss Castray was very much older than Mrs. Beale. She was of vigorous mind. Witness met Mrs. Clarke in the main road at Wynberg, and spoke to her with regard to the illness of the old ladies. She knew that Mrs. Clarke afterwards attended Mrs. Beale and Miss Castray. Subsequently Mrs. Clarke's husband and child came and lived with the old ladies. Mrs. Clarke was constantly in attendance upon them, and she had charge of the household. She believed Mrs. Clarke's health suffered through her exertions. On the day of the operation, she found Mrs. Beale surrounded by sympathising friends, and the old lady said she had been telling these friends that she wished to give the house she was living in to Mrs. Clarke. Mrs. Beale further asked witness to take charge of her money and valuables and documents, and take supervision of her affairs, as she feared chloroform. Witness afterwards handed the things entrusted to her to the Board of Executors. Something was said about Mrs. Beale bequeathing the house in a formal manner to Mrs. Clarke, and she agreed that it would be better to have a will prepared, but her condition afterwards rendered it impossible for her to execute the document. Witness was present when Miss Castray executed the *donatio causa mortis* in favour of Mrs. Clarke. Mrs. Beale seemed to be very pleased at

the re-union with Mrs. Clarke, and she told witness that she would now be all right, and that she (Mrs. Horne) need not trouble any more. There had been friction between the old ladies and Mrs. Clarke. Miss Castray, when she executed the *donatio*, said that the money was all Castray money, and that the Beales were not to have a penny. Mr. Brady, the attorney, after the new will had been executed by Miss Castray, went along with witness and her husband into the dining-room. Mr. Brady then asked witness if she wished to keep the two documents that she had, viz., the older will of 1882 and the *donatio*. He said they were of no value, as the matter was embodied in the new will. Mr. Brady suggested that they should be destroyed. Neither Miss Castray nor Mrs. Clarke expressed any wish that the two documents should be destroyed. Mr. Brady destroyed them with witness's consent. She shared the blame.

Cross-examined: Clarke came to the house before the death of Mrs. Beale. Witness looked through the documents of 1853, and showed some to Mrs. Brady. Witness gave instructions to draft the document under the power of attorney she held. In the deed of donation, it was stipulated that the property was given if the donator might lawfully do so, and if the same was in her legal power, and in the will the words occurred, "In case it shall be ascertained that such dwelling, house, and premises is not in my own absolute power . . ." These words were put in because witness having read the whole documents, thought they were intricate, and might cause difficulties. Witness had heard from Mrs. Beale and Miss Castray that they only had a life interest in the old property. Witness remembered the house being sold in 1897, and the proceeds being handed to Mrs. Beale. The latter bought land and began to build. previously to this she had frequently bought land, but had not built. Miss Castray said that the money was Castray money, and that she did not want it to go to the Beale family at all. Mrs. Beale was constantly trading and turning money over.

Re-examined: Miss Castray had expressed regret that no proper arrangement had been made by Mrs. Beale with regard to a lady in Tasmania to whom witness wrote, but Miss Castray never indi-

cated a wish that that should affect any right of Mrs. Clarke's to this property.

Christopher Brady, attorney, said he prepared a draft copy of a codicil to Mrs. Beale's will. This was not executed, but was filed with the will. He drew up the general power of attorney, appointing Mrs. Horne. This was on the 10th June. Instructions were sent to witness at his house—he was ill at the time—to prepare a deed of donation. He prepared the draft produced, and sent a copy to the house. Witness was not present when the deed was executed. Dr. Moltono was under the impression that he had witnessed the deed, whereas in reality he had witnessed the power of attorney. Witness drew up a will, which was not executed on each leaf. Witness had practised in England and assumed that the law of execution of wills the same here. Witness thought the old will and the deed were unnecessary, after the new will had, as he thought, been duly executed, and told Mr. and Mrs. Horne that they might be destroyed.

[De Villiers, C.J., said that the utmost the executors could be called upon to do by the heirs of Luke Castray was to hand over the same amount as was paid to Mrs. Beale and Miss Castray.]

Mr. Schreiner: And there is an abundance left to pay us after this has been done. Counsel further stated that Mrs. Beale and Miss Castray were entitled to two ninths of the estate of Luke Castray.

[De Villiers, C.J.: The heirs are not prejudiced by the deed of donation.]

Mr. Searle said that the question was whether under the old documents, the heirs of Luke Castray were not entitled to the proceeds of the property transferred by the sons to the daughters.

In cross-examination, Mr. Brady said he was not present when the deed was executed. Witness witnessed the will and was quite satisfied that Miss Castray knew what she was doing.

Re-examined: Miss Castray was very anxious that Mrs. Clarke should have the house.

Peter Johannes Zoutendyk, auctioneer and valuer, valued the property in question at £1,000.

Mrs. Mary McCallum, of Wynberg, gave corroborative evidence. During Mrs. Beale's illness she said to witness that God had heard her prayer, and sent Katie back to take care of her in her old age. Witness substantiated Mrs.

Horne's evidence as to what Mrs. Beale said on the day the operation was to have taken place.

Mrs. Catherine Henrietta Clarke, the plaintiff, stated that she was married to a sergeant of police at Wynberg. She was adopted when a very small child by Mrs. Beale and Miss Castray, with whom she lived until 1899. She used to help the two old ladies in the working of the boarding-house. She married in 1900, and early this year, as the result of a conversation with Mrs. Horne, she went to see Mrs. Beale, who said to her, "God has heard my prayers, and has sent you to look after me in my old age." She promised witness that if she would return she would make over the house to her. Witness took up her residence with the old ladies in May, assuming charge of the house, nursing Miss Castray day and night, besides helping to nurse Mrs. Beale. She was in the room when the conversation took place the day prior to the operation. Witness was not present when the deed was executed. Subsequently Miss Castray said everything had been settled and signed, and witness kissed and thanked her. The nursing had completely knocked witness up.

Cross-examined: Mrs. Beale asked witness to go back to her; witness was not very anxious to do so, as it was a great responsibility.

Frederick Charles Clarke, police-sergeant, said that, in order to go to live with the old people, he sold the furniture in the house in which he formerly resided.

William Henry Horne said he had known Mrs. Beale, Miss Castray, and the plaintiff for a considerable time, and regarded the latter as the adopted child of both sisters. He witnessed the invalid will, and heard it read to Miss Castray. Miss Castray's former will was destroyed under the circumstances already stated.

Cross-examined: Witness thought the will superseded the other documents.

Mr. Schreiner put in certain correspondence, and closed the plaintiff's case.

Johannes E. N. Roos, one of the executors dative, gave evidence as to the property in the estate. This property witness estimated to be worth £950. The rest of the property had been al-

ready realised for £3,430. There were no substantial debts on the property.

By the Chief Justice: If the clause mentioned in the plea were good, there would be over £3,000 to meet it.

By Mr. Searle: The net proceeds of the sale of the old property amounted to £2,300. Witness found the old documents since the first plea was filed. Upon the discovery of the documents, witness considered that they should be brought to the notice of the Court. The value of property at Wynberg had considerably increased of late.

Cross-examined by Mr. Schreiner: Witness had not ascertained the exact amount of money put into the building of the houses by Mrs. Beale. Luke Richard Castray was the surviving executor in the estate of Luke Castray when the old property was sold. He had not, to witness's knowledge, filed any account. There were sufficient funds to meet all claims on the estate.

Mr. Searle closed his case.

Mr. Schreiner, K.C.: I submit that on the facts we are entitled to judgment. We have proved the *donatio mortis causa*, which was a good one, and we have shown that the estate of the donor is quite sufficient to satisfy all claims, quite apart from anything she may have inherited under her father's will.

Mr. Searle, K.C.: Mrs. Horne held Miss Castray's full power of attorney. Her legal acts were therefore Miss Castray's acts, and Mrs. Horne destroyed the deed of *donatio mortis causa* not accidentally but intentionally. It was therefore revoked just as if Miss Castray had herself destroyed it.

[De Villiers, C.J.: But the will was in almost the same terms, and you could not dispute the plaintiff's claim if the will had been valid.]

But the will was invalid. No doubt, if a testamentary document is destroyed accidentally, it may be proved *aliunde*, but here it was deliberately destroyed. Mrs. Horne, Mr. Brady, and everybody else present when the document was destroyed thought it was of no further use, and Mrs. Horne (acting for Miss Castray under full power of attorney) destroyed it *animo revocandi*. If the will has since turned out to be invalid, that fact does not cancel this previous revocation of the deed. Then, again, Mrs. Horne said in her evidence that

she knew there were doubts as to whether the donor had power to dispose of the house "Mon Repos," and hence the will. Now there seems to be nothing in the late Mrs. Beale's estate save a few articles of furniture.

Mr. Schreiner (in reply): A *donatio mortis causa* cannot be put on the same footing as a will. *Gronewegen in Cod.*, 8, 57, 4. In this case Mrs. Horne was not instructed to destroy the deed. As far as Miss Castray was concerned, its destruction was purely accidental. See *Van Wyk v. Van Wyk's Executor* (5, Juta, p. 1). This document must be regarded as if it had never been destroyed. An invalid will, moreover, cannot revoke a valid testamentary document. *Nelson v. Currey and Others* (4, Juta, 355); *In re Beresford* (2, Juta, 303); *Jarman on Wills* (p. 118).

[Maasdorp, J.: But did Mrs. Clarke accept the gift?]

Acceptance was not necessary. Voet is the only authority who requires this. A *donatio mortis causa* resembles a will in this respect, that acceptance after the death of the donor is sufficient. There can be no doubt of our acceptance now of property we are doing our best to recover. But apart from this, there is abundant evidence of acceptance even during Miss Castray's lifetime. Lastly, the estate is in a good condition and well able to satisfy all claimants. I submit that there is no reason for postponing the case in the interests of the late Luke Castray's estate.

De Villiers, C.J.: It appears to me that the gift relied upon by the plaintiff was a valid *donatio mortis causa*. It had all the requisites of a valid *donatio mortis causa*. Miss Castray, who executed the gift, was not the registered owner of the property at the time, but she was heiress to the registered owner, who had already died; she was the sole heiress, and as such she, by this document, which has been put in, gave the property in question as a *donatio mortis causa* to the plaintiff. The document was duly executed in a manner required of testamentary writings; it was duly witnessed, and although it was not signed by the name of Miss Castray it bore her mark, which was duly witnessed by two witnesses, who have deposed to the Court as to the circumstances under which that document was executed. The question has been raised as to whether

the donation was duly accepted. It is, perhaps, unnecessary in view of the facts of the present case to decide as to the exact time when it is necessary for a donee under a *donatio mortis causa* to accept a gift. For the purposes of the present case the Court may take it that the acceptance must take place before the death of the donor. In my opinion there is ample evidence that such acceptance did take place. Before the gift was made it had been understood between Miss Castray and the donee that in consideration of her services she should be rewarded by the gift of this house, and after the gift had been executed the plaintiff was informed by the donor that everything had been properly settled. Well, it is said that when the donor made this remark she had in view the will, but in that will this gift was repeated, and therefore what was accepted by the donee at that time was the gift of this property and seeing that that gift was still in force, and is held now by the Court to be still in force, I think the Court must hold that there has been due acceptance by the donee. The only question then remains whether the fact that the will was subsequently made and the original deed destroyed should deprive the plaintiff of her rights. In my opinion this circumstance should not in any way deprive the plaintiff of her rights, seeing that the donor never intended to revoke the gift. She executed the will, not with the object of revoking the gift, but with the object of strengthening and confirming the gift. It was found, however, that the will was invalid, and the result of the will being invalid would be that the gift would remain in force not as a legacy but as a *donatio mortis causa*. The deed was destroyed not by the donor but by Mrs. Horne, who had no authority to destroy it. The power of attorney would give to Mrs. Horne no authority to make revocations of testamentary gifts; that would be a power reserved to the donor, to the person who executed the power of attorney, and, therefore, I think the destruction of this document must, so far as the donor is concerned, be considered as a purely accidental circumstance. In making these remarks I do not wish it to be implied in any way that even if Miss Castray herself destroyed the deed such destruction would, under the circumstances, have

amounted to a revocation of the gift, because it would have been clear that her sole reason—as it was the sole reason of Mrs. Horne in destroying it—was that there was a subsequent will, which was looked upon as a valid will, and as confirming the *donatio mortis causa*. It was considered that there was no necessity for two documents doing the same thing; therefore the first document was destroyed. Therefore, in respect of this *donatio mortis causa*, judgment must be given for the plaintiff. The only other question on which I need say a few words is how far the further plea which has been filed should affect the plaintiff's case. The plea, in my opinion, does not really affect the plaintiff's rights; it does not show that what Mrs. Beale and Miss Castray had to restore was more than the capital amount which they themselves received. It is admitted that the capital sum does not amount to more than £2,300, and the account shows that there are ample funds in the estate to pay back that amount, and even more. The judgment in this case does not affect the Castrays in Tasmania; it will be open to them to raise an action and to claim that the agreement, which is referred to in the plea, has a wider effect than the Court now is inclined to give to it. The decision in the present case, therefore, will not be binding upon them, but I do not think what is disclosed in the plea is sufficient to justify the Court in staying judgment. It seems to me, as far as the Court can now judge, that there is no probability that these people will succeed in any action to recover the property. Judgment will be in terms of prayer (a) of the declaration, and costs will be paid out of the estate. The course will be that the transfer will be taken by the executor of Castray from Beale's estate, and that then transfer will be given by the executor of Castray to the present plaintiff.

[Plaintiff's Attorney, C. Brady; Defendants' Attorneys: Scanlen and Syfret.]

COX V. COX.

{ 1902.
{ Nov. 25th.

This was an action for divorce brought by Thomas James Cox, of Port Elizabeth, against his wife (*née* Marie Car-

dew), on the ground of adultery. The plaintiff did not ask for costs.

Mr. Close for plaintiff; defendant in default.

Formal evidence was given as to the marriage of the parties at Port Elizabeth on March 11, 1881.

James Thomas Cox, the plaintiff, stated that he was married to the defendant on March 11, 1881, by the Resident Magistrate of Port Elizabeth. There had been no issue. They were married by ante-nuptial contract out of community of property. His wife had no property of her own, and he (plaintiff) settled certain furniture on the defendant by the said contract. As the result of the defendant's drunken habits and general behaviour, plaintiff applied in 1892 for a deed of separation, which was granted. He then paid her the sum of £100 for the furniture settled on her, and further agreed to pay her £5 per month for her support. The defendant then left him, and led a wandering life. As the result of information which had reached him from Cape Town, he had instituted an action for divorce on the ground of adultery, with forfeiture of the benefits under the ante-nuptial contract and deed of separation.

By the Chief Justice: Before the deed of separation was executed, the defendant had not committed adultery.

Edward Cave, who stated that in September last he was assistant detective at the International Investigation Bureau, gave evidence as to the alleged adultery.

Henry Tickton, superintendent of the said Bureau, gave corroborative evidence, stating that on being fetched by Cave he went to No. 7, Buitenkant-street, and entered the house.

By the Chief Justice: He did not know the proprietor of the house. He was induced to open the door because he had received information that the parties were in the room.

[De Villiers, C.J.: So you consider that when the International Detective Bureau is investigating a case, you have the right to open doors?]

Witness: We have a right to get evidence.

[De Villiers, C.J.: And go into a house and open doors?]

Witness: I knocked first. The door was unlocked.

[De Villiers, C.J.: The people might object, however. They might throw you out of the place.]

Judgment was given as prayed.

HUNTER AND JACKSON V. BURRILL.

This was an action for cancellation of contract of sale and damages. On or about July 16, 1902, the plaintiffs sold certain premises in Chiappini and Waterkant-streets, Cape Town, to the defendant for the sum of £8,750, upon certain terms and conditions, which, it was alleged, had not been fulfilled. The defendant had paid £250 in respect of the purchase price, but had refused to pay the balance, in accordance with the terms and conditions of the broker's note. The plaintiffs asked for cancellation of the contract of sale and £500 damages, together with interest at 6 per cent. per annum.

Mr. Benjamin for the plaintiff; defendant in default.

Vincent Arthur Hunter stated that, with the co-plaintiff (his partner), he was the owner of certain premises in Chiappini and Waterkant streets, the numbers being 32, 34, and 36, Chiappini-street, Cape Town. On July 16 last he sold the place for £8,750 to the defendant Burrill, upon the terms and conditions set forth in the broker's note. The broker's note provided that "you as sellers pay 2½ per cent and stamps for brokerage." The broker's note was duly accepted by Burrill. He gave defendant possession of the property from July 16. He now claimed cancellation of the sale and damages. In respect of the latter, he claimed the broker's commission, viz., 2½ per cent. on £8,750, amounting to £218 15s. He had already paid £50 to the broker, and was liable for the balance. The defendant was still in possession of the premises. They (the plaintiffs) wanted £90 per month rental; they had been offered £80 per month before defendant purchased the premises. They had had no offer since, but that was because the defendant being in possession, they could not do anything. They claimed for rental in respect of the premises as from July 16. The defendant had paid £250 on account of the purchase price, but had refused to pay the balance. The plaintiffs were willing to set the £250 against the damages (broker's commission and rental).

By the Chief Justice: If he sold now, he could get more than £8,750; in fact, they had had an offer for £1,000 more, but they could not get that now. Land had risen since in value, but they did not get buyers every day.

By Mr. Benjamin: If he sold the property again, he would have to pay fresh brokerage.

Mr. Benjamin pointed out that the summons was only issued on October 23, three months and a week after the date of the sale.

The Court made an order for cancellation of the contract of sale, with £200 damages and costs, possession to be given up on December 5 next.

ESTATE GARDNER V. TOWN COUNCIL OF PORT ELIZABETH. { 1902.
Nov. 25th.

Sale by auction—Sub-division of lots — General plan — Open space for public purposes—Executor—Registration.

An executor caused a piece of land falling within the Municipality of P. and forming part of the estate to be sub-divided and sold by auction in lots according to a general plan which was displayed at the sale. The plan showed among the lots an "open space for municipal purposes." The executor died and another executor was appointed, who proposed to sell the open space in lots, and asked the Municipal Council of P. for its consent, which was refused.

Held, in an action by the executor against the Municipal Council and some of the purchasers of lots at the sale, that the plaintiff was bound by the acts of the previous executor, and was not entitled to an order compelling the Council to give its consent.

This was an action instituted by the executor dative of the estate of Gardiner against the Town Council of Port Elizabeth. The testatrix, Johanna Magdalena Gardiner, died in 1864, notice of death not being filed until 1877, in which year John Alfred Holland was appointed executor dative. Holland caused a plan of sub-division to be made, and caused a certain lot to be sold and deducted. There afterwards remained registered in the name of the testatrix land to which the Town Council now made claim. Holland was the predecessor of the present plaintiff. Upon the plan of sub-division, which Holland caused to be prepared, were endorsed on a certain portion of the land the words, "Reserved for municipal purposes." To this portion of the estate the Town Council now made claim, and plaintiff complained that the Council had wrongfully and unlawfully refused to allow him to sell this ground. He applied for an order confirming his title to the land, and authorising him to sell the same in accordance with a certain plan which had been prepared. The defendant corporation admitted that the ground was still registered in the name of the executor, but they alleged that the ground had been reserved by the plaintiff's predecessor as an open space for municipal purposes, and that the Council had since exercised control of the land in the interests of the public; they alleged that there was a servitude on the property, and that it must remain under municipal control for municipal purposes.

Mr. Schreiner (K.C. (with him Mr. Buchanan) for the plaintiff; Mr. Searle, K.C. (with him Mr. Benjamin) for the defendants.

Walter Piers Murray, assistant registry surveyor, produced the office copy of the outline of the diagram attached to the title deed. The title deed itself was in the Surveyor-General's office. The outlined diagram showed the deductions. Witness produced the title of the deceased testatrix in 1841, and plans of 1857, 1862, and 1878. There was no record so far as witness was aware of any deduction of the open space shewn on the plan. No sub-division was shown on the original title.

Alfred Charles Oakes, officer in the Surveyor-General's office, produced the

original grant and diagram, dated 1820. There was no record of deductions of ground for municipal purposes. If there were such a record it would be found in the Deeds' Office.

William Grount, clerk in the employ of Messrs. Walker and Jacobson, said he had searched the Deeds' Office and Surveyor-General's office and could find no trace of a deduction of the open space for municipal purposes. Witness found a list of deductions of the lots which had been disposed of. He produced a copy of this list. Witness had investigated the diagrams of all the lots surrounding the open space, and in none of them was there any reference to the open space.

Thomas O'Brien, the plaintiff, said he succeeded Mr. Holland as executor. Witness knew Jacobus Andries Rudolph, who was an aged man. He was the only heir witness personally knew of. On the plan of 1878 the open space for municipal purposes first appeared. Witness caused a plan of subdivision to be prepared after his appointment. The witness deposed as to certain correspondence. The open space was rated at £500. In the assessment it was stated that the owner or reputed owner was unknown. It was stated in a footnote to the roll that the ground had not been transferred to the Municipal Council, but that it was an open space for municipal purposes. The ground was worth £1,000. The Town Council had not improved the ground. Witness had seen Mr. Pinn the former Town Clerk, as to getting the land for a certain public purpose, but that gentleman said the Council did not have the title or transfer of the land.

Mr. Schreiner closed his case.

Mr. Searle called,

Herbert Elwood, who said he was at the sale of lots, and purchased some of the property. He understood that the open space was reserved for municipal purposes. Mr. Holland said the land was for a market square. Witness did not think he would have paid so much for the land if he had not thought there would be a market square. Games were played on the open space.

Charles Ernest Hollings, stated that he was an accountant and law agent at Port Elizabeth, in 1879. He was then a partner in the firm of J. A. Holland and Co., auctioneers. Mr. J. A. Holland, the exe-

cutor dative, was the senior partner. Previous to this witness had been six years in the firm as clerk. In or about 1882 he left the business, and in the early part of 1883 he left Port Elizabeth. He (witness) was at present doing certain work for the defendants' local attorneys. He remembered the sales of landed property in the estate of Gardiner; he was present at the sales himself. The plan of the ground was made by Surveyor Pinchin. The plan that he (witness) had in court was not the actual plan produced at the sale; it was a copy. The actual plan had been placed in Holland's strong room. He (witness) thought Holland took Mr. Smith, surveyor, into partnership with him before he died, and he believed that Mr. Smith then took over his business. Witness saw the original plan as signed by Pinchin on Wednesday last. The plan produced showed the different lots marked off, giving the purchasers at the sale, in most cases. The whole property was disposed of by Holland, as far as witness knew. It was Holland's intention to close the estate by the second sale, to sell all that was left. He had some slight recollection of the advertisements in the "Port Elizabeth Telegraph," in 1878 and 1879; he believed Holland drew them up himself. The phrase in the first advertisement "plans at the auctioneers," referred to the plans now produced. With regard to the second advertisement the five acre lots with right to the commonage would not be shown on the plan, but the 80 lots referred to would be shown there. Witness kept the roll book of the second sale in 1879 himself; not the 1878 sale. There was a diagram of Biesjesfontein in the possession of Pinchin at the time. Witness saw the papers in the possession of Pinchin last week, Mr. Smith showed them to him. It showed a certain deduction of the area sold in the estate. A certain portion was marked off, coloured blue something over 25 morgen in extent, that included building plots, streets, and those open spaces marked off on Pinchin's diagram.

Cross-examined by Mr. Schreiner: The eleven lots on the roll book of the second sale (A—K, £225), were large lots, five-acre lots. He could show the Court what was sold on May 13, 1879, but not what was sold in 1878. The numbers given on the roll book corresponded with the numbers on the plan.

By Mr. Searle: There was no other plan but that produced at the sale with the exception of that showing the lots A—K.

By Mr. Schreiner: I don't remember any lots being held over at the sale.

Mr. Searle put in certain documents and closed his case.

After hearing Mr. Schreiner on the facts for the plaintiff, the Court gave judgment for the defendant, with costs.

De Villiers, C.J.: It is not necessary to hear Mr. Searle on behalf of the defendant. The plaintiff is the executor dative of the estate of the late Mrs. Gardiner, and in that capacity he finds that there is certain property still registered as the property of the estate, which he still wishes to sell. He accordingly applied to the Town Council of Port Elizabeth for leave to sell it in lots, according to the plan of sub-division, and that leave was refused. Accordingly the plaintiff brought this action. He sues in his capacity as executor dative, but before considering what his rights are as executor dative, let me consider what the rights of an ordinary individual would have been under similar circumstances. Supposing a person had sold land which he had subdivided into lots, and at the public sale had displayed a general plan on the basis of sub-division upon which there appeared an open space for municipal purposes. The question would be: what would be the rights of the purchasers as against the seller? Clearly in such a case, quite independently of questions of transfer for registration—and I am now dealing only with a contract between the parties—the Court would hold that there was intended to be a contract between the purchasers and sellers; that the space so indicated should be an open space for municipal purposes. A municipality exists for the benefit of the public; that is the sole object of its existence. If, therefore, there is an open space for municipal purposes, it means an open space for the benefit of the public, under the control of the municipality. Every purchaser of lots at such a public sale would clearly understand that that is to be for his benefit as one of the public of that neighbourhood. That being so, further questions might arise as to whether it is necessary, in order to bind particular

successors to the seller that there should be registration; but that question does not arise where it is the original seller who comes to the Court for assistance. If there had been an original seller coming to the Court for assistance, and it had been proved that there is one purchaser still of an adjoining lot who must be taken to have bought in the belief that that space is to be left an open space, the Court would refuse to grant assistance to that original seller. It so happens in the present case that it is not the original seller, in the sense that it is not the same individual. It is the successor of that individual, the executor appointed after the previous executor who died after making these sales. The previous executor was Hollond. In his capacity as executor, he proceeded to sell these lots, and has no doubt received enhanced prices for the lots in consideration of the existence of the open space, but it is strenuously argued that this must be treated as a gift, and that an executor has no right to make a gift of an open space for municipal purposes. If no consideration had been given, no doubt it would have been a gift, and the Court would have regarded it as such, but this must be looked at as part of a large transaction. The executor comes to the conclusion that it would be for the benefit of the estate to cut up this land in lots, and he comes to the conclusion that larger prices can be obtained for these lots if an open space is left for municipal purposes. It is common knowledge that open spaces are for the benefit of a community. The absence of large open spaces in Cape Town, for instance, is very often remarked upon, and in the same way when strangers go to London they are struck by the large open spaces which are there provided for public purposes, and which make London one of the healthiest cities in the world. So it is common knowledge that for the health of the inhabitants open spaces of this kind are of great value, and it stands to reason that the fact that there is to be such an open space would weigh with the intending purchaser. I think we must take it for granted that this must have affected some of the purchasers, and that so far from there being a want of consideration, there is ample evidence of

consideration. We must look upon this case as if the person coming to the Court for its assistance is the person who has actually sold. Taking that view of the case, it is unnecessary to fully discuss the wider question whether there has been registration of this servitude, such registration as would amount to a notice of the servitude to a particular successor of the seller, but there certainly seems to me to be strong reason for holding that there has been such registration. The diagram attached to the servient tenements, which is the original one, and which is very small, refers to a plan marked "P.11 A." In the small diagram itself it would have been impossible to show each of the lots; a pin-prick would probably show the open space upon this minute diagram. We find that the plan "P.11 A" is on a very large scale, and this shows the land reserved for municipal purposes. It is quite within the range of possibility that people may have gone to the Deeds Office and seen this general plan, and it is reasonable to assume that if they had done so it would have affected their minds in purchasing these different lots. I am by no means prepared to say that there was not registration, but in the present case this question does not arise. The question is whether the seller himself, who sold the lots with the distinct contract as between himself and the purchasers that there should be an open space for municipal purposes, is entitled to say: "You must now allow me to cut up these lots." In my opinion he had not that right, and the judgment of the Court must therefore be for the defendant, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendant's Attorneys: G. Trollip.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

SCHONBERG V. SCHONBERG (1902.
AND CONNELLY. (Nov. 26th.

This was an action for divorce.

Mr. Buchanan was for petitioners, defendants being in default.

Petitioner stated that he married respondent on July 4, 1900. They were not happy, and from the very first he had to complain of her familiarities with other men. He found her at various bars drinking with men whom he did not know. In September, 1901, he found a letter under her pillow addressed "To my own darling," signed "Charles," and enclosing a postal order for 10s. At the beginning of the present year they became acquainted with the second defendant, with whom his wife became familiar. On March 17 she left the plaintiff, who traced her to a Woodstock hotel, and found her occupying the same bedroom with the second defendant. He took her back on the understanding that she would never see the man again, but a week after she left him, and went to Gordon's Bay. In August last she admitted adultery with Connelly, and said she would do as she liked. On August 25 she again left him, and had not since returned.

Further evidence was led showing that respondent had recently lived in Roeland-street, sharing a bedroom with another man—not Connelly.

A decree of divorce was granted.

Ex parte RADEMEYER.

This was an application for the appointment of a *curator bonis* in the estate of Johannes Theodorus Rademeyer.

Mr. Buchanan appeared for plaintiff, defendant in default.

Mrs. Habertha Frederica Rademeyer stated that she married defendant on November 21, 1871, in community of property. After living at Beaufort West—where they had a farm—they removed to the Paarl, where they had a house, and they also owned a small

house in Cape Town. Defendant was about 58 years of age, and there were nine children, four being over age. A few years ago her husband became melancholy, and had latterly become very restless, rambling around Cape Town, purchasing unnecessary articles and making foolish speculations.

Dr. Frederick William Weber said that for the last five years he had been attending defendant for melancholia. There was a general mental enfeeblement and lack of reasoning capacity.

Evidence was also led showing that on one occasion defendant bought three pianos and an organ and 55 mules, giving away the whole, with the exception of two. He walked about the house in which he resided in the middle of the night, beating the servants. He wanted to buy a motor-car for £800, and to bet people that he would take them to Johannesburg and back in 24 hours.

Stephen Rademeyer, step brother to the respondent, said he lived with his brother, who had changed very much of late.

An order was granted declaring defendant incapable of managing his own affairs and appointing his wife as curator of his property, with the powers prayed for in the summons. The Chief Justice said he would suggest that the wife should take a little more pains to control his person, and should use some persuasion to get him to return with her to the Paarl, so that he should not be a nuisance to others.

BARRATT V. MCKENZIE AND CO.

Lost luggage—Delivery agent— Postponement of trial.

This was an action brought by Col. Barratt, of the Royal Army Medical Service Corps, against Messrs. A. R. McKenzie and Co., for the delivery of certain baggage belonging to plaintiff, or for the payment of the sum of £390, its value, together with £50 damages. The declaration stated that the baggage was entrusted to McKenzie and Co., who undertook to send it to plaintiff at Bloemfontein, but they did not do so, and the baggage was lost. The bag-

gage had gone astray. It was, however, subsequently recovered, having gone to England, and about eight months afterwards it was tendered by McKenzie and accepted by plaintiff without prejudice to defendant's liabilities regarding an action which had meanwhile been commenced. The only question now was one of costs. The case had been before the Court on several occasions, and the evidence was taken on commission in Australia of Captain Webb, Colonel Barrett's agent, who had instructed defendants to send the baggage to Mr. Bishop, at the South Arm, at the docks, for despatch to Bloemfontein. On November 23, 1900, the defendants received the baggage from plaintiffs; it consisted of two trunks and cases containing clothing. Defendants in their plea said that they undertook to deliver the baggage at the depot at the South Arm to an officer named Jones; this they carried out, and the said officer, they alleged, sent the luggage to England without their instructions. The replication stated that defendants negligently and without authority handed the baggage to some unknown person at the Docks, by whom it was sent to England. Plaintiffs accepted the baggage on its return from England on condition that the costs of the action should abide the result of the trial. Defendants alleged that in consequence of orders they sent the goods on a wagon to the South Arm, where an officer unknown to them ordered the baggage to be placed on a transport for England. They made a tender of £25 in full settlement of plaintiff's claim, this being the amount at which they were valued for insurance purposes when plaintiff left the luggage in their care.

Mr. Searle, K.C. (with him Mr. Benjamin), for plaintiff; Sir H. Juta, K.C. (with him Mr. Buchanan), for defendants.

Lieutenant Jones, Army Service Corps, said that in November, 1900, he went to the South Arm in charge of the Military Parcels Office. Mr. Bishop was the chief corresponding clerk. When goods came to the office a receipt was given. The goods said to have been delivered by Captain Webb in December were never delivered at the office, nor was there any record of a way-bill for the package being received from McKenzies. The witness explained the procedure in sending goods for embarkation to England,

Witness thought that the probable explanation of the package going to England was that some officer thought it was his. Witness had no authority to order goods to be taken on board.

Cross-examined by Mr. Buchanan: The embarking officers would have power if they saw baggage belonging to an officer who was sailing by a particular vessel to order it to be taken on board, but witness did not think they would exercise that power. In such a case no receipt would be given.

Francis Bishop produced books showing the record of goods received in the military parcels office. For twelve months after the date this package was said to have been delivered no parcel was sent through the office to England. Witness had no authority to send goods to England.

Cross-examined: The office was established for the purpose of receiving gifts from England. They did not deal with baggage at all.

Mr. Searle closed his case.

Mr. Buchanan applied for a postponement in order to call evidence for the defence to show that the package was delivered at the Docks and that an embarkation officer ordered it to be taken on board a transport.

[De Villiers, C.J.: That contradicts your plea. You say in your plea that it was handed to Lieutenant Jones or his authorised agent.]

Mr. Buchanan said the question was whether the defendants had not substantially carried out the directions given to them.

Mr. Searle objected to a postponement, and

The Court refused the application.

Mr. Buchanan was then heard in argument on the facts of the case.

De Villiers, C.J.: When application is intended to be made for a postponement of trial it is usual to hand in affidavits as to the reasons for such application, and the application is invariably made before the case is heard. In the present case I am not aware of any affidavits having been made stating the reasons why a postponement should take place. The case was part heard when counsel informed the Court of some intention of applying for a postponement. Even then, if some valid reason had been shown, or if the other side had consented, the

Court might have allowed a postponement, but this case has been dragging on so long, and there have been so many postponements that the time has come when there ought to be a final conclusion of the case. The declaration alleges that the arrangement was that delivery of these goods should be made to one Bishop, and for the purpose of proving this allegation, the evidence of Captain Webb, who had been employed by the plaintiff to see after his luggage, has been taken on commission; and he states positively that he mentioned to the defendants the name of Bishop as the clerk to whom delivery was to be made. Defendants in their plea, however, alleged that the direction was to make delivery to Jones. Now in either case, whether we take it that the direction was to deliver to one or the other, the plaintiff, in my opinion, is entitled to succeed. Webb has clearly proved the declaration. Then Bishop has been called, and he says positively that he never received the luggage. Jones, who, according to the plea, was the person to whom delivery was to be made, has also been called, and he says no such delivery was made. So these persons clearly disprove the plea. But it is said that if the defendants had been allowed time to call evidence, they would have proved that coolies brought the luggage to the place where it was directed to be taken, and that an officer there ordered it to be taken on board a transport. If this had been proved, there might possibly have been something in such a defence. But this is not alleged in the plea, and no attempt is made to prove it. Under these circumstances I think judgment must be given in the plaintiff's favour. The goods have now been recovered, and the only question is one of costs. I cannot help remarking that at one time the defendants seemed to have been prepared to pay the amount which they conceived to be the value of the luggage, namely, £25, which was the value declared. I should think that if at one time they were prepared to pay the value of the luggage, they ought now to be prepared to pay the costs—costs which were incurred in consequence of their failure to deliver the luggage to the person indicated on behalf of the plaintiff, as the person to whom delivery was to be made. Defendants must therefore be ordered to pay the costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

[Before the Hon. Sir J. BUCHANAN and a Jury.]

MICHAU V. ASHE. { 1902.
{ Nov. 26th.

Libel—Damages.

This was an action brought by J. J. Michau, attorney, of Cape Town, against E. Oliver Ashe, medical practitioner, of Kimberley, arising out of certain events connected with the siege of Kimberley. Plaintiff claimed £1,000 damages for alleged defamation of character in a book written by the defendant under the title of "Besieged by the Boers: Diary of Life and Events During the Siege," written and published by the defendant.

The plaintiff's declaration was as follows:—

1. The plaintiff is and was at all times material to this action a British subject, and a duly admitted attorney and notary of this Honourable Court, residing and practising his profession in Cape Town. He is also a Justice of the Peace. The defendant is a duly licensed medical practitioner, residing and practising at Kimberley.

2. In or about the year 1900 the defendant falsely and maliciously wrote and published in a book, entitled: "Besieged by the Boers: A Diary of Life and Events in Kimberley During the Siege," of which the defendant is the author, the following defamatory words of and concerning the plaintiff, to wit: "A Dutch lawyer, a prominent Bondman, who cleared out from here the day before we were cut off, was captured by Methuen's people some weeks ago, and is now in gaol at Cape Town. Rumour says that when caught he was in an office telegraphing some information to the Boers, but the truth is not known. Now he keeps writing to his relatives asserting his innocence, and they publish his letters. He says he was arrested by the Boers, as he was suspected by them, and that, being a leading Bondman, he was suspected by the English. When he is tried, I have little doubt his Boer friends will swear that he was arrested by them, but Kimberley will never believe that, whatever the Court does," meaning

thereby that the plaintiff was a rebellious subject, and guilty of treasonable acts and practices.

3. The said publication has been and is still being circulated freely both in England and throughout South Africa, and the plaintiff has sustained damage thereby to the extent of £1,000.

The plaintiff claims: (a) The sum of £1,000 as damages aforesaid; (b) alternative relief; (c) costs of suit.

To this declaration the defendant pleaded as follows:

1. The defendant admits paragraph 1 of the declaration.

2. He admits the allegations in paragraph 2 of the declaration, save and except the allegations that all the words referred to are defamatory, that he published the said words falsely and maliciously, and that the plaintiff has sustained damages in the sum of £1,000, which allegations he denies.

3. He says that the matters of fact alleged in the passage quoted in the declaration are substantially true and correct, but he admits that he is legally liable for publishing the rumour regarding the plaintiff to the effect that he was a rebellious subject and guilty of treasonable acts and practices, and he does not justify the publication of the same, which he withdraws.

4. He has paid into Court the sum of £100 by way of satisfaction or amends in respect of the plaintiff's claim, and tenders hereby to pay the plaintiff taxed costs to the date of this plea.

Wherefore, subject to the said payment into Court and tender, he prays that the plaintiff's claim may be dismissed with costs.

The plaintiff, in his replication, denied that defendant's payment into Court was sufficient, and joined issue.

Mr. Burton (with him Mr. J. E. R. de Villiers) for plaintiff; Sir H. Juta, K.C. (with him Mr. Upington), for defendant.

John Johannes Michau, the plaintiff, stated that he went to his house at Modder River the day before the Boers surrounded Kimberley. He took his wife and family with him, and his brother-in-law, Dr. Broadhurst, and Mrs. Broadhurst accompanied them. They remained two days after the battle of Modder River. He was arrested by the British. He was charged with communicating with the Boers, allowing Boer officers to visit his house, and showing lights to the

Boers. He was detained in gaol close upon four months. On the 26th January he was handed over by the military to the civil authorities. He was committed on a charge of high treason and released on bail. On the 23rd March, 1900, he received a communication from the Attorney-General, declining to prosecute. He first saw the defendant's book in August of this year. He tried to get a copy of the book in Kimberley, but failed. In consequence of the passage referred to, he sent a letter dated August 23, to Dr. Ashe, calling upon him to apologise and withdraw the statements and pay damages. He received no reply. He issued his summons about a fortnight afterwards. After the pleadings were closed, his attorneys wrote to the defendant. Defendant's attorneys replied that their client did not justify the remarks concerning the plaintiff. He had paid into court a sum of £100, which he considered ample compensation. They pointed out further that he parted with all rights on the book on the 5th April, 1900, but, notwithstanding, he had written to the publishers asking them to omit the paragraphs in question. The defendant's attorneys added: "Our client understands that there is very little demand for the work, and consequently the sales are few."

Mr. Burton: Can you say how this libel has inflicted injury on you?

Plaintiff: I know it has embittered many of my friends against me in Kimberley, people who attached weight to whatever Dr. Ashe said at the time, and also my clients. Upon my return to Kimberley since the war, I have found in a great many instances that the attitude of friends and clients has changed. I have got no Kimberley connection now to speak of.

Mr. Burton: I think Dr. Ashe describes himself as the "boss doctor" of Kimberley?

Plaintiff: Yes. Even Dr. Ashe, I might mention, whenever I met him in Kimberley, always refused to recognise me, and kept himself aloof from me the same as my other friends and clients.

Cross-examined by Sir. Henry Juta: Are you quite sure that your unpopularity in Kimberley was not due to the fact that you ran away from Kimberley the day before the siege, and nobody else did?

Witness: No

Didn't you leave Kimberley and advise others not to leave Kimberley?—That I deny absolutely. Nobody ever asked my advice.

You advertised that the reason why your severance with Kimberley took place in the legal world was owing to your political feelings. You sent circulars round all through the country, and advertised, didn't you, giving no reason why you left Kimberley?—I sent circulars out.

The reason why your legal connection with De Beers ceased was owing to political feelings?—I don't think so.

What did you advertise?—You have got the papers. I merely advertised that I had opened business in Cape Town.

You stated that the reason was that owing to political differences with De Beers your legal connection had been severed?—I don't think so.

[Buchanan, J.: In the first place did you send out a circular?]

Witness: Yes.

Sir H. Juta: Have you got a copy?

Witness: I suppose I have.

Will you kindly send for it?—I don't know where it can be found.

Now, take the statements in the book. You are a Dutch lawyer?—I don't know that I am a Dutch lawyer. I am a Dutchman.

And you are a lawyer?—Yes.

You were a prominent Bondman at the time?—I think so.

You did leave Kimberley the day before the siege?—Yes.

You were captured by Methuen's people?—Yes.

There was a rumour that you had communicated with the Boers?—I was charged with that.

You did write to your relatives asserting your innocence, and they published your letters?—Yes.

You said you were suspected by the Boers and they arrested you?—Yes.

And you said that, being a leading Bondman, you were suspected by the English?—Yes.

Arising out of the same circumstances you had an action against the "Argus" about your being at Modder River and your communicating with the Boers, and being guilty of treasonable practices?—No; the "Argus" said I was fighting with the Boers.

When was your action brought against the "Argus"?—Towards the end of 1900.

Your declaration in that case wound up by saying it was alleged that the plaintiff had been guilty of treasonable practice, and was not a fit and proper person for other than disloyal subjects of Her Majesty to associate with. The same circumstances with regard to Modder River were in this case?—Oh, no, as I said in that case, the "Argus" said I had been fighting with the Boers.

Yes, but all at Modder River?—I suppose so.

You got damages out of the "Argus" at that time to the extent of £250?—Yes.

Not content with that, you then proceeded to bring an action against the "Times"?—Yes.

A further action arising out of the same circumstances about your being at Modder River and treasonable practices?—Yes.

What did you get out of the "Times" for that?—I think the "Times" paid me £25 and apologised. That was a compromise.

Then you brought an action against a man called Westermann?—I sued the "Cape Times" for £500 damages, and I agreed to accept £25 by way of damages and an apology.

Then you brought an action against Westermann, who was a man who, in reply to inquiries by the military at Modder River, made certain affidavits?—I brought the action against Westermann for malicious prosecution.

However, in that you didn't succeed? No.

Whom next did you proceed to sue for the same sort of thing arising out of the same circumstances?—Then I sued the "Scotsman."

Yes, that is published in Scotland. What did you get out of them? They paid £50 and apologised.

Whom next did you proceed to sue?—Dr. Ashe.

Did you issue a summons against another man at the same time as you sued Westermann?—Not that I know of.

Have you written to the publishers of this book holding them liable?—I have written to them asking them to withdraw the statements or I should sue them.

It has become a profitable business?—May be. None of the money recovered so far has gone into my pockets.

That may be, but we don't wish to go into the details of that.

In further cross-examination, plaintiff said he started business in Cape Town in April, 1900. He employed no clerks then. He had now five clerks in his employ. He had also taken a partner. He had built up a large business.

Then I should like you to tell the jury how in the world you have suffered damages by the publication of this book in 1900, when at the same time you started in business and you have now got a very much larger business.

I say that if that and other libels had not been published—

No; but you got money for all the other libels?—The £250 or £300, that I have got for the other libels has not gone into my pockets. What I do say is not that my business has suffered so much, but that one's social position or reputation has suffered. The libel contained in this book would not affect my intimate friends.

The money in your profession is not made from the people who read this book?—I said I could not be certain. I could have made a great deal more but for these libels.

Did you say the same thing when you brought this libel action against the "Argus"? You said the same thing on each occasion. You got damages?—I have yet to learn that everybody would have the right, in spite of these judgments that I have secured, to call me a rebel for instance, or a thief, or a liar, as Dr. Ashe also calls me. I am not alone alleged to be guilty of treasonable practice, but also a liar. I say I was arrested by the Boers. He says Kimberley will never believe that, whatever the Court says.

He cannot help it if Kimberley won't believe it?—He says so.

Apparently, Kimberley didn't believe it?—He says Kimberley would not believe it. I don't believe that Kimberley ever believed that I was arrested by the Boers.

In the course of further cross-examination, witness said he was made Mayor of Somerset West about twelve months ago. About the end of March, 1900, he dissolved partnership with Mr. Haarhoff. That involved, so far as he was concerned, the loss of De Beers work. He was told that in view of his conduct at Modder River his continuing as a partner

in the firm would be distasteful to the De Beers Company.

That was before this book was published?—I don't know when it was published.

[Buchanan, J.: Why did you leave Kimberley?—I was advised that it would be better to get away with my wife and children from Kimberley, as there was likely to be a long siege.

Who advised you?—Colonel Harris told me that he had sent away his daughter the day before, and I left the day after. My intention was to come straight to Cape Town, but I found the last train had left Kimberley.

So that the persons who advised you advised others?—Oh, yes. I certainly was never asked my advice in the matter. Kimberley was in a terrible state of excitement, and I did what I thought was best for myself and my family.

I would like you to explain what the arrest by the Boers was?—I was accused by the Boers of having assisted despatch-riders and having communicated with British troops. I was arrested at my house by an escort of 20 armed men. They took me to General De la Rey's laager, and when I got there I found there were nine others, some of them my English friends. We were then charged by General De la Rey with having communicated with British troops and assisted despatch-riders, and held secret meetings at night. There was no evidence called, and after we had been kept there till late in the afternoon, we were told to go home, on our promising not to interfere at all with their movements and to keep quiet.

You went home and remained at home?—Yes.

John Wm. Yallop, of Messrs. Juta and Co., booksellers, said that the defendant's books had a comparatively good sale. Speaking from memory, he should say they sold in Cape Town about 100 copies. It was published in London in May, 1900, and they had it on sale in Cape Town in June.

Cross-examined: The fire at Messrs. Juta's took place in May, 1901. There had been very little sale of the book since then. For the last twelve months it had been dead.

Wm. Frederick Kruse, of Messrs. Darter Bros. and Walton, said the book had had a middling sale. They dis-

posed of between 70 and 80 copies locally. They sold seven copies at Stellenbosch.

Cross-examined: There had been no sales during the last twelve months.

Mr. Burton closed his case.

Sir Henry Juta intimated that he did not propose to call evidence. He would explain that Dr. Ashe was not present through any discourtesy to the Court, but he was detained in Kimberley by several very pressing cases.

Mr. Burton (for plaintiff): The whole question is whether the offer of £100 and costs is a sufficient reparation for the injury done to my client. No offer was made until after the plea had been filed. The whole of the cross-examination of my client was directed to the question of the material injury he had sustained by reason of this libel; but the matter ought not to be considered from this point of view. If the defendant had come forward in a proper spirit and apologised we should have been willing to accept even a shilling as damages. The fact that the plaintiff has obtained damages in other cases ought not now to prejudice him. This libel imputes to him not only treason (a very serious crime), but that he is a liar. He is a man holding a good social position; he is a J.P., and his good name and reputation have been seriously damaged by this publication. We do not want money, but what we do want is an expression of opinion from the jury as to the merits of this case. On the question of libel see *Odgers on Libel* (p. 355, 3rd edition). All the aggravating circumstances he mentions are here present. Then as to the publication of the libel. Dr. Ashe's book has been freely and widely circulated, and at the very time this book was written the writer must have known that Mr. Michau's case was *sub judice*. In the case of *Michau v. Argus Company* (10 Sheil, 722), Laurence, J.P., said that if a man expressed an opinion on a matter still *sub judice* he undertook a very serious responsibility. A book is a very different thing from a mere newspaper report, which is always a more or less hurried publication. If a man writes a book he must be presumed to have taken time to think of what he writes. Then, again, this book was not published till two months after Mr.

Michau had obtained damages from the Argus Company. Dr. Ashe cannot now be heard to say that he has put it out of his own power to suppress the book. *De Crespigny v. Wellesley* (5 Bingham, 402). Another element in this case is the long continued publication of the book, and another is the conduct of the defendant. He refused to apologise or to make adequate reparation when called upon to do so. The book itself shows not only what is known in law as *animus*, but actual *animus*. Dr. Ashe seems to have no respect for Courts of Law, for he says that whatever the results of the trial may be, Kimberley will never believe that Mr. Michau was arrested by the Boers. The inuendo is that if the plaintiff should happen to escape the meshes of the law we shall all continue to believe him guilty. Then as to the conduct of the defendant. He is asked to apologise, but takes no notice of the request. After the pleadings have been closed the plaintiff gives him another chance, and asks defendant to withdraw his book, and to express his regret at having published it; and what is his reply? He takes refuge behind a mere legal quibble, and says that he has done all he could to suppress the book. Defendant has acted in a cowardly manner (1) by not acknowledging the wrong and frankly apologising, and (2) by not coming into the witness-box to-day.

Sir H. Juta, K.C. (for defendant): This is a very simple case, and if the case can speak for itself, why not let it do so? As to any question of malice I would refer to the argument of plaintiff's counsel. He says he does not want damages, but what then does he want? He comes into Court for damages. Does he want to punish Dr. Ashe? If so, we must not talk about malice. He could not show that Dr. Ashe's book was still in circulation; the book is dead. The plaintiff has suffered no damage. He commenced business in Cape Town without a clerk, and now he admits that he employs five or six, and is in very flourishing circumstances. He has been libelled several times, but these libels seem to have done him more good than harm. If a man has been injured in his good name of course he can come into this Court for redress; but surely the Court will not allow him to make a living out of such proceed-

ings. The plaintiff in this case has brought actions against the "Argus," the "Cape Times," and now he brings an action against Dr. Ashe. All these actions are founded on the same set of circumstances. The character of the plaintiff has already been vindicated, and I submit that if any damages are awarded they should be merely nominal.

Mr. Burton was heard in reply.

Buchanan, J., in summing up, said that the question for the jury to decide was whether the amount paid into court was sufficient for any damages that the plaintiff might have sustained. There was no dispute as to the facts, and he might almost adopt a method adopted on another occasion, and simply say: "How much, gentlemen?" His Lordship then reviewed the salient features of the case.

The jury retired to consider their verdict, and after an absence of ten minutes, they returned into court, and stated that they had found a verdict for the plaintiff for £5 damages.

Mr. Burton: Do I understand this to be £5, and £5 only?

His Lordship assented.

Mr. Burton: I would like to know if it means £5 only, or £5 in addition to the amount paid into court?

The Foreman: £5 only.

Sir H. Juta: We get the costs after date of tender.

Mr. Burton said he applied for judgment in the terms of the verdict, and asked for costs of the whole action.

Sir H. Juta objected, and pointed out that the plaintiff had refused to take the money paid into court in satisfaction of his claim.

His Lordship, after further argument, entered judgment for the plaintiff for £5 damages, with costs to date of tender. plaintiff to pay the subsequent costs, leave being reserved to the plaintiff to move a full Court on the whole question of costs.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Scanlen and Syfet.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

Ex parte MEYER. { 1902.
Nov. 27th.

Mr. Alexander moved for the admission of Harold Lionel Meyer as an attorney-at-law and notary public, the oath to be taken before the Resident Magistrate of Hope Town.

Application granted.

Ex parte PEARSON.

Mr. Close moved for the admission of Wilfrid Vernon Pearson as an attorney-at-law and notary public.

Application was granted, and the oath administered.

PROVISIONAL ROLL.

BARENSKIE AND ANOTHER V. GLUCKMAN.

Mr. Alexander moved for the final adjudication of defendant's estate as insolvent, the provisional order having been granted on the 19th inst.

Order granted.

COLONIAL GOVERNMENT V. DAMBE.

Mr. Nightingale, for plaintiffs, asked for costs of suit, the sum of £9, interest on certain mortgage bond for which defendant had been sued, having since been paid.

The application was granted.

COLONIAL GOVERNMENT V. SCHOLTZ.

Mr. Nightingale moved for provisional sentence for £4 1s. 8d., being interest on certain mortgage bond.

Motion granted.

COLONIAL GOVERNMENT V. JOHANNES VERMEULEN.

Mr. Nightingale moved for provisional judgment for £4 19s. 2d., interest on a certain mortgage bond.

Motion granted.

LAGESEN V. PETERSEN.

Mr. M. Bisset moved for provisional sentence for £34 18s., interest on a certain mortgage bond.

Motion granted.

MACHANIK V. SIMMONS. { 1902.
Nov. 27th.

Bail bond—Provisional sentence.

The Court refused to grant provisional sentence on a certain bail bond, on the ground that should the bailee surrender himself to prison the bailor would be relieved from liability.

This was an application for provisional sentence for £39 13s., upon a certain bail bond, entered into jointly and severally by defendant and his partner; the latter had gone to England.

Mr. Close (for plaintiff): This is a liquid claim. See *Kennedy, N. O., v. Haarhoff* (2 H.C., 215) and *Colonial Government v. Gock and Chapman* ((3 H.C., 216). We are, therefore, entitled to provisional sentence.

[Maasdorp, J.: But the defendant can still surrender himself to imprisonment, and then the liability of his sureties ceases.]

The defendant (who appeared in person): The Sheriff told me that as soon as the man for whom I became security should appear by counsel, my responsibility would cease.

[De Villiers, C.J.: Under what rule do you apply?]

Rule 14.

[De Villiers, C.J.: What has become of the debtor?]

I am not instructed. I understand, however, that there were certain former proceedings against him, and that, in consequence of these, certain moneys were paid to the creditor.

[De Villiers, C.J.: This is not a case for provisional sentence; the litigants must go into the principal case.]

WUNDER AND HUERSWALD V. HAMPSON.

Mr. Burton moved for provisional sentence on two bills of exchange for £150 and £100 8s. 3d.

Granted.

WALKER V. BLACK.

This was an application for provisional sentence on certain bills of exchange, and for judgment under Rule of Court 329d. Certain of the bills of exchange were admitted, subject to certain set-offs, which the defendant claimed; but one for £397 14s. 2d. was in dispute. Plaintiff admitted that £250 had been paid on account of this bill, but defendant said that, in addition to the £250, a further sum of £141 9s. 8d. was paid in respect to this bill. Plaintiff denied this. Plaintiff claimed £87 1s. 5d. for moneys disbursed on defendant's behalf, and the amount of the bills of exchange, less £215 13s. 6d. The defendant filed an affidavit, to which he attached a cheque in favour of plaintiff for the sum of £141 9s. 8d., which had been cashed by the Standard Bank, and an account, dated June 2, subsequent to the date upon which the disputed bill fell due, which did not include the item for the amount of the disputed bill. Defendant alleged that plaintiff owed him £49 7s. as rebate upon freight, according to agreement, and £23 19s. 6d. for goods received through them in a damaged condition. Edward Wilson, agent for the plaintiff, stated on affidavit that the £141 was paid in settlement of another bill, on which defendant was not being sued. The amount referred to was only calculated to the end of May. He denied the claim for rebate and damage.

Mr. Benjamin appeared for the plaintiff; Mr. Upington for the defendant.

Mr. Benjamin said that the defendant had been barred in respect to the illiquid claim.

After hearing Mr. Upington in argument on the facts, the Court gave judgment.

De Villiers, C.J.: In regard to the liquid claims, the probabilities of the case seem entirely in favour of the plaintiff, and the Court will give provisional sentence upon the liquid claims. As to the illiquid claim, there will be no order; leave will be given to

defendant to enter appearance and purge his default, so that the principal case can be decided.

MENDELSSOHN V. STERN.

Mr. Russell moved to make final a provisional order for sequestration.

Defendant appeared, and asked for a postponement, in order to enable him to arrive at a settlement.

The case was ordered to stand over until December 12.

Postea, December 12: The Court granted an order for the final adjudication of respondent's estate.

Postea, December 19: The above order was superseded, on agreement of parties.

TENNANT V. JARMALDIEN.

Mr. Alexander applied for provisional sentence on a mortgage bond for £800.

Granted.

TE WATER V. ESTATE OF DU PLESSIS.

Mr. Rowson applied for provisional sentence for £1,000, balance due on a certain mortgage bond, and for certain hypothecated property to be declared executable.

Granted.

ILLIQUID ROLL.

KANNEMEYER V. ALTIN. { 1902.
 { Nov. 27th.

Mr. Upington moved for judgment, under Rule 329d, for £56 12s. 6d., for money disbursed and services rendered.

Granted.

SCOTT V. WEIDNER.

Mr. Russell moved, under Rule 329d, for £74 for goods sold and delivered.

Granted.

REHABILITATION.

On the motion of Mr. Buchanan, an order was granted for the rehabilitation of Gerhardus Louwrens van Niekerk.

HADDON V. HORTON. } 1902.
Nov. 27th.
Dec. 11th.

**Prospectors—Written agreement
—Net proceeds of sale.**

A company promoter agreed in writing with certain prospectors to transfer to them a third interest in certain cases treated by them, and on sale of such claims to pay them one-third of the net proceeds. The written agreement did not contain the whole of the contract between the parties, and there was evidence to show that the intention of the parties was to throw on the company promoter the obligation to keep the claims alive.

Held, affirming the judgment of the High Court of Southern Rhodesia, that the company promoter was entitled to deduct from the proceeds of the sale the expenses connected with such sale, but not the licence fees and other expenses of keeping the claims alive.

This was an appeal from the judgment of the High Court of Southern Rhodesia in an action in which the appellant was the defendant.

The plaintiff's declaration was as follows:

1. The plaintiff is a resident of Bulawayo, and the defendant is a merchant carrying on business in Bulawayo.

2. On or about the 21st November, 1895, the defendant and one Richard Cairncross entered into an agreement, a copy of which is hereunto annexed marked "A," and which it is claimed may be considered as inserted herein.

3. Under the said agreement the defendant agreed to hand to the said James Richard Cairncross one-sixth of the nett profits of the sale or flotation of certain claims, more particularly referred to in the said agreement.

4. On or about the 19th February, 1902, the said James Richard Cairncross ceded, transferred and made over all his right, title, and interest in the said

agreement to the plaintiff. The said cession was duly given to the defendant.

6. The defendant sold the said claims, but, though requested, refuses to give an account of the dealing and disposal of the said claims and of the amount due to the plaintiff under the said agreement and cession, or to produce vouchers supporting the said account, or to pay or deliver the cash or share due to plaintiff.

7. The plaintiff has suffered damages in the sum of £500.

8. All times have elapsed, all things have been done, and all things have occurred to entitle the plaintiff to claim in this action.

Wherefore the plaintiff claims: (1) A full and true account of the dealing and disposal of the said claims; (2) that the said account be supported by vouchers and be properly debated; (3) delivery of plaintiff's proportion of the shares and payment of his proportion of the cash for which the claims were sold; (4) £500 damages as aforesaid; (5) general relief; (6) costs of suit.

"A."

Bulawayo, Matabeleland,

November 21, 1905.

An agreement entered into this 21st day of October, 1895, between William H. Haddon, of Bulawayo, Matabeleland, of the first part, and James Richard Cairncross and George Walker, of Bulawayo, Matabeleland, on the second part.

The said William H. Haddon agrees to transfer to the said James Richard Cairncross and the said George Walker one-third interest in the following claims registered in the name of William H. Haddon, viz.: Melbourne, forty (40) claims; Haylake, ten (10) claims; New Brighton, thirty (30) claims; Eastham, twenty (20) claims; and on the sale or flotation of these claims or any part thereof the said William H. Haddon binds himself to hand to the said James Richard Cairncross and George Walker one-third of the net profits of such sale or flotation.

(Signed) W. H. HADDON.

As Witnesses:

(Signed) Edgar Scale,

„ R. Lewis.

19th February, 1902.

I hereby cede transfer and make over all my right title and interest to and in

the interest I hold jointly with W. H. Haddon and Geo. Walker in an agreement, dated 21st November, 1895 (my interest in the Filabusi Company), to George Horton, of Bulawayo.

(Sgd.) J. R. CAIRNCROSS.

(Sgd.) W. H. Burrows.

., Julian M. Hurst.

To this declaration, defendant pleaded as follows:

1. Defendant admits paragraph 1 of the declaration.

2. As to paragraphs 2 and 3 thereof, defendant says that claims referred to in the document of the 21st November, 1895, annexed to the declaration, and which were in the name of defendant, as registered holder, were the property of a certain syndicate, of which defendant was manager, and the said Cairncross and one Walker referred to in the said document were the prospectors of the said syndicate, and that on or about the 21st November, 1895, an agreement was entered into between defendant, as manager of the said syndicate, and as the registered holder of the said claims, and the said Cairncross and Walker, the terms of which are contained in the said document, and for such terms defendant craves leave to refer to the said document, save as aforesaid defendant denies the allegations in paragraphs 2 and 3 of the declaration.

3. Defendant admits paragraphs 4 and 5 of the declaration, but craves leave to refer to the allegations in paragraphs 5 and 8 hereof.

4. As to paragraphs 6, 7, and 8 of the declaration, defendant denies each and every allegation therein contained.

5. Defendant says that previous to the said cession referred to in paragraphs 4 and 5 of the declaration, the said claims were sold by certain mining agents on behalf of defendant and of the said syndicate to the promoters of a company known as the Filabusi Insiza Development Company (Limited), and that, after deducting all expenses incurred in connection with the said claims and the said sale thereof, there remained for distribution, as net profits, 4,500 shares of the said company, of which the said Cairncross and Walker were entitled to 1,500 between them, and which amount the said Cairncross and Walker agreed to as correct.

6. It was a condition of the said sale in the last paragraph referred to that all

the vendor shares, including the shares of the said Cairncross and Walker, should be pooled until such time as the said shares could be sold to the advantage of all the vendors, including the said Cairncross and Walker, and such condition and arrangement was known and consented to by the said Cairncross and Walker, and the said shares were accordingly pooled, and have not yet been sold.

7. On receipt of plaintiff's demand, defendant wrote to London requesting delivery of the 1,500 shares which the said Walker and the plaintiff as the assignee of the said Cairncross are entitled to, and on receipt of the same, which have not yet been received, defendant is ready and willing to deliver the same to the said Walker and the plaintiff; but by reason of the premises, defendant denies that the said shares or any part of them are due and owing by defendant to plaintiff.

8. Defendant further says that before the said cession by the said Cairncross to plaintiff, the said Cairncross and the said Walker received from defendant a full and true account of all dealing and disposal of the said claims, and were satisfied with the same, and that nothing further has taken place with regard to the said claims since such account was given, and that, although not obliged to do so, defendant gave plaintiff a full and true account of such dealing and disposal.

Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

The replication was general.

The Court below granted judgment for plaintiff and ordered the said defendant to deliver unto the said plaintiff seven hundred and fifty (750) shares (in the hands of the Registrar of the Court) in the Filabusi and Insiza Development Company Limited, and three hundred shares (300) in the said Filabusi and Insiza Development Company, Limited (in the hands of defendant), the said 300 shares to be delivered to the said plaintiff within a reasonable period.

And further ordered the said defendant to pay the costs of the action.

The Judge's reasons for this judgment were as follows:

In argument the issues were as follows:

(a) Was plaintiff entitled to an account, and, if so, was a proper account rendered to him or his predecessor, Cairncross?

(b) Was plaintiff entitled to 750 or 1,050 shares?

(c) Did plaintiff sustain any damages?

In my opinion the claim for damages could not be entertained inasmuch as I considered that the plaintiff's predecessor, Cairncross, must be regarded as having consented to the pool which closed in March last, and there was no difference in the value of the shares between that month and the date of trial or judgment. I may mention that this claim was not pressed. In my opinion Cairncross was entitled to a specific account of the dealings with the claims. In July, 1900, he received, through Walker, a copy of a document delivered to Walker by Haddon, showing that the claims had been disposed of for 5,000 shares, and how these shares had been distributed. This document, which is the account mentioned in paragraph 8 of the plea, cannot be taken to be such an account as Cairncross was entitled to demand. It was admittedly incorrect and misleading (*vide* Haddon's evidence). I find that the actual purchase price of the claims was 7,000 shares, whereas this document shows the price as 5,000, and is silent as to the allotment of 1,800 shares to the firm of Haddon and Sly.

After the plea was filed, the defendant rendered to plaintiff an account under cover of a letter of the 28th May last, and gave plaintiff notice that an application would be made at the trial for an amendment of the plea so as to incorporate therein the account. It will be noticed that there is no tender of costs up to the date of the rendering of such account.

In my opinion this last account was a full and fair one. The only questions then which appeared to me to demand consideration were, what number of shares should be adjudged to be due; whether 750 or 1,050, and if only 750, upon whom the costs of the action should fall.

In my judgment plaintiff's share of the venture was 1,050 shares.

I was satisfied from the evidence that the agreement between the prospectors Cairncross and Walker and Haddon was to the effect that Haddon and his friends were to find, as their share of the venture, all the capital required to preserve the claims and to put them into a fit state for flotation. The amount of capital necessary was in the sole discretion

of Haddon and his friends. Haddon, it is true, did, when entering into the agreement with the prospectors, consider that £450 would suffice to bring the claims into a marketable state, but I was not satisfied that the prospectors agreed that any advance beyond this £450 was to be a first charge on the proceeds of the sale or flotation of the claims. The conclusion I arrived at was, that all sums advanced were to be regarded as an asset put into the venture by Haddon and his Port Elizabeth friends, and were not to be considered as expenses of sale or flotation. It appeared to me that it was never contemplated by the parties that, in the absence of a special agreement, the prospectors should contribute to the joint venture or to the expenses thereof, in any other way than the pegging of the claims and the required prospecting work; that being so I was of opinion that the advance of £750 made by the firm of Haddon and Sly was not a charge upon the joint venturers, but should have been debited to the capitalists, *i.e.*, the Port Elizabeth gentlemen. The letter of Mr. Coghlan, plaintiff's attorney, to the defendant's attorney, dated March 10 last, seemed to me to correctly set forth the facts of the case and the legal position of his client.

In these circumstances I was of opinion that the term "one-third of the nett profits of such sale or flotation" meant one-third of the proceeds of the sale or flotation, less the actual expenses incurred in and about such sale or flotation. In this instance the expenses were the 10 per cent. commission paid to Ross, amounting to 700 shares. There were therefore left for distribution among the parties interested 6,300 shares. Plaintiff's share on this basis was one-sixth of 6,300 shares, *viz.*, 1,050, for which amount of shares I gave judgment with costs of suit."

Mr. Searle, K.C. (with him Mr. Upington) for the appellant; Mr. Schreiner, K.C. (with him Mr. H. Jones) for the respondent.

Mr. Searle, K.C.: The nett proceeds in this case were converted into shares by means of money advanced from Haddon. The respondents really claimed the gross proceeds, and we say that from these the £450 should be deducted.

[Buchanan, J.: You can do that only if you say that it was part of the flotation expenses.]

That is what we do say. Money was advanced for assays, for prospecting, etc., and then certain sums were paid to a broker. Surely the broker's commission is not the only thing which should be deducted? Other legitimate expenses (shown in the record) had been incurred.

[Maasdorp, J.: What consideration is shown on this contract?]

The written agreement was entered into long after the actual arrangement had been made. In order to prospect the property much preliminary work had to be done, as is shown by the accounts put in in April, 1899. Money was also spent on Government licences and other preliminary expenses. The respondents are entitled to come in only after all necessary expenses have been paid. One thousand eight hundred shares were offered for £759. Horton credited himself with 5s. per share, but Haddon put his shares at 8s. I submit that 8s. was the fairer valuation, and that there was no evidence to show that 1,800 shares should have been allotted for £759. The whole of the argument on behalf of the plaintiff was to the effect that he was entitled—not to the judgment given in the Court below—but to an account.

Mr. Schreiner, K.C. (for respondent): There is nothing to show that £450 was the sum stipulated for between the prospectors and the financiers. Either the prospectors were entitled to all they claimed or nothing. In point of fact, the agreement between the parties was made long after the work done by the prospectors had been to a great extent accomplished. The Port Elizabeth syndicate was not directly a party to this agreement, and there is nothing to show that respondents were bound to contribute to the working expenses.

Cur. Adv. Vult.

Postea (December 11): The Court delivered judgment.

De Villiers, C.J.: This is an appeal against the judgment of the High Court of Southern Rhodesia in an action brought by the present respondent against the appellant. The action was for an account and for damages, and it was based upon an agreement which had been entered into between Haddon and Cairncross and Walker on November 21, 1895. It is as follows: "The said William Haddon agrees to transfer to James Richard Cairncross and George Walker one-third interest in the following claims, and on

the sale or flotation of the claims or any part thereof, Haddon binds himself to hand to Cairncross and Walker one-third of the net proceeds of such sale or flotation." Now it is noteworthy that in this agreement it is stipulated what shall be done by Haddon, while there is nothing said as to what is to be performed by Cairncross and Walker; and the explanation seems to me to be that Cairncross and Walker have already performed their part of the agreement. They were the prospectors who located the claims, and having done so they entered into certain arrangements with Haddon, by which Haddon was to arrange for the flotation of a company, and they were practically to do nothing more. The written agreement did not constitute the whole of the contract between the parties, for it said nothing as to the liability of keeping the claims alive until flotation. On the evidence, the learned judge came to the conclusion that this liability rested upon the defendant, and I am not prepared to dissent from this finding. It is worthy of remark that when in 1900 the appellant was asked to render an account, he rendered an account in which no charge whatever is made for his expenses in keeping alive these claims during the interval between the sale and the flotation. But after the plea had been filed, or simultaneously with the filing of the plea, he filed an account, and in that account he charged the plaintiff, who had acquired the rights of Cairncross, with license fees and other expenses which he had incurred for the purpose of keeping alive these claims. The learned judge held that these charges should not be made against the plaintiff, and in my opinion he was right in holding that the only charges which Haddon was entitled to deduct from the proceeds of the sale were charges connected with the sale. After the deduction of these expenses the net proceeds which would remain would amount to 1,050 shares, which the learned judge allowed to the plaintiff. The appeal, therefore, in my opinion, must be dismissed with costs.

Euchanan, J.: The only issue which came before the Court on appeal was what was the true number of shares to be allowed to the prospectors for their share in the venture, whether 750 or 1,050. The contract which was reduced to writing was not the original agree-

ment, nor did it contain all the terms of that agreement. The parties had entered into an agreement before any writing was come to at all, and it was only afterwards, when considerable expenditure had been incurred and certain claims had been secured, that the parties put in writing how the proceeds to be obtained by the flotation of the claims into a company were to be divided. They must look to the evidence to see what was the whole contract between the parties. The learned judge in the Court below found that what he termed the capitalists were to finance the venture, and that the prospectors were only to give their labour. This he (Sir John Buchanan) thought was the correct conclusion which could be come to on the evidence, and he was confirmed in this not only by Haddon's own evidence, which seemed to him to be almost conclusive, but by the account Haddon had rendered when the dispute first arose. At the time this account was rendered the whole of the expenses which Haddon now wished to set off had been incurred, and yet in that account he said nothing about charging the prospectors with this expenditure. His lordship thought there was a great deal of force in what the learned judge had said, viz., that Haddon might be entitled to recover the expenses incurred from the financiers, but certainly not from the prospectors. He concurred in the judgment.

Maasdorp, J.: After hearing the evidence and the arguments in this case, it seems to me clear that the document annexed to the declaration does not contain the whole of the contract between the parties interested in this case, although the main issue between the plaintiff and defendant will depend largely upon the interpretation of the written agreement. By it an interest in certain properties is transferred by the defendant to Cairncross and Walker, without any mention of the consideration that passes from them to the defendant for such interest. That has to be looked for outside the document. Then both plaintiff and defendant admit that a third party has been admitted into the venture, whose rights and obligations materially affect their position. If we had merely to construe the document I should come to the conclusion that the defendant on the one part and Cairncross and Walker on the other were jointly interested in certain claims which

they were then prepared to put into flotation by sale to some prospective company, and that they agreed after deducting the expenses of flotation to share the proceeds in the manner specified. I think when the agreement was made the parties made it in contemplation of having already arrived at the point of flotation, and their rights must ultimately be determined with reference to that position. As a matter of fact, they had not yet arrived at that point, for the claims were still being developed preparatory to flotation at the expense of a third party who had joined in the venture. This third party was the Port Elizabeth Syndicate, who had agreed to supply the funds for development on condition that they received a third of the proceeds. The learned judge in the Court below found as a matter of fact that the funds they were to find for the purpose were not limited to the amount they actually expended. At this stage we have three sets of parties to the venture, the prospectors who found the claims, the defendant who gave his services, and the syndicate who furnished the means to develop the claims prior to flotation. If the claims had been floated before the funds put in by the syndicate were exhausted, it is clear that Cairncross and Walker would have received their third share of the proceeds without being called upon to share in the expenses of development. It was at that time clearly contemplated by the parties that the expenses of development should not fall on the prospectors, although counsel for the appellant seemed to question the correctness of that view in his argument. The view then taken by the parties coincides with my interpretation of the document, that the costs include expenses of sale of flotation, but not the costs of development. When the syndicate ceased to furnish funds, a firm in which the defendant was interested undertook to finance the concern. That, in my opinion, could not alter the position of the prospectors without their consent. It might have altered the position of the syndicate, but the defendant chose, with the funds obtained from his firm, to keep the interest of the syndicate alive, and to treat them as remaining in the venture. If the syndicate remained in the venture it must be in the capacity of parties who were to furnish the develop-

ment money. They were never released from that obligation by the prospectors. This is how the matter was treated by the defendant when he rendered his first account in which he brought up 5,000 shares as the price of the properties, and in which he did not debit the plaintiff with the cost of development. But subsequently when he brought up the correct number of shares as 7,000 he changed his attitude. I am of opinion that the plaintiff, who now stands in the position of Cairncross, one of the prospectors, is entitled to one-sixth of the proceeds of the claims, after deducting the costs of sale and flotation, but not the costs of development. I concur that the appeal should be dismissed.

[Appellant's Attorneys, Findlay and Tait; Respondent's Attorney, D. Tennant.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

MARSBERG V. MARSBERG. { 1902.
Nov. 28th.

This was an action for restitution of conjugal rights, failing which a decree of divorce and custody of the children—two boys, aged 16 and 18 respectively.

Mr. Alexander appeared for plaintiff, defendant being barred for default of plea.

Charlotte Jane Marsberg, the plaintiff, said that she married the defendant—Wm. Douglass Marsberg—in May, 1883, at Queen's Town. From 1885 to 1888 they lived at Kimberley. In March, 1896, he left her at Fort Beaufort; he then proceeded to Matabeleland, and returned in the following December, the only money she received from him during his absence being between £6 and £7. On December 30 he went to Kim-

berley, where she followed him in 1897. Subsequently they lived at Vryburg, but she left him there because of his drinking habits. They again lived together until April, 1898, when he turned her out of her house and sold up everything. Since 1896 he had contributed only £5 towards her maintenance.

The Court granted a decree of restitution of conjugal rights with costs, defendant being ordered to return to or receive plaintiff on or before January 28 next, failing which to show cause why a decree of divorce should not be granted.

WATSON V. WATSON.

This was an action for the restitution of conjugal rights, or failing that a decree of divorce.

The plaintiff's declaration set forth that the defendant was married to him at East Budleigh, Salterton, Devonshire, England, on the 21st August, 1889, and the marriage still subsisted. The parties were domiciled in this colony, and the plaintiff resided at Ladismith, where the defendant also until recently resided. There were three children, two girls and a boy, issue of the marriage, all of whom were minors. On or about the 30th May, 1902, the defendant maliciously deserted the plaintiff at Ladismith and came to Cape Town, and had refused to return to plaintiff. Plaintiff claimed a decree, ordering defendant to return to him and to restore his conjugal rights; or failing compliance with such decree, a decree of divorce dissolving the marriage, reasonable access to the children at all times and places, or alternative relief.

The defendant in her plea admitted that she left plaintiff, and that she refused to return to him, and says that she had and has good and sufficient reasons for so doing, owing to his cruel, negligent, and indifferent conduct towards her. Owing to the plaintiff's conduct it had become impossible for the plaintiff and defendant to live together. She prayed that the plaintiff's claim be dismissed with costs.

For a claim in reconvention the defendant said: In expectation and in consideration of the intended marriage between them she, on August 20, 1889, executed, together with the defendant

in reconvention, an agreement in the following terms: "The said Robert Walker Watson agrees with the said Jane Sarah Edwards, that he will in consideration of the said intended marriage, and as soon as he conveniently can after the solemnisation thereof, assign a sum not exceeding three thousand pounds to trustees upon the trusts hereinafter mentioned, such sum being hereafter referred to as the husband's funds. The said Jane Sarah Edwards agrees with the said Robert Walker Watson, and with the consent of the said Robert Walker Watson, that she will, in consideration of the said intended marriage assign to trustees upon the trusts hereinafter mentioned, such moneys not exceeding in the whole the sum of six thousand pounds as shall come into her hands from time to time after the solemnisation of the said marriage, and the said Robert Walker Watson hereby agrees to concur in settling the same accordingly. These moneys are hereinafter referred to as the wife's funds. The trusts of the husband's funds and of the wife's shall be as follows: The income during their joint lives to go to husband and wife respectively, and then to the survivor, and after the death of survivor the principal to go to issue in the usual way. The ultimate trust of the husband's funds to be for the husband absolutely, and of the wife's trust funds to be for the wife absolutely if she survives the coverture, but if not for her appointees by will or next of kin as if she had died intestate and unmarried—the life interest of the husband in the trust funds to cease on bankruptcy or alienation. As witness the hands of the said parties the day and year first above written." No trustees of the money styled "the wife's funds" were ever appointed, but the husband took possession and made use of the £6,000, which was her sole and separate property at the date of the marriage, and he still retained and had never accounted for it to her, nor paid her the interest or income. In addition to the above the husband had in his possession a further sum of £2,000, the property of his wife, and on this sum he had paid her no interest, but he had had the use of the same for some years past during the marriage. With the said sum the husband had acquired a

considerable amount of property, both movable and immovable.

The plaintiff in reconvention claimed: (a) A decree of judicial separation *a mensa et thoro*. (b) The custody of the three children of the marriage. (c) That the defendant in reconvention pay over to her, and to trustees duly appointed to carry out the provisions of the deed, the sum of £6,000, her property, with interest from the date of the marriage, the plaintiff in reconvention to draw the interest on the sum, so paid over, during her life-time; the capital to revert on her death to the children of the marriage. (d) That the defendant in reconvention pay over to the plaintiff in reconvention the sum of £2,000, with interest from the date when he received it. (e) That the defendant in reconvention be ordered to contribute a reasonable sum per annum towards the support of the children as long as they remain in the custody of the plaintiff in reconvention, and until their majority or marriage. (f) Alternative relief. (g) Costs of suit.

The plaintiff, in his replication and plea in reconvention, denied the allegations of facts and conclusions of law therein contained, and especially that his conduct had been cruel, negligent, and indifferent, and that thereby it had become impossible for the parties to live together. For a plea to the claim in reconvention, plaintiff (now defendant) admitted that the agreement was entered into, that no trustees were appointed thereunder, and that the £6,000 referred to was the sole and separate property of plaintiff in reconvention and was now in defendant's possession, and, further, that he had in his possession £2,000 belonging to plaintiff. He said that the appointment of trustees was left in abeyance by arrangement between the parties, and that his wife handed to him first the £6,000 and later the £2,000 for investment to carry out the terms of the agreement. He accordingly, with the consent of his wife, invested the sums, and had from time to time paid to her sums of money amounting to considerably more than any interest on the said sums. He had never been called upon to account for the £6,000 and £2,000, but was willing to have trustees appointed in terms of the agreement and to pay over such sums to them within such time, to

be fixed by the Court, as would be reasonably necessary for the realisation of proportionate investments. He was furthermore willing, within the same time, to pay over to such trustees £2,000, which, together with a policy of insurance on his life for £1,000, already ceded to and accepted as such by his wife, would make up the sum of £3,000 referred to as "husband's funds." He admitted that he had acquired considerable property, but denied that it was acquired solely with the aforesaid money. As regarded the children, he was willing that, in the event of a decree of divorce or of judicial separation being granted, the wife should have their custody, subject to his having reasonable access to them. For their maintenance and education until they severally reached the age of majority or marry, he agreed to pay £100 each per annum in respect of the two daughters, and £50 per annum for the son, to increase these sums as the children advanced in years to a maximum of £150 per annum each, and forthwith to renounce in their favour his life interest in the "Husband's funds."

The wife in her replication contended that plaintiff's offer was insufficient, as he had not offered to pay the arrears interest on the trust funds.

Mr. Buchanan for plaintiff; Mr. Searle, K.C. (with him Mr. Gardiner), for defendant.

Mr. Buchanan called

The plaintiff, Dr. Watson, who said that almost immediately after they were married they came out to live at Ladysmith. They did not get along happily, almost always having quarrels. In 1895 defendant left him and went to England, staying away for about ten months, during which he sent her about £700. In May, 1901, she came to Cape Town, returning to Ladysmith after a few months. Last May she said she was going to leave him and not return. They first had a banking account, from which they both drew, but afterwards they had separate accounts. His wife had drawn out money and witness had invested it with her knowledge and consent. Witness was making money himself apart from what came in from these funds.

Cross-examined by Mr. Searle: For some time past witness had led his own life and his wife hers.

It was practically impossible for them to live together. Witness was anxious that the children should be well-educated. Witness had a large practice and his estate was worth at least £15,000. It was not true that Mrs. Watson had been kept short of money. She had complained of not getting the interest on her money and witness had also complained of the expenditure and had told his wife she could not have money both ways.

[De Villiers, C.J.: If, in obedience to the order of Court, your wife returns, you will receive her?]

Witness: Yes.

Mr. Searle said the word cruelty was mentioned in the plea, but he did not wish to proceed with that.

[Buchanan, J.: Incompatibility of temper, I suppose?]

Mr. Searle called

Mrs. Watson, who said she felt it was impossible for her to return to live with her husband. Witness was satisfied with the arrangement in regard to the children. With regard to the money, witness had had none of the interest from her money. Her husband gave her money when she went away on visits. When she went to England she probably spent about £300, which her husband gave her. Witness was agreeable that anything in the way of arrear interest should be settled on the children.

The Court granted a decree for restitution of conjugal rights, defendant to return to or to receive plaintiff on or before the 31st December, failing which a rule would be granted calling on the defendant to show cause on the 12th January why a decree of divorce should not be granted, and why plaintiff should not have access to the minor children of the marriage at all reasonable times and places, plaintiff undertaking to allow defendant to have the custody of the minor children of the marriage in case of such divorce, and to hand over to a trustee within one month from the date of such divorce the sum of £8,000, and his life policy for £1,000, the trustee to pay the interest to the defendant during her lifetime, and to pay the capital sum to the children of the marriage after her death; plaintiff further undertaking to pay to the plaintiff the sum of £100 per annum for the maintenance and education of each of the two daughters for five years, and thereafter £150 per annum until

they became of age or married, and £50 for the maintenance and education of the son for five years, and thereafter £150 per annum until he attains his majority; plaintiff also undertaking to pay the sum of £2,000 to the defendant one month after divorce; the secretary of the General Estate and Orphan Chamber to be trustee.

[Plaintiff's attorney, F. Trollip; Defendant's Attorney, D. Tennant, jun.]

ESTATE MULLER V. COLONIAL GOVERNMENT. { 1902.
 { Nov. 28th.

Contract—Conveyance of mails—

Impossibility of performance

—Payment—Note of capture owing to war.

The plaintiff, a post contractor for the conveyance of mails between A. and B., was not called upon for six months during the currency of the contract to convey such mails owing to part of the country between A. and B. being occupied by the enemy during a time of war. The instructions from Government to the local postmaster were that the plaintiff was to be bound to carry mails when called upon, but that he was to be paid only for those months during which he had carried the mails once at least, although the contract provided for monthly payments for a year. It was proved that although there was great risk of the mails being captured there was always a possibility of their being carried through during the six months in question.

Held, that the plaintiff was entitled to payment for the six months.

This was an action to recover the sum of £90 8s. 4d., in respect of a contract by which plaintiff undertook the carriage of mails between the village of Sutherland and Middlepoort and Tontelboschfontein. In his declaration the plaintiff

stated that he was executor testamentary in the estate of the late George Johannes Muller, who by a contract entered into on the 9th January, 1902, agreed to carry the mails between the places named for the sums of £125 (Middlepoort) and £30 (Tontelboschfontein) per annum. Muller, during his lifetime, and plaintiff subsequently to Muller's death, were always ready to perform the obligations under the contract, and since August plaintiff had carried mails between Sutherland and Middlepoort, but from the 1st January to the 31st July the Government had neglected to provide mails for carriage. In their plea the Government said it was impossible for either party to carry out their obligations under the contract by reason of the invasion of and war in the Colony, and the rebellion and disturbance in that area.

Mr. Benjamin (with him Mr. C. W. de Villiers), for plaintiffs; Mr. Schreiner, K.C. (with him Mr. McGregor), for defendants.

Vismer von Molcke Louw, the executor in the estate of the late Muller, said that Muller died in April this year. Witness produced the contract. There was a similar contract the previous year. During 1901 and 1902 the war was going on, and there were bands of the enemy about the district. This was so when the contract was entered into. It would have been possible to have taken mails between the places at intervals during both years; there would have been risks. In April of this year witness made a journey to Tontelboschfontein. During the early part of 1901, mails were carried under the contract. Witness, acting for Muller, received the money from the Government up to the 31st December, 1901. From what Muller told him in February this year, witness understood that he was prepared to carry the mails. Muller kept a donkey. Witness was prepared to carry out the contract after Muller's death. On the 5th February witness wrote to the Postmaster General asking for payment of the remuneration under the contract. The Department refused to make payment. Further correspondence followed.

Cross-examined by Mr. Schreiner: There would have to have been a permit to enable a person to go to Middlepoort. Witness went to Matjesfontein in March, 1902. The road from Sutherland to Matjesfontein was a patrol road. Witness went via Tontelboschfontein.

William Martin, one of the sureties under the contract, said that in 1901 there was always Boers in the Sutherland district. Muller kept a cart and horses in 1901, but the latter were commandeered in January of that year. Muller then agreed with another man named Theron for the conveyance of the mails. The cart was adapted, for draught by a donkey. Witness was doing the work at present by a cart and two mules.

Jacobus Lodevicus Theron stated that in 1901 the late Mr. Muller arranged with him to carry the mails under the contract. He would have been prepared to carry the mails this year if he had been asked.

Mr. Schreiner objected to the latter statement.

Witness proceeding, said a good donkey could cover the route; the work had been done by bicycle.

Cross-examined. He was sent out of the district in July, 1901, and returned in the following July from Worcester and Matjesfontein. His wife could have superintended the work during his absence.

Mr. Benjamin closed his case.

Mr. Schreiner called

Mr. Hilliard who said that from May, 1901, to August, 1902, he was R.M. and C.C., and in September he took over the duties of Deputy Administrator of Martial Law. Muller was the successful tenderer, and a contract was made with him. There was great difficulty in going to Middlepoort from Sutherland, owing to the presence of the enemy. The route by which the mail had to travel was part of the disturbed area. No one could travel without a permit. From December, 1901, onward witness would have refused to give a permit to carry the mails. If the Postmaster-General had sent asking for such a permit witness would not have given it on his own responsibility.

[Buchanan, J.: Not if asked by the Government?]

Witness: No; I would not have given it.

In answer to further questions by Mr. Schreiner, witness said he considered it impossible to take these mails.

By the Court: When the contract was entered into witness advised the Department that the contract should be made to take effect when it became possible to carry the mails.

By Mr. Schreiner: Horses were commandeered universally in the district. No serviceable horse was submitted by the contractor to witness in 1902.

Mr. Alladeye said he resided in the district. The enemy or scouts were always in the district. The route that the mail had to travel was a dangerous one, and there was no chance of sending the mail without its being captured. Neeser and Godding's commandos were in the district. One of a patrol was shot on one occasion. Witness remembered a cart and mules being captured. If a cart had been sent it might have got through once in a hundred times. If a person had gone without a permit the scouts would have brought him back.

By the Court: Some of the British scouts sometimes got through, but not by this road.

Michael J. Anguier, postmaster at Sutherland, said that on or about the 14th January Muller spoke to him about the contract. Witness told him that if no mails were run he would not get paid for it, but that if he took one mail in a month he would get paid for the whole of that month.

By the Court: If witness had at any time given him mails during a month, he would have been bound to carry them.

Re-examined by Mr. Schreiner: Witness had instructions from the Government to the same effect as those he stated to Muller. Witness returned the mail matter to headquarters.

Cross-examined: Witness would not have raised objection to a bicycle being used in carrying the mail.

Mr. Schreiner closed his case.

Counsel having been heard in argument on the facts, the Court gave judgment for the plaintiff.

De Villiers, C.J.: The plaintiff relies upon a contract which was entered into on the 9th January, 1902. Under that contract he claims payment of the sum payable for the conveyance of mails for six months, namely, the months from January, 1902, until July, 1902. Counsel for the Government has spoken of the contract as a conditional one; but so far as I can see, the contract is as unconditional in its terms as it possibly could be. It is a contract by which Muller, the deceased, undertook to convey the mails between Sutherland and Middelpoort, and between Suther-

land and Tontelboschfontein once a week each way, such conveyance to be effected on horseback or by cart, the journey to be performed either way within a period of 60 hours and five hours, respectively, for the sum of £125 and £30 respectively annually, to be paid to the contractor, his heirs, executors, or administrators at the expiration of every month by the Postmaster-General. This contract is for one year, to commence on the 1st January, 1902, and to terminate on the 31st December, 1902, either party being at liberty, however, to terminate it on giving two months' notice in writing. It is clear, therefore, that it is an unconditional contract on both sides. But it is said we are to look at the circumstances under which this contract is made, and in consideration of those circumstances to say it was a conditional contract. But before I consider those circumstances I wish to refer to the contention that plaintiff has not proved his readiness and willingness to perform his part of the contract. Now, in my opinion, it was not necessary for the plaintiff to prove that he kept any horses at all. He alleges he was ready and willing to perform his part, and the Government does not allege that they ever put this willingness and readiness to the test. The contractor might not have had a horse at all, and yet if he had been called upon to convey the mails on any occasion, he might, as indeed he did on one occasion, have acquired horses from someone else. He went so far as to say he did possess a donkey. Some fun was made about that donkey, but it seems to me that fun might rather be made of the terms of the contract. It would be a very poor donkey that could not do 50 miles in 60 hours. I should say that if it was required of the plaintiff to prove his ability to do the work he has proved that he could have done it. But it does not seem to me necessary for him to prove that he actually had horses there. He was never put to the test and never asked to do the work. In point of fact there was no desire to ask him. But the postmaster who has been called on behalf of the Government said, "If at any time I had given plaintiff bags to carry he would have been bound to carry them." That was the position the Government took up. The Govern-

ment sent instructions to the postmaster that if there was a conveyance of mails once a month there was to be payment, and this showed the desire of the Government to keep the contract open and their reliance on the ability of the plaintiff to perform his part of the contract. That the Government intended to keep this contract open is further clear from the fact that as soon as the war was over this contractor was called upon to perform his obligations. It was clear also that if there had been any accumulation of letters the plaintiff would have been bound to carry them. Under these circumstances, I am of opinion that he was entitled to his monthly payment in terms of the contract. But then it is said that the contract was impossible of performance. Impossible of performance by whom? It is not necessary to consider the authorities which have been cited. If there is a contract by which one undertakes to level Table Mountain to the ground that would, for instance, be impossible of performance. But it is quite a mistake to say that it was wholly impossible for the Government to have sent these mails. It would have been a risky thing, a dangerous thing on their part to have done; there would have been considerable risk of the mails falling into the hands of the enemy, but it was also quite possible that the mails might escape capture. The Intelligence officer called on behalf of the Government said that in one case out of a hundred it would have been possible to go through. So it is not a question of impossibility; it is a question of great risk. That risk plaintiff would have been obliged to run if he had been called upon to take the bags. I think there is no defence whatever in this case. It seems to me as clear a case as could be brought into a court of law, and the plaintiff must obtain judgment for the sum claimed with costs.

Their Lordships concurred.

[Plaintiff's Attorneys, Godlonton and Low; Defendant's Attorneys, Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

BUISSINNE V. WYNBERG { 1902.
MUNICIPALITY. { Nov. 29th.

Mr. Searle moved for an interdict against the Wynberg Municipal Council to prevent them continuing the cutting down of a hedge and removal of a fence bounding the property of plaintiff, who is at present in Paris. The property is located on the main road, and there had been a dispute as to boundaries, the Municipal Council maintaining that the hedge encroached on the main road.

A rule nisi was granted, calling upon respondent to show cause by December 12, why the work of removal should not be stopped, the rule to operate as an interdict, interim leave being given to respondents to move for the discharge of the rule before the return day.

WITTHUHN V. ROBERTS.

Mr. Buchanan moved for an interdict to prevent respondent selling certain erven.

An affidavit was read, made by the petitioner—a blacksmith of Lady Grey—alleging that respondent had killed a horse of his. Petitioner had instituted proceedings for £100 and costs, and it had come to his knowledge that Roberts intended to sell certain immovable property registered in his name for the express purpose of evading the judgment.

Mr. Buchanan, in reply to the Court, stated that respondent had no movable property.

[De Villiers, C.J.: The Court has always set its face against applications of this kind; respondent may win the case, and in the meantime lose an opportunity of selling his property.]

The application was refused.

PROVISIONAL ROLL.

CUMMINGS V. MILNE.

Mr. Benjamin moved for provisional sentence on two promissory notes, one for £30 and the other for £20.

Order granted as prayed.

SEARLE V. MUSLAK.

Mr. Close moved for provisional sentence for £69 upon certain conditions of sale of certain property situate in Landsdowne-road, Claremont. Defendant had failed to pay certain instalments of the purchase price, as per aforesaid conditions.

Granted.

FORBES V. BOOSE.

Mr. Alexander moved for provisional sentence for £220 on an acknowledgment of debt.

It appeared that the parties—Finlay Forbes and Jacob Boose—were formerly joint owners of the steam launch Shamrock. The former sold his share to the latter for £220, which was to be paid in monthly instalments of £12 each, dating from August 25. No instalments had yet been paid, and counsel asked for judgment for the full amount.

[De Villiers, C.J.: We must look at the contract as it stands; it formed part of the contract that the price was to be paid in monthly instalments. Judgment will be given for the two instalments already due, viz., £24, with interests and costs.]

DUTCH REFORMED CHURCH V. PARSON.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £700, and for the property specially hypothecated to be declared executable.

Granted.

S.A. MILLING CO. V. GRAND JUNCTION RAILWAYS.

Mr. Benjamin appeared for the plaintiff; Mr. Searle, K.C., for defendants.

Application was made for a postponement of trial until January 12, a consent paper being filed.

The application was granted.

Postea (December 12, after hearing. (*q.v.*), the case was ordered to stand over till next term.

VAN ZYL V. NEL. { 1902.
 { Nov. 29th.

This was an application to show cause (1) why a certain judgment by default under Rule 319, granted on November 29, 1902, should not be set aside; and

(2) why the defendant (now applicant) should not have the bar removed and be allowed to plead; (3) why the costs of bar, setting down the case for trial, argument and judgment and of the application should not be costs in the cause.

The affidavit of Sybrand Jacobus Mostert, of Cape Town, attorney, stated *inter alia*, that summons in this matter was issued August 30, 1902; appearance entered September 19, 1902. Plaintiff's (now respondent's) declaration served November 1, 1902; and notice demanding plea within 24 hours on November 11, 1902. On November 12 deponent (the attorney for the defendant) wrote to plaintiff's attorneys stating that after summons had been served, several days would elapse before a mail would reach Calvinia, and that as defendant resided far away from the said village, it would be impossible for him to transmit instructions for entering appearance within the usual time. To this letter no reply was received. After receipt of notice of bar, deponent wired to defendant's local agent for immediate instructions. Other telegrams were afterwards passed between deponent and defendant's said agent, with a view to the amicable settlement of the case out of Court. These, however, proved futile, and on November 22, 1902, notice of bar was served upon respondent's attorneys, and plaintiff's attorneys set down the case for trial for November 29, 1902. Judgment was given then against applicant under Rule 319, subject to proof of service of due notices given to and received by him. Deponent further says that the said defendant has a *bona fide* and substantial defence to the plaintiff's claim, and that the default in pleading arose from the difficulty of communicating with the defendant.

There was an answering affidavit from Johannes G. van der Horst (attorney for the plaintiff) stating that every consideration had been shown to the defendant, and that the plaintiff would be much prejudiced should the judgment of November 29 be superseded.

Mr. Gardiner moved

The Court refused the application with costs.

[Applicant's Attorneys, S. J. Mostert; Respondent's Attorneys, Van der Horst and Van der Byl.]

HILLS V. COLONIAL GOVERNMENT.

This was an application for removal of bar and for extension of time in which to plead.

Mr. Schreiner, K.C. (with him Sir Henry Juta, K.C.), appeared for the Government; Mr. Searle, K.C. (with him Mr. Close) for Hills.

The case had been set down for trial on December 12, the action being brought by Hills for breach of contract and damages in respect of the construction by plaintiff of certain railways in the Eastern Province.

After hearing counsel in argument on the facts,

De Villiers, C.J.: The present application does not deal with the question of the postponement of trial at all, but the application does apply for extension of time to enable defendants to file their plea. That will be granted. Then it also applies for particulars. It is quite clear these further particulars ought to be given, because it would be quite impossible, in my opinion, for defendants to plead on the vague allegations made. These particulars must be given.

Mr. Searle said that they would give particulars by Monday.

De Villiers, C.J.: The particulars must be given by Monday, and the plea must be filed by Monday week, the 8th. The costs of the application will be costs in the cause. The case will remain for trial on the 12th, but it is quite clear it will be impossible to do more than hear the evidence of the plaintiff, who is here in this Colony on a visit, and it is only fair he should be allowed to give his evidence.

WENTZEL V. WENTZEL.

This was an action for divorce. The plaintiff was the wife, who alleged that her husband, to whom she was married at Cape Town in 1875, had been guilty of adultery.

Mr. Alexander for plaintiff; Defendant in default.

Christina Wentzel, the plaintiff, said there were four children of the marriage, of whom three were minors. Witness had twice entered into notarial deeds of separation, and an order was granted in 1900 for judicial separation.

Evidence having been given as to the adultery, a decree of divorce was granted, with costs.

SKLAAR V. SKLAAR.

This was an action brought by Barnett Sklaar against his wife Sarah Sklaar for divorce, on the ground of the subsequent bigamous marriage and adultery of the defendant.

Mr. Buchanan for plaintiff; Defendant in default.

Plaintiff said he was married to defendant secretly, and without the knowledge of defendant's parents, in July, 1891. They never lived together, not having been married by Jewish rites. They were married by licence at Prestwich, England. Witness came out here in 1891 with his father-in-law. The latter returned to England after being here three months. Subsequently defendant and her parents went to America, and witness heard she was married there. Her mother had written telling him so.

Max Sklaar, brother to the plaintiff, said he was present when defendant was married to a man named Jacobowitz in America. The witness produced a card of invitation to the wedding. Jacobowitz knew the whole story before the wedding. The marriage which plaintiff and defendant contracted was not legal in Jewish law. Respondent had had two children by Jacobowitz.

A decree of divorce was granted.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller.]

VAN AARDT V. BEKKER AND MAYNIER.

Mr. Schreiner, K.C., moved, on behalf of the defendants, for removal of bar and for time to plead.

Mr. Searle, K.C. (with him Mr. Burton), appeared for the plaintiff, respondent in the motion.

The Court ordered the removal of the bar, defendant to pay costs of removal and of the application, and to plead within seven days.

Ex parte WALKER.

Mr. Buchanan moved for a rule nisi granted under the Derelict Lands Act to be made absolute.

Granted.

KOPKE V. SONJICA.

Mr. Buchanan applied for removal of trial. A consent paper had been filed.

Granted.

Ex parte GREENBERG.

Mr. Russell moved for leave to applicant to mortgage certain property without the assistance of her husband, who was then of unsound mind and an inmate of a lunatic asylum at S. Joseph's Mission, U.S.A.

Granted.

Ex parte DE KOCK.

Mr. Burton applied for directions as to the service on the respondent, Abe Bailey, of a copy of a certain petition. De Kock had filed a petition praying that the election of respondent as a member of the Legislative Assembly for Barkly West should be declared null and void, on the ground that respondent did not possess the necessary qualification, not being a registered voter.

On affidavit, it was stated that Mr. Bailey was nominated as a farmer, resident at Hollow River, Colesberg. The usual dwelling-place of respondent was at Johannesburg. He was not known to have any place of residence in the Colony. Petitioner asked for directions as to service.

The Chief Justice said the petition could be served upon respondent at Johannesburg.

REX V. GROBBELAAR.

Mr. Burton applied for an order for release on bail.

Mr. Nightingale, for the Crown, consented on the following terms: Accused to give security in the sum of £500, and to find two other sureties in the sums of £200 each.

The application was granted.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Sir JOHN BUCHANAN.]

GROVE V. ESTATE GROVE. { 1902.
Dec. 1st.

Executor—Account—Delay—
Costs.

*In an action against an executor
for an account it was proved*

that for six months from the time when letters of administration were granted to him he was deported from his district under martial law without any apparent default on his part, and was unable, except with the greatest difficulty, to communicate by letter with the debtors or creditors of the estate.

Held, that there was no unreasonable delay in not filing the account within six months.

This was an action brought by J. J. Grove, of Richmond, against his brother, who lives at Murraysburg, for an account in the estate of his mother, who was a widow, and who died at Staalkloof in January, 1901. Defendant was testamentary executor of the estate.

The declaration was as follows:—

1. The plaintiff is Jacobus Stephanus Grove, of Richmond; the defendant is Johannes Francois Grove, of Murraysburg, but at present residing at Beaufort West, and is sued in his capacity as executor testamentary of the estate of the late Maria Anna Elizabeth Grove, hereinafter called the testatrix, mother of plaintiff and of defendant.

2. The testatrix died on January 27, 1901, and by her will the plaintiff was appointed one of her heirs. The defendant was appointed executor, and took out letters of administration on July 31, 1901. The testatrix bequeathed her estate, consisting of certain movable property, to her children as heirs.

3. The plaintiff is, under the said will, entitled to his inheritance, which is now in defendant's hands; but although the defendant has been repeatedly requested to frame and lodge with the Master of this Honourable Court a full and true account of the administration and distribution of the testatrix's estate, supported by vouchers, he has neglected and refused to do so.

4. The plaintiff claims: (a) That the defendant be ordered forthwith to lodge with the said Master a full and true account of the administration of the said estate, supported by vouchers, and to pay over the amount of plaintiff's inheritance to him; (b) alternative relief; (c) costs of suit.

The plea filed by the defence was that there had been no refusal to render an account, but set forth that defendant had not been able to realise the assets owing to having been ordered to leave the district by the military authorities.

The replication was general.

Mr. Searle, K.C. (with him Mr. C. W. de Villiers), for plaintiff; Sir H. Juta, K.C. (with him Mr. Buchanan), for defendant.

Mr. Searle stated that since the proceedings were commenced an account had been prepared by defendant and handed in, with which the plaintiff was perfectly satisfied, and the action would have been withdrawn, had it not been for a difficulty as to costs.

Plaintiff was called. He stated that there were six heirs to the estate. He was one. The defendant, his brother, was second son of the deceased. The defendant had sole management of his mother's affairs before her death. The greater part of the money in the estate had been advanced by defendant to the different heirs. After the death of his mother witness wired to his brother, and asked him for a statement as to the estate. His brother did not come to see him. After that he wrote and told him to come at once, and close the estate at once, as war was about to take place, and had already commenced at Stormberg. He did not get a reply to that letter. Six months afterwards he went to see his attorney, Mr. De Villiers, and in consequence he wrote to the Master at Cape Town. When the account was filed he found that the following sums were owing to the estate: Mr. Herholdt, £218; defendant, £321; Mr. A. P. Burger, £316.

Cross-examined by Sir H. Juta: He did not know that his brother was refused a permit. He saw his brother at Richmond when the latter was on his way to Beaufort. He knew the military were taking him to Beaufort, and that he was under military supervision at Beaufort. He was taken to Beaufort because he was what was called an "undesirable."

Sir H. Juta: Well, knowing this, you in February took out a summons against him?—Plaintiff: I warned him from beginning to end.

How did you expect him, when he was under military supervision in Beaufort West, to go and collect assets in Rich-

mond and Murraysburg?—Yes, he had freedom to come and go; at any rate, he was free at Beaufort.

But he was not free to go from Beaufort to Richmond?—No, he was not; but he could have sent to Mr. Herholdt or the bank.

Answering further questions, witness said he did not go and see the defendant before he issued the summons, because he had no money. The only proposal that he made to the defendant was that, if he paid him £300, he would give him six months in which to raise the costs. The defendant in a letter to witness's attorney agreed to this. Witness was content with the account which had been filed. He admitted that he had given his elder brother a pledge upon his inheritance, in consideration of a wagon and some oxen he got from him, representing £100 10s.

Johannes Wicht, conveyancer, spoke to having seen the acquittance signed, and the inheritance handed over. The only question, as far as he knew, was one of costs. He did not know at that time that plaintiff had given his elder brother a claim upon a certain portion of his inheritance.

For the defence,

Wm. van Heever van Oudtshoorn was called. He said he was Resident Magistrate at Murraysburg from January to the end of June, 1901, and he also acted as local commandant. He knew the defendant, and during the time he was commandant he received from him several applications for a permit to go to the farm where his mother died. Witness refused the applications. About that time communication with Murraysburg was cut off, and subsequently witness received letters which were 8, 9, 10, and 12 months old.

J. J. Herholdt, agent, and deputy sheriff of Murraysburg, said that after the death of Mrs. Grove he acted for the defendant, and he was aware of the applications which were made to the local commandant by the defendant. Witness also tried to procure a permit for him. Witness came to Cape Town in July, and brought with him forms so that letters of administration in Mrs. Grove's estate might be taken out. He made application to the Master, and eventually he managed to obtain letters on July 31. Witness explained to the Master that it would take a long time to

file the account. He afterwards saw Mr. Paul de Villiers, and explained the circumstances to him. He subsequently got a wire from the elder brother's wife, saying that he must not deduct from the inheritance the amount of the pledge. He afterwards received another wire asking him to postpone the settlement. He drew up a statement and deducted the pledge, and sent it to the plaintiff and asked him to sign an acquittance. When he got the letter asking him to leave the matter alone for the present, he thought there was something "fishy" about it.

Cross-examined: He did not tell the Master that he was one of the principal debtors.

Johannes F. Grove, the defendant, said his mother died in January, 1901. He used to manage his mother's affairs, but for some time before the war he did not. When she died some of the promissory notes were on the farm. Witness tried to get there, but was not allowed to. Witness was what was called an "undesirable," and while at Beaufort West was under military supervision. It was after the summons that he heard he had received letters of administration. Witness did not know what had become of Herholdt until the bank was shifted from Murraysburg to Beaufort West. Witness was allowed to leave Beaufort West on the 4th July, 1902. Several applications were previously made for permits. Witness did not receive a wire from Mr. Herholdt until after the summons. While at Beaufort witness sent several letters, but none of them reached their destination. When he got from Beaufort witness lost no time in administering the estate.

Cross-examined: Witness did not write from Beaufort West about the estate. He did not write in reply to his brother's letter. Witness had written letters to his family, but none of these went through. Witness saw his sister at Richmond, but did not ask her to give him the papers.

This concluded the evidence, and Mr. Searle was then heard in argument on the facts.

De Villiers, C.J.: The deceased died in January, 1901, and at the time of her death she lived in the neighbourhood of Richmond. Plaintiff, who was appointed executor, was living at the time in Murraysburg. When he heard the news of his mother's death he tried to obtain per-

mission to go to the farm on which she had been living, in order to obtain information with regard to the estate. He made repeated applications to the commandant, but permission was refused. There has been no attempt in the present case to show that the defendant has been guilty of any conduct which would impose upon the military authorities the duty of detaining him and of treating him in the manner in which they have done. No evidence has been led upon that point, and, therefore, the Court has no opportunity of judging whether the defendant, by his own conduct, placed it out of his power to frame the account. If there had been such evidence the case would have assumed a different complexion, because a person has no right to place himself in such a position as would render him unable to perform his duty as an executor, and to thereafter plead the restraint so imposed upon him as an excuse for non-performance of his duty. But no such question arises in this case. The defendant had been appointed executor, but he could not be expected to take out letters of administration until he had some knowledge as to the position of the estate. Time passed, and at the end of July, letters of administration were taken out, apparently even without the knowledge of the defendant. On the 10th August, before the defendant had an opportunity of doing anything as executor, he was deported to Beaufort West as an undesirable. Here again there is no proof whatever of any conduct on the part of the defendant which rendered such deportation necessary. There is nothing charged against the defendant as to his conduct. He was kept at Beaufort West from the 10th August, 1901, until the 4th July, 1902, and during that time it was, I will not say wholly impossible for him to do any thing as executor, but it was quite unreasonable to expect him to do anything. There was no postal communication; letters did not reach him that were sent to him, and telegrams failed to reach their destination; and yet, although the plaintiff knew that this was the position of his brother, he actually in January of the present year, issues summons against him to compel him to file an account. Well, it seems to me to be wholly unreasonable for the plaintiff to expect that under the circumstances the defendant could have fulfilled

the duties required of him as executor. Ultimately the case resolved itself into a question whether a certain amount should be paid by the estate which was owing by plaintiff to an elder brother. A document has been put in which practically amounts to an order given by the plaintiff to the executor to pay this amount out of his inheritance from his mother. The whole case hinges upon the question as to whether this amount should be deducted or not, and now the plaintiff, after having caused these unnecessary costs, asks that the defendant should be made to pay all of them. In my opinion it would be wholly unjust to order the defendant to pay these costs. I think the plaintiff might well have waited until his brother came from banishment and was able to do his duty as executor. There will be no order and plaintiff will have to pay the costs.

Buchanan, J., concurred.

[Plaintiff's Attorney: Paul de Villiers; Defendant's Attorneys: Scanlen and Syfret.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D., and the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

FISH V. PRICE AND ANOTHER. { 1902.
Dec. 2nd.

Harbour Board—Voters List—
Firm—Election of member—
Act 36 of 1896—Partnership
—Authority in writing—
Telegram.

A member of a firm which appears on the voters' list framed in terms of the 11th section of Act 36 of 1896, is eligible to be elected as a member of the Harbour Board in terms of the 15th section, even although he has not been nominated by the firm in terms of the 14th section,

to appear and vote on behalf of such firm, and although he joined the firm after the 30th of June last preceding the election.

An agreement that a person admitted as a member of a firm shall share the profits of the firm amounts prima facie to an agreement that he shall share losses also.

A telegram or cablegram addressed by a voter to the collector or sub-collector of customs authorizing some person to vote on behalf of such voter is a sufficient authority in writing in terms of the 10th section of the Act.

This was an application for an order invalidating the election of the respondent Price as a member of the East London Harbour Board.

From the petition and the affidavits, it appeared that petitioner, who stated that he was a partner in the firm of Charles Cootes and Co., stood as a candidate for a vacancy in the East London Harbour Board. The respondent Price was also a candidate, and in consequence of there being two candidates, an election was fixed to be held on the 15th October. Applicant said that on the 14th October he objected to the candidature of Mr. Price, on the ground that he did not possess the necessary qualification. An election was held, which resulted in the return of Price. Applicant alleged that Price got his majority by votes cabled from London, and five votes wrongfully recorded on behalf of the Union-Castle Company. Although Price said he was a member of the firm of Malcomess and Co., he was not a payer of £10 in dues to the Harbour Board, as required by the Act. In his affidavit the respondent Price stated that there was no document to prove that Fish was a member of the firm of Cootes and Co., and that, even if he were, he was not qualified to sit on the Harbour Board, as the firm had not paid the required amount in harbour dues. No objection was notified by applicant to respondent until after the

election. When he discovered that he was unsuccessful, Fish immediately handed in his objection. It was not until then that respondent was aware of the objection. Price claimed to be a member of the firm of Malcomess and Co., and that he had been a member since April, 1902, and as the firm were payers of harbour dues, he had a right to sit on the Harbour Board. With regard to the objection as to votes being cabled, respondent admitted that the votes were cabled, but said that only 18 votes were recorded for applicant, as against 29 recorded in favour of Price.

The present application was made on four grounds:

1. That Price was not qualified, under sections 14 and 15 of the East London Harbour Board Act, to become a member of the Board, not being nominated by the firm to vote on its behalf.

2. That he was not a member of the firm on the 30th June, and had not paid wharfage dues during the year ended the 30th June, as required by the Act.

3. That he was not a member of the firm at all within the meaning of the Act; and

4. That the cabled votes and the votes of the Union-Castle Company were not properly admitted, and that, therefore, if the applicant's objections were well founded in this respect, the votes were equal, and the returning officer should draw lots.

Mr. Searle, K.C. (with him Mr. Benjamin), for the applicant; Mr. Schreiner, K.C., for the respondents.

De Villiers, C.J.: The object of this application is to have the election of the respondent as a member of the East London Harbour Board set aside, and four objections to the election have been raised. The first objection is that the only member of a firm who could be elected a member of the Board is the person actually nominated by that firm under the 14th section of the Act. This 14th section of the Act consists of two parts. The first part names the class of persons and firms who are to be considered as voters, while the second part directs the manner in which the right to vote shall be exercised. The first part says: "The persons and firms named in such list, after the additions to or alterations

of the same (if any) have been made by the said Collector or Sub-Collector of Customs as aforesaid, shall be the voters entitled to vote at the election of members as hereinafter provided." Then comes the second part of the section, which provides the manner of voting as follows: "And as often as a firm shall be nominated in such list of voters, such firm shall be entitled to vote only either by that member thereof who shall be nominated by the firm in writing addressed to the said Collector or Sub-Collector of Customs, or by some person similarly nominated to appear and vote for such firm." Then comes the 15th section, which says that "every person being a voter, as in the last preceding section provided, and whether he be so individually or as a member of a firm, shall be qualified to be elected a member of the Harbour Board for members of which he is entitled to vote." Now it must be admitted that is very clumsy drafting. It would have been far better if the Legislature had stated in more definite terms that every member of a firm is entitled to become a member of the Harbour Board if that firm has paid dues in the manner provided, but I think the meaning of the Legislature is reasonably clear. If the Legislature had intended what Mr. Searle contends for, I think it would have used different words, and would have said in this section: "Every person being a voter, as in the last preceding section provided, and whether he be so individually or as nominee of the firm, shall be qualified to be elected a member of the Board," instead of saying, "whether he be so individually or as a member of the firm." It is the firm which is the voter, and taking that reading of the section, I think the first objection falls to the ground, and that the respondent was entitled as a member of a firm which had a vote to become a member of the Board, although he had not been nominated by the firm in terms of the 14th section to record their votes at the election. The second objection is that the respondent did not join the firm of Malcolmess and Co. until the 1st of July, 1902, and that, therefore, he is not a person who had on the 30th of June paid dues in terms of the 10th section, but in my opinion the whole scope of the Act is to treat firms as a legal en-

tity, for the purpose of recording their votes at these elections. By the 14th section it is the firm that becomes a voter, and any person who is a member of the firm at the time the voting takes place is, in my opinion, entitled to be elected as being a member of that particular firm, that entity which had on the 30th June been recorded as persons who had paid the dues required by the 10th section of the Act. The third objection is that it is not clear that the respondent is a member of the firm at all. Upon that point we have the statement of the respondent himself, who states that he not only receives salary, but is entitled to share in the profits. Well, an agreement to share profits amounts *prima facie* to an agreement to share losses also. In the present case there is not only this, but we have the statements of both respondent and Mr. Malcolmess that the respondent is a member of the firm. Supposing that this firm were to become insolvent, I should think there would be no doubt whatever that respondent would be called upon as a person sharing in the profits, and as being therefore *prima facie* a partner, to contribute towards the debts of the firm. In the absence of any clear evidence to the contrary, I take it that in every respect the respondent was a member of the firm of Malcolmess and Co. The fourth objection is that there was no authority in writing addressed to the Collector or Sub-Collector of Customs at the port. In the present case telegrams and cablegrams addressed to the Sub-Collector of Customs at East London were produced, and upon the authority of these telegrams and cablegrams the votes mentioned were accepted. In my opinion that is sufficient authority in writing to justify the Sub-Collector of Customs in accepting the votes. In England, under the Statute of Frauds the signature of a person to a telegram has been held to be a signature in writing in terms of the Statute. The 10th section of the Act now in question allows voters to vote by some person duly authorised in writing addressed to the Sub-Collector of Customs. Before a telegram or cablegram can be transmitted it must be reduced to writing, and that writing is transcribed at the receiving office and sent to the addressee. The authority conveyed by the telegram or cablegram may therefore be fairly held to be in writing. The

Sub-Collector acted properly in allowing the votes and the application must be refused, with costs.

Maasdorp, J., said: With reference to the first objection, it seems to me that Price was certainly a voter such as contemplated under section 15 of the Act. He was such a voter as a member of the firm of Malcomess and Company. We find that under section 14 persons and firms that appear upon the list shall be voters. Now, a firm consists of a certain number of individuals, and those persons who constitute a firm may become voters. There is nothing said as to a firm merely as a body distinguished from the certain number of members. These members, therefore, are created voters, and then the fourteenth section proceeds to make provision as to how the firm should vote. It seems to me that the object of that section was to provide that a firm, although it consists of a certain number of voters, shall only cast one vote. The section proceeds to provide for the manner in which that vote shall be cast, but that one vote is really representative of a certain number of other voters, who are made voters under section 14. Consequently Price, being made a member of the firm, became a voter under section 14. If that construction be not put upon it, then it would be very difficult to find machinery for carrying out the provisions of the Act at all, because it would be very difficult to ascertain who are the appointed members of the firm whom the petitioner contends are the only persons who are to be qualified as voters, and therefore qualified for membership.

[Applicant's Attorneys, Silberbauer, Wahl and Fuller; Respondent's Attorneys, Walker and Jacobsohn.]

NORDEN V. TOWN COUNCIL OF (1902.
CAPE TOWN AND OTHERS. } Dec. 2nd.

Cape Town Municipality—Election of Councillors—Procedure—Parliamentary elections—Act 9 of 1883, section 4—Act 26 of 1893, section 44 Disqualification of candidate—Notice to electors.

The procedure for questioning the return of a member of the Town Council of Cape Town

should be the same as far as possible as that provided by Act 9 of 1883 for questioning the return of a member of Parliament, and therefore the petition should be presented within forty-two days after the declaration of the result of the poll made in terms of the 44th section of Act 26 of 1893.

A candidate who succeeds in setting aside the election of a successful candidate on the ground that such successful candidate had not the necessary qualification, cannot claim the seat as being first on the list of unsuccessful candidates unless before or at the time of the election he had brought the disqualification clearly to the notice of the electors.

Where a person who is disqualified on the ground of his being an unrehabilitated insolvent is elected as a member without any objection or notice of the disqualification to the electors and thereafter resigns, a fresh election may be held, and the person so elected will remain in office for the unexpired term of the person so resigning.

This was an application by John Benjamin Norden upon notice of motion calling upon the Corporation of the City of Cape Town and Mr. T. J. O'Reilly (returning officer), Mr. Thomas Harris, and Mr. W. Spivey Woodhead, to show cause why an order should not be granted, ordering an amendment of the declaration of the returning officer during the month of September last, and why the above-named applicant should not be declared duly elected, and a councillor for the space of one year.

The applicant set forth in his affidavit that he was duly qualified to vote for the election of Councillors for the Corporation of the city of Cape Town. In September last he became a candidate for one of the vacancies on the Town

Council, and on September 9 the result of the poll was declared. There were eight vacancies and applicant came ninth on the list, the first six candidates being declared elected for terms of three years each, the seventh candidate for a term of two years, and the eighth candidate, to whom applicant came next, for one year. Towards the end of September it was brought to applicant's notice that one of the candidates who had been elected, viz., Mr. T. Harris, was an unrehabilitated insolvent, and therefore did not possess the qualification required under the Cape Town Municipal Act. Subsequently, on October 24 a letter was written by applicant's attorneys to the Town Council drawing attention to this fact. Later on it was notified that Mr. Harris had resigned, and nominations having been called for to fill the vacancy, and only one candidate having been nominated, that candidate, viz., Mr. W. Spivey Woodhead, was declared duly elected.

Sir H. Juta, K.C., for the applicant: Mr. Schreiner, K.C., for the Corporation, and for T. J. O'Reilly, Harris, and Woodhead, in default.

Sir Henry Juta contended that under the Municipal Act it was quite clear that an unrehabilitated insolvent was incapable of election, and therefore Mr. Harris, never having been a Councillor at all, could not be allowed to retire. Consequently, that attempt of Mr. Harris to get over the difficulty by retiring could not succeed.

De Villiers, C.J.: Should not the objection have been taken at the time? If the voters had known that Harris was disqualified it is not clear that the votes would have been given to the petitioner; they might have been given to someone else.]

Sir Henry Juta submitted that the method of the Town Council in trying to get over the difficulty by getting Harris to resign his seat was absolutely wrong. Harris never having been a Councillor. The proper way to declare the poll would be to leave out Harris's name, and to say that he could not be elected, and that, therefore, the next name on the poll, that of the applicant, must be taken. The only alternative was to say that the whole election must be declared void. Either they must, say, strike out Harris's name entirely, and say that, as he was never qualified, the

votes given for him must be simply ignored, or else, seeing that there were various terms for which the persons declared elected were to hold office they must have the whole election over again.

Mr. Schreiner pointed out that in the case of objections to the candidates on the ground that they were not qualified, the Cape Town Municipal Act provided that the procedure should be the same as in the case of elections for members of Parliament. That provided that a petition should be presented to the Supreme Court within 42 days after the result of the election was declared, and that had not been done in this case. The Mayor acted properly in declaring the vacancy when Mr. Harris resigned. When the vacancy was declared, Mr. Norden should have adopted the course of being nominated afresh. There was nothing to show that if the votes given to Mr. Harris had been recast, Mr. Norden would have been a successful candidate. For instance, the other unsuccessful candidate, Mr. McKey, might have been returned.

Sir Henry Juta, in reply, submitted that it was never intended that the whole of the cumbrous and expensive machinery in regard to Parliamentary election petitions was intended to apply to municipal elections. It was quite competent for a simple matter such as this to be decided by the Court on motion.

De Villiers, C.J.: The election which is now questioned by the applicant took place as far back as the 8th September of this year, and on the 9th September, the returning officer, in terms of the 44th section of the Act, declared the successful candidates to have been duly elected, and among these successful candidates was Mr. Thomas Harris. It was subsequently discovered, apparently by the applicant, that Mr. Harris was an unrehabilitated insolvent, and when his disqualification, by reason of his insolvency, was brought to his notice, Mr. Harris sensibly sent in his resignation, which was accepted by the Town Council. The present application is for the amendment of the declaration of the returning officer, by declaring that the applicant was duly elected as a Town Councillor for the space of one year. It appears, further, that after the resignation of Harris, the Town Council had a fresh election, and the applicant was not a candidate at this fresh

election, but Mr. William Spivey Woodhead was elected as a Councillor, and the second part of the present application is to have it declared that the election of Mr. Woodhead was null and void. Now as to the first part of the application, I am of opinion that it is made too late. Even if there had been no specific time mentioned in the Act, I should have considered it wholly unreasonable that after so long an interval an application of this kind could be made. In my opinion, however, under the 44th section of the Cape Town Municipal Act, read by the light of Act 9 of 1883, an application to the Court should be made within 42 days after the declaration by the returning officer. [His Lordship read the 44th section, and said that the clear meaning of this was, that if it was sought to set aside any election by reason of any illegality in respect to such election, the only mode of procedure was that provided in regard to the election of members of Parliament. His Lordship read the 3rd and 4th sections of the Act of 1883, and said it had been stated that there was no proclamation in the "Government Gazette" of an election of Town Councillors, but there was a public declaration that the candidates had been duly elected, and in his opinion a petition for setting aside such election should be presented within 42 days of the date of such declaration.] So that, on this ground alone, applicant must be held to be not entitled to succeed, because the declaration took place on the 9th September, and the notice of motion was only filed on the 19th November. But there appears to me to be a further objection to the application, namely, that even if there had been a petition presented in due form, the applicant would not at all events have been entitled to claim that he had been duly elected. There is no proof that it was generally known to the electors that Mr. Thomas Harris was an unrehabilitated insolvent. If the applicant had made a public announcement, and had brought it clearly to the notice of the electors that Harris was an unrehabilitated insolvent, no doubt the Court would have held that the electors had willingly and knowingly thrown away their votes, and there would have been no injustice in such a case in holding that the person next on the list

should be declared to be elected. But in the absence of such knowledge on the part of the electors, I am of opinion that the candidate standing next on the list could not claim in a municipal election, as he would not be entitled to claim in a parliamentary election, to be declared elected. For these reasons I am of opinion that the applicant is not entitled to succeed on the first point. Then as to the second part of the application, the applicant is clearly not entitled to succeed. The matter must now be treated as if there had been due declaration of the election of Mr. Harris. He was a Councillor until he resigned or until his election was set aside. It was never set aside, and he therefore remained a Councillor until his resignation. [The Chief Justice referred to the 63rd section.] This clearly shows that a person might have a lack of qualification, and yet he might be regarded for certain purposes as a Councillor, and in the present case it appears to me that Mr. Harris must be regarded as having been a Councillor until he resigned, and if he was such a Councillor, then when a fresh election was ordered to take place, the candidate elected in place of Mr. Harris would naturally step into his shoes, and would become and remain a member for the same time as Mr. Harris would have remained, if he had not resigned. The second part of the application, therefore, must also be refused. There is only one other remark which I need add, and that is that supposing there had been no resignation, and the disqualification continued, it would be still competent for any person interested to apply to the Court in the usual way, because that would not be a question affecting the election of such a person; it would be the question affecting the qualification of a Town Councillor in regard to which under the ordinary law and independently of the Municipal Act, any interested person could apply to a competent Court.

Maasdorp, J., concurred.

The application was refused with costs.

[Applicant's Attorneys, Silberbauer, Wahl and Fuller; Respondent's Attorneys, Fairbridge and Arderne.]

ALHEIT V. STEWART AND OTHERS. { 1902.
Dec. 2nd.

Church body—Registered title—
Seceding congregation—
Ejectment.

Certain land was duly granted to the Chairman of the Home Missions Committee of the Dutch Reformed Church and registered in his name as such Chairman. On the land a church was built by the committee, and a congregation was established under the spiritual care of a missionary. During the absence of the missionary, who joined the recent rebellion, a majority of the congregation seceded from the Dutch Reformed Church and invited a Congregational minister to take charge of the congregation. The Home Missions Committee thereupon appointed another missionary, but the dissenting majority refused to admit him or to give up possession of the premises.

Held, that the chairman as the registered owner, was entitled to an order ejecting the seceders and their missionary from the premises.

This was an application for an order for the ejectment of respondents from a church and certain property at Upington. The applicant was the chairman of the Home Missions Committee of the Dutch Reformed Church. It was alleged that the respondents, who were formerly members of the Dutch Reformed Mission Church at Upington, had resolved to join the Congregational Church, and had taken possession of the property in pursuance of this intention.

In affidavits filed on behalf of the respondents it was stated that in 1900, the missionary of the Church, Mr. Schroeder, transferred his allegiance to His Majesty's enemies, and resigned his appointment as missionary. It became necessary for the spiritual welfare of the congregation to obtain the services of another missionary, and at a meeting of

the congregation it was unanimously resolved to join the Congregational Union, and the respondent, Mr. Stewart, was sent for, and came to the place as missionary. It appeared that the property was registered in the name of the Home Mission Committee of the Dutch Reformed Church. There were some 18 members of the congregation who dissented from the resolution to join the Congregational Union, and of these 17 belonged to one family. The land was transferred to the mission under the 12th section of Act 15 of 1887.

Mr. Gardiner for applicant, Mr. Close for respondent.

After counsel had been heard on the facts,

De Villiers, C.J.: All the transfers which have been put in recognise the Chairman of the Home Mission Committee of the Dutch Church as the owner of this property. Now application is made by the chairman of that committee to eject the respondents from the occupation of the property which they have taken during the absence of the missionary. The registered title is conclusive as to the right of applicant, and the respondents have shown no ground for taking occupation in opposition to the holder of the registered title. No reason has been shown for refusing the application, and the rule must be made absolute with costs.

[Applicant's Attorneys: Van der Byl and Van der Horst; Respondents' Attorneys: Godlonton and Low.]

Ex parte CORNWALL.

This was an application for an order to confirm the sale of certain property.

The petition of Moses Cornwall, one of the executors in the estate of the late Catharine Cornwall, showed:

1. That the petitioner, together with his niece Elizabeth (born Cornwall), married without community of property to Edward C. Fitzpatrick, were the executors testamentary of the estate of the late Catherine Cornwall.

2. The estate comprised certain landed property and an interest in a tailor's business in St. George's-street, Cap. Town, which is being liquidated.

3. All the landed property has been disposed of, with the exception of certain three houses in Hope-street, known as "Glenmore Villas," and these were put up for sale by public auction about four

months ago, when the highest bid was only £3,500, and the property was declared not sold.

4. At the time of the sale the executors had received an offer of £4,000 for the said properties. It is considered advisable that the estate be now liquidated, and the petitioner was approached to sell the property at £4,010, and he is of opinion that this is a fair offer, but he has ascertained that the purchaser is his co-executrix and niece, and that the confirmation of the Court is necessary. The major heirs, with one exception, consented to this sale. Wherefore the petitioner prayed that the sale might be confirmed.

The Master stated in his report that having heard both sides, he found that neither the heiress who objected to the sale nor the person who offered £4,000 was prepared to buy the property at a higher price, and that as he was satisfied that every endeavour had been made to obtain the best price, he recommended that the sale should be confirmed.

On the motion of Mr. Benjamin, the Court granted an order as prayed.

BERMAN V. AFRICAN BANKING CORPORATION.

Mr. Rainsford moved to fix a day for trial by jury.

Mr. Schreiner appeared for respondents.

The Court fixed the 5th February.

GRAHAM BROTHERS V. STRASBURGER.

This was a motion to fix a date for trial by jury.

Mr. Searle, K.C., appeared for applicants; Mr. Schreiner, K.C. (with him Mr. Benjamin), for the respondent.

Defendant opposed the case being set down next term. It was stated on affidavit that defendant was in Paris, and was not likely to be in Cape Town during the February term. He was an essential witness. Defendant wished to have an opportunity given him to apply for a commission to take his own evidence and that of his witnesses. Plaintiffs contended that defendant had had ample time in which to prepare his defence. The case was commenced in 1899, and had stood over through various causes.

The Court fixed the 26th February for the trial.

Ea parte TOUSSAINT.

Mr. Gardiner moved for leave to applicant to sue his wife for divorce *in forma pauperis*.

Applicant said he earned £1 10s. a week.

[De Villiers, C.J.: Can't you save something out of that?]

Defendant said he had to maintain a child.

The application was granted, Mr. Gardiner being appointed counsel.

PERL V. SPIRO.

Mr. Alexander moved for a rule nisi restraining respondent from carrying on a certain business or selling or in any way disposing of certain goods or any portion thereof in a certain shop in Claremont. The petition showed that the petitioner sold to respondent a certain business and goods in a shop at Claremont, respondent undertaking to pay the balance of the purchase price by instalments, failing payment of the instalments, the business and goods to revert to applicant. The balance amounted to £55, and as the instalments had not been paid it was alleged that by virtue of the agreement the business and goods reverted to the plaintiff. It was therefore sought to obtain a rule nisi restraining respondent from selling or parting with the goods, pending an action to be brought by applicant for the recovery of the £55, and also an amount of £24 due as rent of the shop.

[De Villiers, C.J., said that he doubted very much whether the document (the agreement referred to) would hold water at all. The rule nisi could only be granted with regard to the rent.]

The Court granted a rule nisi, calling upon the respondent to show cause why he should not be restrained from removing the goods until the rent of £24 should be paid, the rule to operate as a temporary interdict.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.

OLSEN AND ANOTHER v. { 1902.
BOYD AND OTHERS. { Dec. 3rd.

Statute—Ordinance—Release of
fidei commissum.

An ordinance passed in 1826 by the then Governor, with the advice of his Council, after reciting that the petition for the release of a certain estate from fidei commissum had been referred to the Court of Justice who had heard the parties interested, and with their consent recommended a compliance with the prayer, proceeded to enact that the estate should be freed from the entail imposed by will.

Held, that the ordinance was valid, and that the descendants of the beneficiaries under the will are not entitled to claim the estate from the present registered owners.

This was an action for declaration of rights.

The plaintiffs' declaration was as follows: The plaintiffs are Helena Olsen (born Traut), widow of the late Daniel Olsen, of Woodstock, and Pieter Laubscher, of Woodstock. The defendants are Charles Boyd, the Roodebloem Estates, Limited, and William Hare. On the 20th December, 1779, one Pieter Laubscher and his wife Johanna Eksteen married in community of property, made a joint will, and on 19th October, 1781, a codicil thereto. By the codicil certain property, called Roodebloem, was bequeathed to the son of the testators, Hendrik Oostwald Laubscher, subject to the *fidei commissum, ne erant extra familiam*. Thereafter the testators died, and on the 17th August, 1786, in

accordance with the provisions of the codical, transfer was passed to Hendrik Oostwald Laubscher of 16 morgen and 11 square roods of the farm Roodebloem. After the death of Hendrik Oostwald Laubscher and on 28th November, 1807, the then Governor of the Cape Colony granted to Susanna van Breda, widow of H. O. Laubscher, 93 morgen 362 square roods and 72 square feet of the place Roodebloem. The extent in the last paragraph mentioned was an addition to the said 16 morgen and 11 square roods, which then was registered in the name of H. O. Laubscher. Susanna van Breda also received transfer of certain other property not material to this issue. On the 10th August, 1818, a judgment of then High Court of Justice declared that the heirs and further descendants of Pieter Laubscher and Johanna Eksteen, and of H. O. Laubscher and his lawful wife, were exclusively entitled to the ownership of the farm "de Roodebloem." This judgment was reversed by the then Colonial Court of Appeal by a judgment given on the 26th April, 1819. The Court of Appeal declared the appellant, one Pieter Laubscher, a son of H. O. Laubscher, and hereinafter described as Pieter Laubscher the younger, to be the sole male heir of his father, the said H. O. Laubscher, and as such entitled to the estate Roodebloem, subject to the condition of his paying to the other heirs of H. O. Laubscher and the wife of H. O. Laubscher the sum of 60,000 guilders. This sum was duly paid by Pieter Laubscher the younger. Subsequent to the decision of the Appeal Court a dispute arose as to the application of the *fidei commissum* to the properties acquired by Susanna van Breda, in addition to the extent of 16 morgen and 11 square roods, and this dispute was compromised by Pieter Laubscher the younger agreeing to pay 16,000 guilders for the same to the other heirs. Upon his failure to pay this sum his estate was sequestrated, and in order to remove any doubts as to the applicability of the *fidei commissum* to the additional property, Private Ordinance No. 1, of 1826, was passed. Upon this Private Ordinance the properties purported to have been acquired by Susanna van Breda, including the 16 morgen and 11 square roods, were on the 7th March, 1828, transferred to Pieter Laubscher, the younger, and on the same

day retransferred to one, Adriaan Christiaan Deneys, who had purchased the same from the insolvent estate. Successive transfers of the 16 morgen and 11 square roods have since been passed down to the present defendants or those under whom they claim. Plaintiffs say that the said Private Ordinance does not affect the said 16 morgen and 11 square roods, and that all the transfers subsequent to and including that to A. C. Deneys were illegal and void. In the alternative they say that the Private Ordinance of the 10th of July, 1826, was null and void inasmuch as it was bad, *ultra vires*, contrary to the laws of this colony, and in violation of the rights of His Majesty's subjects secured to them by the British Constitution, and by the terms of the Capitulation of this colony to the forces of his Britannic Majesty on January 18, 1806. The present plaintiffs are *fidei commissary* heirs of H. O. Laubscher, within the 4th degree, and are by reason of the premises entitled to be declared owners of the property subject to *fidei commissum* to their further descendants and to enter into possession thereof, and to have it declared that defendants, not being descendants of H. O. Laubscher are not entitled thereto. The defendants refuse or neglect to give up possession of the property, being the 16 morgen and 11 square roods aforesaid or to admit the plaintiffs' right to any of these claims, though frequently requested to do so. Wherefore the plaintiffs claimed: (a) That it be declared by the judgment of the Court that the descendants of H. O. Laubscher, and Pieter Laubscher the younger, are the lawful owners of the 16 morgen 11 square roods of the estate of Roodebloem, subject to any rights of further *fidei commissary* heirs together with the dwelling houses thereon, and that the defendants may be adjudged to have no right or title thereto or to any part thereof. (b) An order of Court prescribing a time within which the defendants shall give up possession of the aforesaid property. (c) An order calling upon the defendants to account to the plaintiffs for all rents or profits made or received by the said defendants by reason of their unlawful occupation. (d) Interest *a tempore morae*. (e) Alternative relief. (f) Costs of suit.

The defendants Boyd and the Roodebloem Estates, Ltd., in their plea stated

that they had no knowledge of the relationship of the plaintiffs to the late H. O. Laubscher. They admitted that after the passing of the Private Ordinance on or about March 7, 1828, the property claimed in this suit, together with certain other property, was transferred to the said Pieter Laubscher, and thereafter to one A. C. Deneys, who purchased the same publicly and without protest from any one. They admitted that they purchased portion of the property claimed in this suit, together with other property forming the estate Roodebloem, from one Adriaan Van der Byl, a successor in title of the said Deneys, and that they obtained transfer on or about 29th August, 1901. They declared that Van der Byl, from whom they purchased, and also his predecessors in title from the year 1828, had had transfer in full, free and absolute ownership without any entail of *fidei commissum*, and the plaintiffs had no legal right to impugn the title and to claim the land. The defendants and their predecessors in title had for far longer than the period of prescription been living in continuous and uninterrupted possession of the property, and had had the full and free use and occupation of the same, and cannot be disturbed therein now. They admitted that they denied the plaintiffs' right to interfere in any way with the property.

The defendant, William Hare, in his plea, admitted that he was the registered owner by several deeds of transfer of certain portions of the Roodebloem estate, including portion of the 16 morgen and 14 square roods claimed in this suit. He said that on or about July 5, 1902, he obtained an amended title under Act No. 9 of 1899 to the portion of the said property owned by him, being in extent 28 morgen and 546 square roods. He and his predecessors in title had for far more than 30 years been in continuous and uninterrupted possession of the said property.

Mr. Rowson for plaintiffs; Mr. Searle K.C. (with him Mr. Burton), for defendant Boyd and the Roodebloem Estate; Mr. Searle, K.C. (with him Mr. Fissett), for defendant Hare.

[De Villiers, C.J.: What is the defence?]

Mr. Rowson: The defence is chiefly the question of prescription, I take it. The defendants say that under the Land Beacons Act having lain by so long

we cannot now come forth and claim the property.

[De Villiers, C.J.: If that ordinance applies to this 16 morgen, and if the ordinance were valid, your case would fall to the ground?]

Exactly, my lord.

[De Villiers, C.J.: For the sake of this argument we will assume that the plaintiffs are the lawful descendants.]

Mr. Rowson: The private ordinance No. 1 of 1826 does not apply to the property which we now claim, but to the 93 morgen. The burial-place is stated to be on the land released from the burden of *fidei commissum*, but it is not on the land we now claim.

[De Villiers, C.J.: But the private ordinance expressly alludes to the 16 morgen bequeathed by the codicil of October 19, 1781. That was the only part of the property subject to *fidei commissum*, and it was clearly the intention of the Governor to release this property from that burden.]

Then we say that that ordinance was bad in law and *ultra vires* of the Governor. By our law only the Sovereign can release from a *fidei commissum*, and even he can do so only under certain conditions. See *Van der Linden* (1, 9, 8, 6, page 66 of Juta's translation); *Sande on Restraints* (note at the end of Webber's translation). A Governor of a Crown Colony is not a Sovereign. The sovereign authority is vested in the King, with Parliament. The Governor has not even the full authority of the King in Council. His Majesty is not justiciable in any of his courts, but a Governor can be tried even in an ordinary police court—*Regina v. Eyre* (18, L.T., 512)—where see the judgment of Blackburn, L.J. (p. 513). In *Campbell v. Hall* (20, State Trials, 323), it was held that a Governor had no power to impose an export duty, and surely the sovereign authority could well have done this. See the opinions of York and of Mansfield (p. 326). The comparatively recent case of *Sprigg N.O. v. Sigcau* (13, S.C.R., 504) is another illustration of the same principle. Even the King in Council does not exercise full sovereign power. *Anson on the Constitution* (p. 261). *Broom* (p. 374). *Forsyth*, citing *Cameron v. Kite* (3, Knapp, P.C. 332). Moreover, such a release from *fidei commissum* was in direct violation of Nos. 6 and 8 of the Articles of Capitulation of January 18, 1806.

Mr. Searle, K.C., was not called upon.

De Villiers, C.J.: For the purposes of the present case the Court will assume that plaintiffs are the direct descendants of H. O. Laubscher, who was the legatee under the will which has been put in. By the codicil to that will the testators bequeathed: "To our son, Hendrik Oostwald Laubscher, Lieutenant of the Burgher Dragoons at Stellenbosch, after the decease of both of us, the farm whereon we now live, called Roodebloom, situate between the Cape and Salt River, for the sum of forty thousand gulden, Indian valuation, in cash, provided that the said farm shall always remain and pass over into our and his family, and furthermore, that those who are in possession of the aforesaid farm shall be bound to always keep the graveyard upon it with its surrounding wall in good order, so that at death it may serve as a burial place for such of our family as may desire it." It is admitted that a private ordinance was passed on July 10, 1826, which purported to remove a certain *fidei commissum*. The first question is whether the private ordinance applied to the 16 morgen which the plaintiffs now claim. In my opinion it is perfectly clear that the ordinance applies to the place subjected to the *fidei commissum* by the codicil of October 19, 1781. The preamble of the ordinance expressly states: "Whereas a petition has been presented to His Honour the Lieutenant Governor at the Cape of Good Hope, by the joint heirs of the late Widow Hendrik Oostwald Laubscher, praying that the place Roodebloem, part of the estate of the said widow, may be released from the entail of *fidei commissum*, in which the same is given to the late Hendrik Oostwald Laubscher by a codicil bearing date the 19th October, 1781, added to the joint will of the late Pieter Laubscher and his late wife, Johanna Eksteen, which was passed by the said testators on the 20th December, 1779, before the chief clerk in the Colonial Office, Mr. J. M. Horak. I think there can be no doubt that the ordinance refers to the 16 morgen. The next question now is whether the ordinance is valid or not. The Governor in framing the ordinance acted as the duly constituted legislative power in this country. At the time the only manner in which local laws could be passed was by the Governor in Council. In the

report prefacing the first issue of revised statutes signed by Sir Sydney Bell, Mr. Justice Henry Cloete, Mr. Justice E. B. Watermeyer, Mr. R. W. Rawson (the then Colonial Secretary), and the Hon. W. Porter, it is stated that: "With regard to the laws passed by the Legislature before 1863, when the Colony received the Constitution from Her Majesty, these, up to the month of May, 1825, consisted of proclamations and advertisements issued from time to time by the Governors of the Colony. In May, 1825, the laws assumed a form of ordinance, which up to 1834 were passed by the authority of the Governor in Council." Some most important laws were passed during that time. One of the most important laws in this colony is Ordinance No. 40 of 1828. That ordinance has reference to the administration of the criminal law and the powers of the Supreme Court over inferior Courts. The Governor in Council had full power of legislation with the advice of his Council. The private ordinance proceeds thus: "And whereas the said petition has been referred to the Worshipful Court of Justice, who have thereupon heard the parties interested, and with their consent, he recommends a compliance with the prayer thereof, be it therefore declared and enacted, that from and after the date of these presents, the aforesaid estate called Roodebloem is free from the entail imposed thereon by the aforesaid codicil, save and except in so far as it has been therein declared to be the will of the aforesaid joint testators, that the burying place on the said place Roodebloem, with the wall round the same, shall as such remain the common property of all their descendants, with liberty to any one of them to select the same for him or herself, as that place where his or her body shall be buried, it being the intention that this part of the codicil shall remain in full force and effect; and it shall be incumbent on the future owners and possessors of the place Roodebloem, to allow the descendants of the aforesaid testators a free passage through the place Roodebloem to the said burying-place, whenever it shall be thought by them requisite for the purpose of burying the body of any of the deceased descendants of the aforesaid testator, or for the purpose of repair or improvement to be made in or at the

said burying-place or the surrounding wall thereof." I do not understand that there is any question now of a burial place; this decision does not affect the point as to whether the people should desire to be buried there. There may be reasons not before the Court as to why the right should be lost. At any rate, the decision does not affect the rights of descendants to be buried there; the Court does not express any opinion on that point. In every respect it is a valid ordinance, and now, after a period of 76 years, the Court is asked to set aside the whole transaction and everything done since then, and to allow certain people, descendants of the original Laubscher, to claim land which has passed from purchaser to purchaser. Such a thing is unheard of; we cannot possibly after this ordinance do anything of the kind. The preamble of the ordinance stated that consent had been obtained. The presumption would have been that the Legislature of the day would not have passed this ordinance without seeing that the rights of everyone concerned were fully protected. But the ordinance leaves no doubt upon the point, because it says that the petition was referred to the Court of Justice, who heard the parties interested, and with their consent the thing was done. There is no analogy therefore, between the present case and that of *Sigcau*, which has been referred to during the argument. The Legislature had full power to pass this law. The *fidei commissum* upon Groot Constantia was removed merely for the convenience of the vendor, and no public interests were served. The Legislature has repeatedly exercised that power since the establishment of Parliament, and the Governor, before the establishment of Parliament, had full right by ordinance—passed by the consent of his Council—to exercise similar power. The judgment of the Court is therefore for defendants, with costs.

Buchanan, J., in concurring, said there was considerable force in the argument as to the limited power vested in the Governor in the present year of grace 1902; but they must look at the circumstances of the Colony at the period when the ordinance in question was passed. Parliament was constituted in this colony only in 1854, and since that time the powers of the Governor were much re-

stricted. But in 1826 the power of legislation was vested in the Governor in Council. The Ordinance was passed by the Legislature of the day, and the principles that applied to legislative enactments must apply to this Ordinance. *Sigcau's* case, which had been quoted, did not at all apply to this case. When the Proclamation was made which was declared *ultra vires* in *Sigcau's* case, legislative power had ceased to be vested in the Governor without the consent of Parliament.

Maasdorp, J., concurred.

[Attorney for plaintiffs: W. G. Coulton; for Defendant Bond and the Roodebloem Estates: Dempers and Van Ryneveld; for Defendant Hare: Reid and Nephew.]

Ex parte RETIEF. } 1902.
Dec. 3rd.

Mr. De Waal moved for the appointment of a *curator ad litem*. The petitioner is the wife of Jacobus B. Retief, to whom she is married in community of property. There are eight children issue of the marriage. The husband had been removed to Valkenberg Asylum on an order by the Magistrate. There were certain moneys, proceeds of the sale of property, and shares in the estate, and it was considered necessary in the interests of the said lunatic to have his sanity or otherwise inquired into. It was therefore asked that a *curator ad litem* be appointed, for the purpose of an action to be instituted against the husband, to have him declared of unsound mind and incapable of managing his affairs, etc.

The Court granted an order as prayed, and appointed Mr. Advocate J. E. R. de Villiers *curator ad litem*, the summons to be served on the alleged lunatic as well as on the *curator ad litem*, and to be returnable on the 12th.

Ex parte BARRON.

Mr. J. E. R. de Villiers moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute.

FOTHERINGHAM V. GEORGE { 1902.
LICENSING COURT. } Dec. 3rd.
Liquor Licensing Acts - Local
option—Memorials for and

against new licence—Striking out names.

The applicant, desiring to have a new licence, obtained a memorial in favour of such licence signed by a majority of the voters registered in the municipality of G. Several of those who had signed thereafter signed another memorial objecting to the issue of the licence. Both memorials were lodged with the Resident Magistrate, but at the sitting of the Licensing Court eighteen of those who had signed both memorials desired to have their names omitted from the memorial objecting to the issue of the licence. The Licensing Court struck out the names of those who had signed both memorials from both memorials, with the result that there was not a majority in favour of the new licence.

Held, that the Licensing Board was justified by the terms of section 13, sub-section 3, of Act 25 of 1891, in treating the first memorial as if eighteen names had been struck out therefrom.

This was an application by Alexander Fotheringham against the members of the George Licensing Court, made upon notice calling upon the respondents to show cause why the proceedings of the Licensing Court of George, held on September 3, 1902, should not be reviewed and set aside, on the ground that they had improperly struck off a certain number of names from a memorial in favour of the grant of a licence to applicant, and further, why the holding of a special meeting of the said Licensing Court should not be ordered, to consider whether or not the said licence should be granted to applicant.

The applicant, Alexander Fotheringham, on September 3 applied to the Licensing Court for a new retail wine and spirit licence, entitling him to sell liquors on his property. A memorial in favour of the application, as required by

Act 25 of 1891, section 13, sub-section 1, was duly filed, containing the names of 119 registered voters in the area, while a memorial, signed by 85 registered voters, against the granting of the licence was also lodged. At the meeting of the Court 33 names appeared on both memorials, and these names were struck off both memorials, thus reducing the number of names on the memorial in favour of the grant to 86, that was, to less than one-half the total of the registered Divisional Council voters in the Municipality. The Licensing Court therefore ruled that the application could not be entertained. It appeared, however, that 18 registered voters, whose names appeared on both memorials, applied to the Court to have their names struck off the memorial against the grant. It was pointed out that had this application been granted, there would have been 104 voters in favour, which would have been more than half the total number of registered voters, viz., 191. The Licensing Court, however, decided by a majority of two to one that, under section 13 of Act 25 of 1891, the names in question were of no effect, and must be considered as struck out of both memorials. Affidavits had been made by the persons who had applied to have their names struck off the opposing memorial. One of these persons alleged that his name on the opposing memorial was a forgery; a second said that he had been paid 2s. to sign the memorial; a third said that he had been promised a Christmas box; another said he had signed it on misrepresentation; while others simply said they had changed their minds.

Mr. Schreiner, K.C., for the applicant; Mr. Searle, K.C., for the respondents.

Mr. Schreiner, in his argument, relied upon section 14 of Act 25 of 1891, which provided that, with regard to every such memorial, sections 24, 25, and 26 of the Liquor Licensing Act No. 28 of 1883 should *mutatis mutandis* apply. Counsel pointed out that section 26 of the 1883 Act, after detailing the manner in which names should be struck off, said that any person whose name had been so struck off could appear in person before the Magistrate or Licensing Court, and upon satisfying such Magistrate or Court that he was a registered voter, and signed such memorial, might have his name restored. Counsel relied upon a

decision of the High Court of Griqualand in a similar case, viz., that of *Potgieter v. The Barkly West Licensing Court* (7 H.C., 147).

Mr. Searle said that, in regard to the eighteen signatories, there were only four cases where forgery, fraud, bribery, or intimidation were alleged, and even if these were allowed, there would not be the requisite number of signatures.

De Villiers, C.J., said that the law provided that in cases such as this the names of the persons should be considered to be struck off, and therefore some application would have to be made for the names to be restored.

Mr. Schreiner said they must read the section as "considered to be struck off by the considering body, i.e., the Licensing Court."

The Court refused the application.

De Villiers, C.J.: The question at issue is not free from difficulty, but on the whole I am of opinion that the applicant is not entitled to succeed. It appears that application was made by him to the Licensing Court for the issue of a new licence, and he obtained the signatures of the requisite number of voters for the granting of such a licence. Then a memorial was got up against this new licence, and several persons who had signed the application for a new licence also signed a memorial against it. Apparently they had changed their minds; it was not a question of fraud or forgery, but they changed their minds. Then at the time when the Court sat eighteen of them desired again to change their minds for the second time, and to have it taken as if their names did not appear on the first memorial, but continued on the second. The Licensing Court was of opinion that the 3rd sub-section of the 13th section of Act 25 of 1891 was binding on them, and that inasmuch as the names appeared on both memorials, they should be struck out. The terms of that sub-section are clear and unconditional. They are as follows: "If upon any memorial approving of the issue or renewal of any licence, and upon any memorial objecting to issue or renewal of the same licence, the name of the same person shall appear, then the said name shall be of no effect, and shall be considered as if struck out of both memorials." Here then, by the operation of the law, the names are struck out, and are to be

considered as if struck out of both memorials. Under the Act of 1891, therefore, there can be no doubt whatever as to the correctness of the decision of the Court, but on behalf of the applicant, reliance is placed on the concluding portion of the 26th section of Act 28 of 1883 which is as follows: "Provided that any person whose name is so struck off may appear in person, and upon satisfying the Court that he is a registered voter, his name may be restored. And any person may, in like manner, appear and have his name withdrawn." In my opinion this concluding portion cannot be made to apply to names which have been struck off under the 3rd sub-section of section 13 of the Act of 1891. The whole context shows that it is not intended that this should apply in a case where a name has by operation of the law been struck out. The effect of restoring the names to the first memorial would practically be to allow a fresh memorial after the time for the admission of memorials had expired in terms of the 13th section of Act 25 of 1891. For these reasons, the Court correctly decided that no names struck out could be restored.

Buchanan, J., said he had at first some little hesitation about the case, but after full consideration he had arrived at the opinion that a person was only entitled to withdraw his signature once. True, a man might withdraw his name, but in the present case the names having been struck out there was nothing to withdraw.

Maasdorp, J., who also concurred, said that if the Court had come to any other conclusion people might play fast and loose with memorials in favour of such licences. For instance, a person having first signed one memorial, might change his mind, and purposely sign the other, saying that in law the signing of a second memorial would make the first of no effect. Then at the very last moment he might restore the memorial by withdrawing his name to the second, reintroducing the new memorial, and rendering the non-effective name effective.

The application was refused, no order being made as to costs.

[Applicant's Attorneys: Fairbridge, Arderne, and Lawton; Respondent's Attorneys: Reid and Nephew.]

Ex parte GAGIANO AND OTHERS. { 1902.
Dec. 3rd.

Martial law — Expunction of names from Criminal record.

Where certain persons had been tried before a Resident Magistrate in his capacity as a deputy administrator of martial law and convicted, and the proceedings were recorded in the ordinary criminal record: the Court granted a rule nisi on the said magistrate, calling upon him to show cause why the said proceedings should not be expunged from the record.

Mr. Burton moved for an order directing that the names of petitioners be expunged from the criminal record book of the Court of the Resident Magistrate of Springbokfontein.

Mr. Nightingale appeared for the Attorney-General.

Mr. Burton read affidavits, showing that the petitioner and eight or nine other persons (British subjects domiciled in Namaqualand) were at present confined in prison at Springbokfontein. In April last they were compelled, very reluctantly and against their will, to do transport work for the enemy. Subsequently they were placed under arrest and confined in prison at Springbokfontein by the British military authorities. In May they were brought before Mr. J. B. van Reenen, Resident Magistrate of Springbokfontein, who acted apparently as deputy administrator of martial law, and charged with contravening martial law regulations. Prisoners said they were guilty under compulsion. On July 18—after the cessation of hostilities—petitioners were ordered by a military officer to appear in the open outside the gaol. This they did, and they were summarily sentenced each to six months' imprisonment, and a fine of £50, and in default of payment six months' additional imprisonment. This sentence they were at present undergoing. When charged before the Resident Magistrate they were not able to have any legal assistance, or to call evidence on their behalf. They submitted that the pro-

ceedings were conducted in a most irregular manner. When sentencing them, the military officer in question intimated that the sentences would run from May 31, which was the date on which they appeared before the Resident Magistrate of Springbokfontein.

[De Villiers, C.J.: The Indemnity Act would cover the military sentence, would it not?]

Yes, my lord. The only point is the expunging of the entry.

Mr. Burton (for the petitioners).

[De Villiers, C.J.: Is this a military case?]

Yes; that is our whole point. The offence for which these men were tried was a purely military offence, and the proceedings should not have appeared on the criminal record.

Mr. Nightingale (for the Crown): I am quite willing to consent to an order to show cause being granted, but I do object to the granting of a summary order.

[Buchanan, J.: We cannot interfere with a military tribunal.]

No; but the Attorney-General has not yet had an opportunity of seeing the original record. If a rule *nisi* is granted, he will be able before the return day to ascertain the facts of the case.

[De Villiers, C.J.: The Court will grant a rule *nisi*, returnable on January 12 on the Resident Magistrate, and on the person who has the custody of the record.]

Mr. Burton: That is all I can ask at present.

[Applicant's Attorneys: Van der Byl and Van der Horst.]

Ex parte MILLS.

Mr. Benjamin moved for an order for the confirmation of the appointment of petitioner's husband as co-trustee in place of one J. H. Cumming, so that some money in which petitioner's minor children are interested might be speedily invested.

The Master recommended the appointment as co-trustee of someone other than petitioner's husband.

In reply to the Court counsel said that the other trustee still remained a trustee.

An order was granted as prayed.

Ex parte SMITH.

Mr. Buchanan moved for an order authorising the amendment of a certain title deed.

Order granted as prayed.

Ex parte WRIGHT AND OTHERS.

Presumption of death—Executor—Curator.

Mr. Buchanan moved for an order authorising the appointment of an executor, and the calling of a meeting of next-of-kin in the estate of one Ebenezer Miller Syme, who had not been heard of for a number of years, he having been last seen at the River Diggings in Griqualand West in 1870. He was then about twenty years of age. The Master had been advertising for him since 1887. The amount paid into the hands of the Master in 1886 as portion of an inheritance due to Ebenezer Miller Syme was £102 odd.

[De Villiers, C.J., said they could not appoint an executor in such a case. The man was very young when he disappeared, and might turn up any day.]

Mr. Buchanan said that in similar cases the Court had appointed a curator to distribute the money among the heirs upon the latter giving security for restitution should necessity arise.]

De Villiers, C.J., said that it was in the highest degree improbable that the man in this case would turn up, but, of course, there was the possibility, and the Court never cared to presume a man dead and appoint an executor, but had rather appointed curators. In the present case the Court would appoint Mr. George Smart as curator to distribute the assets, upon the next-of-kin giving personal security to the Master for the restitution of the money should the said Ebenezer Miller Syme turn up.

CAPE DIVISIONAL COUNCIL { 1902.
V. THE COLONIAL GOVERNMENT. { Dec. 3rd.
MENT. { „ 11th.

Railway siding—Interdict—Act 20 of 1857.

The Government having constructed at Maitland, in connection with the Cape Town to Wellington Railway, a siding which crossed the main road,

the Divisional Council applied for an interdict to restrain the use of the siding, and for an order for its removal.

Held that, in the absence of proof that construction of such siding was not within the power of the company originally formed for construction of the line under Act 20 of 1857, the interdict and order should not be granted.

This was an application upon notice calling upon the Colonial Government to show cause why they should not be restrained from using a siding or crossing recently constructed by them across the Maitland road at Salt River, and also why they should not be ordered to remove the said crossing.

The affidavit of the Secretary of the Divisional Council set forth that in February, 1901, an application was made by the Colonial Government to the Cape Divisional Council, for permission to construct a railway crossing across the Maitland road at Salt River. The application was considered, and on April 3, 1901, the Government was informed that the Council could not consent to the application unless an overhead bridge were constructed for vehicular traffic. A further application was made by the Government, and then an inspection was made by a committee of the Council on July 26, which committee recommended that the former resolution be adhered to, because such proposed railway crossing was at the narrowest portion of the main road, while the line of rails was laid at an oblique angle and being at the bottom of the gradient of the Salt River railway bridge would be a serious danger, and would impede traffic at the crossing, practically in the same manner as when the old railway gates existed. Consequently, on August 18, 1901, the Government were informed that the application could not be granted. An alternative plan, which was submitted, was also refused. On November 25 last it was found that during the night the Government had laid down a line of rails across the road, in order to run locomotives into the shed. Access to the

locomotive sheds, it was stated, could be obtained without crossing the road.

The replying affidavit of the District Engineer said that traffic would not be impeded, as the traffic on the siding would not be very considerable, and the crossing would probably not be used more than once a day for a long time.

A further affidavit by the secretary of the Divisional Council reaffirmed that the traffic would be considerably impeded.

Sir H. Juta, K.C., for the applicants; Mr. Schreiner, K.C., for the respondents.

[Buchanan, J.: I suppose the question is whether or not the Government have a right to make this line?]

Sir Henry Juta said that was so, and the interdict was also asked for on the ground that this crossing was dangerous.

[De Villiers, C.J.: Would it not be the best plan to widen the overhead bridge, so as to continue it over this crossing?]

Sir Henry Juta said he supposed that could be done, and it would certainly make that gradient a great deal less than at present. He however contended that there was nothing to give the Government the right to act as they had done.

Mr. Schreiner contended that the Government had the right, and said that that very point was raised in the case of *Darison Brothers v. The Colonial Government*. (7, Sheil, 284.) He also pointed out that it was stated that the crossing would be very little used.

[Buchanan, J.: Yes, it might be little used now, but by-and-bye it may be used so often as to stop traffic on the road, as they are doing in other places.]

Mr. Schreiner said that the Government would be liable for any damage done owing to negligence on their part.

[De Villiers, C.J.: But the Divisional Council prefer not to have the accident first and then recover the damages. They prefer to avert the accident.]

[Buchanan, J.: There is a large amount of vehicular traffic on that road, and even a temporary stoppage might cause very great inconvenience.]

Mr. Schreiner submitted that the Court would not grant an interdict, but would leave parties who might be injured from time to time to take their remedy.

After hearing counsel in argument on the facts,

De Villiers, C.J., said that the Court would take time to consider its judgment. In the meanwhile, he suggested that the parties should try to come to some arrangement. He thought it only right that the Government should continue the overhead bridge across this crossing.

Mr. Schreiner said he would convey that suggestion to the Government, but he had been instructed that the engineers said that would be impossible.

Postea (December 11): The Court gave judgment, and refused to grant the interdict.

De Villiers, C.J.: This is an application for an interdict to restrain the Colonial Government from using a siding or crossing recently constructed across the Maitland-road at Salt River, and also for an order on the Government to remove the crossing or siding from the road. It appears that this railway in respect of which this siding was constructed, was originally constructed by a company which was formed for the construction of the railway from Cape Town to Wellington. That railway was authorised by Act 20 of 1857, and by a subsequent Act the Government was authorised to exercise all the powers which had been previously conferred upon that company. The widest powers are given to the company for the construction of this railway. No limits of deviation were fixed by the Act, and the company was invested with the powers of taking land for the railway, which the Commissioner of Roads enjoyed under the Ordinance 8 of 1843 in regard to roads. The important question to be decided in the present case is whether the siding in question is one which the company would have been justified in constructing at the time when the railway line was constructed, but unfortunately upon this point there is no evidence whatever. Without such evidence, it is impossible for the Court to interdict the use of the siding or to order its removal. The application must, therefore, be refused with costs.

Buchanan, J., concurred on the ground that there was not sufficient evidence before the Court to justify the granting of an interdict.

Maasdorp, J., concurred.

[Applicants' Attorneys: W. E. Moore and Son; Respondents' Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

GREENSLADE V. ESTATE { 1902.
MCGRATH. } Dec. 4th.

Transfer of property — Ante-nuptial contract—Registration—Curator bonis—Damages.

McG. had passed several mortgage bonds over his immovable property, and had executed an irrevocable power of attorney in favour of A., B. and C. The said attorneys had raised a certain sum of money on a further mortgage on the property of McG. to meet certain pressing claims against the estate, on condition that the mortgagee (the present plaintiff) should have the right to purchase a portion of the property within two and a half years for a specified sum considerably in excess of the then estimated value of the said property. McG. consented to this arrangement. Subsequently a curator bonis was appointed to McG.'s estate, and plaintiff in the exercise of his option tendered payment and claimed transfer of the property. B., however, after filing his plea, discovered that McG. had been married by ante-nuptial contract.

The Court found as facts (1) that the arrangement entered into by A., B. and C. with plaintiff was in the best interest of McG.; (2) that the plaintiff had no notice of the alleged mental incapacity of McG. at the time he assented to this arrangement; (3) that at that time McG. was capable of managing his own affairs. The Court therefore ordered B. to

pass transfer to plaintiff of the aforesaid portion of McG.'s property; but as B. had reasonable grounds for defending the action in his capacity as curator refused to grant costs against him de bonis propriis, but ordered the costs to be paid out of the estate. The Court refused to allow plaintiff's claim for damages as he had only sustained nominal damages, and B. had only done his duty in endeavouring to protect McG.'s interests.

This was an action for the transfer of certain property and damages.

The declaration of Francis John Greenslade stated that the plaintiff resided at Seymour, and the defendant at East London. The defendant was on the 16th January, 1900, duly appointed, and holds office as *curator bonis* of the estate of one John McGrath. On 26th July, 1899, John McGrath, by lawful attorney and agent, executed and registered in the office of the Registrar of Deeds at King William's Town a mortgage bond in favour of the plaintiff for the security of a certain loan of £750, and amongst the terms and conditions and stipulations specially agreed upon and embodied in the said bond was the following stipulation: "And it is hereby further stipulated by the said appearer's constituent that for and in consideration of the said mortgagee advancing the aforesaid sum of seven hundred and fifty pounds sterling (£750) the appearer's constituent doth hereby give and grant the said mortgagee, his heirs, executors, administrators, and assigns, the right at any time within 2½ years, that is 30 calendar months from the date of the registration of this bond, to purchase both the properties mentioned in paragraphs 4 and 5 hereof, namely Lot. No. 5, Block D, and Lot. No. II., Block D, town of East London, Division of East London, for the sum of ten thousand pounds sterling (£10,000) cash for the said two properties, and this right shall be binding on the appearer's constituents, heirs, executors, administrators, or assigns." The plaintiff is the mortgagee, and the said John McGrath is the appearer's constituent men-

tioned in the said bond, and is registered proprietor of the two properties which are referred to and form part of the estate of the said John McGrath under the administration of the defendant as *curator bonis*. On the 14th August, 1901, within the aforesaid period of 2½ years, the plaintiff lawfully and by letter delivered to and received by the defendant exercised the right of purchase of both the said properties for the said sum of £10,000 sterling, and was at all times and is ready and willing to pay the said sum in cash upon transfer being duly passed to him in proper form of law of the said properties. The plaintiff has sustained damages in the sum of £2,000 by reason of the delay and default of the defendant, in making transfer as aforesaid of the said properties to the plaintiff, and says specially that from the 6th day of December, 1901, he has lost the interest at 6 per cent. per annum upon a sum of £10,000 lying to the knowledge of the defendant unused and uninvested in a bank for the purpose of paying the price aforesaid, while the defendant has retained the said properties and has received and enjoyed the benefits, profits, and rents thereof to all which the plaintiff is entitled.

The plaintiff prayed for: (a) An order compelling the defendant forthwith to pass to and execute in his favour transfer of the said two properties in proper form of law, upon payment of the purchase price of £10,000 sterling; (b) judgment for the sum of £2,000 sterling, as and for damages; (c) alternative relief; (d) costs of suit.

The plea of the first-named defendant admitted the allegations as to residence, appointment of *curator bonis*, execution of mortgage bond, and the parties to the mortgage, subject to the remaining allegations of the plea. The said John McGrath was lawfully married to Johanna Leih in March, 1872, and the defendant does not admit that the marriage was without community of property, and puts the plaintiff to the proof thereof. The said Mrs. McGrath died on the 2nd of March, 1899, and at the time of her death the properties referred to in the declaration formed portion of the joint estate referred to in a mutual will executed by J. McGrath and his wife on the 13th of July, 1897. Mrs. McGrath died, leaving the said will of full force and effect, and leaving children, some of

whom are minors, begotten of the said marriage, and on the 10th of March, 1899, J. McGrath executed a deed renouncing and repudiating the said will and all right therein. Thereafter McGrath executed the said mortgage bond, purporting to mortgage, and give the said option over the whole of the said lots. The defendant denied the exercise of the option and the damages, and denied that J. McGrath was legally entitled to pass the bond and to give the option over the whole of the property, or that the plaintiff was entitled to demand from him transfer of the whole of the property, and the defendant further said that he had been called upon by the *curator ad litem* of the minors, and by the Master of this Honourable Court, not to pass transfer of the said property without an order of Court.

Defendant therefore asked that the plaintiff's claim be dismissed with costs.

The intervening defendants, in their plea, said that at the time John McGrath executed through his attorney and agent the mortgage bond referred to, he was mentally incapable of understanding and managing his affairs, and that plaintiff was aware of the fact, and they said further that the condition of the bond was unfair and unjust. They said that the properties therein referred to formed part, at the time of the execution of the mortgage bond, of the estate of John McGrath and his deceased wife, Johanna Maria Margaret McGrath (born Leih), who died on 2nd March, 1899. At the time the properties were acquired there was a subsisting valid marriage between John McGrath and Johanna Maria Margaret McGrath, and under the statutory community of property therefrom arising, the properties became the joint properties of John McGrath and his wife, and even if the statutory community of property was excluded by ante-nuptial contract (which they do not admit), they say that the said properties were acquired by the joint efforts and earnings of John McGrath and his wife, and became their joint property. They admitted the delivery of a letter from plaintiff, purporting to exercise a right of option to purchase, but denied that plaintiff had sustained damages in the sum of £2,000, or any other sum, by reason of anything for which they were liable. They contended that, by reason of the facts set out, plain-

tiff was not entitled to succeed in this action, and that his claim should be dismissed, with costs. As an alternative, they submitted that the plaintiff was not entitled to claim transfer of half of the two properties claimed in the declaration, which belonged to the estate of the late Johanna Maria Margaret McGrath, in respect of which half they contended that plaintiff's claim should be dismissed, with costs.

In his replication the plaintiff said that the marriage between John McGrath and Johanna Maria Margaret McGrath was contracted without community of goods, and that an ante-nuptial contract *inter alia*, excluding community of goods, was passed before the notary, William Dobb, and witnesses on the 1st day of March, 1872, whereby it was agreed between the said McGrath and the said Johanna Leih that there should be no community of property between them. The said contract was on the 2nd March, 1872, in manner at that time in force in the territory of British Kaffraria, where the marriage took place, registered in the public register of hypothecated debt and ante-nuptial contracts, kept at King William's Town, but no copy of the said contract was required to be so registered, and the protocol of the notary, William Dobb (deceased), has been lost. The plaintiff annexed a correct and certified extract from the register.

Mr. Schreiner, K.C. (with him Mr. Upington), for plaintiff; Sir H. Juta, K.C. (with him Mr. Buchanan), for the *curator bonis*; Mr. Benjamin for the intervening defendant.

Mr. Schreiner said that the main issues before the Court were whether Mr. and Mrs. McGrath were married in community of property or not, and independently of the question of community, whether the property stood registered in the name of Mrs. McGrath; whether, as specially pleaded by the intervening defendants, they were not entitled to the property, even if there had been no community of goods, inasmuch as the property had been acquired by the joint efforts of Mrs. McGrath and her husband, and whether Mr. McGrath was capable or not of entering into the contract, and whether plaintiff was aware of McGrath's mental condition at the time.

John Henry Gately, Acting Registrar of the Supreme Court, said that in the roll of notaries of the Supreme Court he found an entry of the admission of William Dibb on April 24, 1866. There was no note of his death on the roll, but there was a death notice filed with the Master. Witness found in his office no trace of the protocol of the deceased Dibb. He had made search, but could not find it.

R. Steyn, second clerk in the office of the Master of the Supreme Court, deposed that there was no record of any protocol of the deceased Dibb in that office.

Henry George Drake said he was an attorney practising at East London, and was the local attorney for Mr. Greenslade. (The correspondence with regard to Greenslade exercising his option to purchase was put in at this stage.) Witness gave evidence as to the bonds on McGrath's property before the bond, and option now in question were given. At that time McGrath's physical health was not good, but witness was quite satisfied that he was sound mentally. After the order of the Eastern Districts Court appointing Mr. Booty *curator bonis* had been made, McGrath resented very much the position he was in.

[Buchanan, J.: I see he did not appear to oppose the granting of the order, although served with notice. Why, then, did he resent it afterwards?]

Witness: Because Booty took a firm hand, and did not let him draw money as he liked. At the time the mortgage and option were passed, there was nothing to indicate that McGrath was of unsound mind at all. As to the ante nuptial contract, witness had made every search, but could not find it. According to the practice at the time the contract would have been made it would not have been filed. As to the property now in question, witness valued it, with the leases thereon, at £13,000 or £13,500.

By Mr. Benjamin: Witness did not take serious steps to raise the bond of £750. He did not know of any unencumbered property on which they could have raised the mortgage. McGrath, to witness's knowledge, had suffered a paralytic stroke. His business was chiefly that of cattle speculator. Witness thought in 1899 that McGrath was a cute business man, and was quite

capable of conducting his own business. Witness did not actually do business with him, but he would have done so. Witness considered McGrath to be a shrewd business man.

Francis John Greenslade, the plaintiff, said he formerly resided at Seymour, and was living at East London when this bond was passed. Witness had no intimate acquaintance with McGrath. Mr. Fairburn, with whose bank witness's firm dealt, introduced the matter. He told witness he was acting for McGrath, and wished to raise £700 or £750. He referred witness to Mr. McDonald, who he said was acting for the power holders. Witness saw McDonald, who showed witness a statement which showed a property under the name of Cook and Bowry, who were then tenants, worth £5,500. The statement showed a balance to the credit of the estate of £4,517. Witness considered that the risk in taking a fourth mortgage was very great, and he wanted more consideration. Witness suggested the option. The idea of the option came from witness; not from Drake. Messrs. McDonald and Fairburn asked him to state his offer in writing. Witness wrote a letter, putting an offer to lend the money if he got a 2½ years' option. They wished a further clause inserted to compel witness to exercise the option, and either close or reject, if they had another offer. Witness never saw McGrath in the matter. Witness was not aware, as alleged, that McGrath was mentally unable to manage his affairs. Witness exercised his option in August, 1901. Witness knew nothing at all about Mrs. McGrath. Witness was sued in the Eastern Districts Court for cancellation of the bond, but that was withdrawn, witness paying the costs, in order to bring the matter at once before the Supreme Court. Witness had no further interest in the bond; in fact, he thought it had been cancelled. He had been in Switzerland, and had sent a power from there. Witness had made deposits to the value of £19,000 in the bank, in order to be ready to pay immediately a demand was made. Witness had had securities in the bank; he had not lost interest. The declaration was in error in stating that £10,000 had been lying idle. The rents from the property amounted to £636 per annum. This matter had constantly been in the

hands of attorneys, and expense had been incurred in searching, travelling, etc., in consequence of the attitude of the defendants. Witness had had to come back from Europe for the purposes of this case. Mr. Booty had received the rents. From the £636, rates, etc., probably to the amount of about £82, had to be deducted.

By Mr. Benjamin: When witness took the option he valued the properties at about £7,000. Witness wanted to ascertain the highest value, and went to the owner of the adjoining property, whose valuation of the properties was £6,800. Witness knew of the existence of the power-holders, but did not take steps to inquire why there were these power-holders. Witness believed Mr. Fairburn told him that McGrath was in ill-health, and that the power-holders were appointed in consequence of this. Witness looked upon the power-holders as responsible men.

George Alexander Reynolds, master of the Supreme Court, said he was not aware that he had called upon the defendant Booty, as stated in the plea, not to pass transfer of this property without an order of Court. Witness had been written to and asked if the curator had power to sell unremunerative vacant lots without order of Court, and he had replied in the negative. Witnesses's reply referred to all property.

Counsel read the evidence taken for the plaintiff on commission. Henry N. Willetts, sworn appraiser to the Master of the Supreme Court for the district of East London, valued the property at £13,500. He considered that the value in July, 1899, was £7,500. Angus Wm. Newman, gave similar evidence. To his knowledge Mrs. McGrath did not take any interest in the business, nor did she, by her industry, increase the wealth of her husband. In his opinion McGrath was an illiterate man, but was a member of the Town Council and Divisional Council. Up to three years ago McGrath was strong. He had transacted business without consulting his wife. Witness considered that McGrath's mind was not deranged after his return from Home; he would not think so if the doctor said so. He would not contradict the doctor if the latter said McGrath's mental faculties were impaired. Witness accepted a promissory note for £34 9s. from McGrath in 1899.

Had he thought that McGrath was mentally affected he would not have accepted this note. Samuel Thomas Wakefield, secretary of the Divisional Council, gave evidence as to the valuations of the property on which rates were paid by McGrath in 1899 and in 1901. The Rev. James Kelly, one of the power-holders, said the impression conveyed to him by Mr. McGrath was that he acknowledged that his wife earned as much money as he did. She was a hard working woman. In 1899, McGrath was short of ready money, and was being pressed. Witness considered McGrath was then mentally capable; he understood anything that was explained to him. The pressure on the estate was relieved by Greenslade's loan. Witness was pretty certain he discussed the loan with McGrath.

Mr. Buchanan read the evidence of Mr. Fairburn, taken on commission. He had great difficulty in raising the £750. Money had been advanced on the property to the extent of £10,000. Witness would have accepted £10,000 for the property. Witness always looked upon McGrath as absolutely sane. McGrath was very dilatory in paying accounts. Mr. Norman R. McDonald, another of the power-holders, said he prepared a statement showing a surplus in the estate of £4,700. This, he believed, was shown to Greenslade. Witness did not think Greenslade would avail himself of the option. Witness had not the slightest doubt that McGrath knew he was giving the option. Mr. Booty, the *curator bonis*, said the majors and curator for the minors had objected to the sale. A sister of Mrs. McGrath deposed to certain of the property having been bequeathed to Mrs. McGrath, and to the latter's mother having given her money from time to time. A son of McGrath said that he considered that when the power-holders were appointed his father was mentally incapable of conducting his own business. In witness's opinion he was insane.

After the reading of further evidence taken on commission, the case for the defendants was closed.

Sir Henry Juta said that it would perhaps help to shorten the case if he said at once that so far as he was concerned, acting for the *curator bonis*, he was not going to take up the time of the Court in contending that there was no ante-

nuptial contract excluding community of property. It would, therefore, be now, as far as the *curator bonis* was concerned, merely a question of the amount of damages.

Mr. Benjamin said that, on behalf of the intervening defendants, he would admit that it was impossible for them to contend that there was no ante-nuptial contract, but he must insist upon the defence that McGrath was of unsound mind.

After counsel had been heard in argument, the Court gave judgment for the plaintiff on prayer (a) of the declaration, with costs.

Buchanan, J.: In the year 1899 John McGrath, then residing at East London, who owned a considerable amount of property, also owed a considerable amount of money. There were several mortgage bonds registered against his property, and in April of 1899 he executed an irrevocable power of attorney in favour of three persons, Father Kelly, Mr. Fairburn, and his son-in-law (Lynch), authorising them to administer his affairs, he at the time being in ill-health. These three gentlemen—power holders, as they are called—in the exercise of the agency conferred upon them, and certainly, I think, in the best interests of McGrath, raised the sum of £750 from the plaintiff, Greenslade, to meet debts for which McGrath had been summoned, and to pay off pressing claims. The only security that could be offered was a fourth bond over the immovable property. This, certainly, was not first-class security, because one of the previous bonds for £2,500 was a bond payable on demand, and as one of the letters pointed out, anyone who lent further money on the property would have to take the further risk of being prepared to meet this bond of £2,500 at any moment, if it should happen to be called up, or otherwise the property might be sold. The three previous bonds amounted to a considerable sum of money, something like £11,000. Greenslade, the plaintiff, agreed to lend £750, on condition that, in addition to the fourth mortgage, he should have the right at any time within 2½ years to purchase certain properties mentioned in the bond for a sum of £10,000 cash. The leading business man of the three power-holders, Mr. Fairburn, the manager of the bank, said that at the

time when the bond was given, he never dreamt of the plaintiff availing himself of this right, as the value of the property was then far below the sum at which the option of purchase was given. Greenslade himself stated that the utmost value was not more than £7,000, and so Fairburn considered himself perfectly safe in agreeing to this condition. The condition was agreed to after full consideration by the two other power holders, and it was brought directly to the notice of McGrath, and McGrath gave a special power in favour of his attorney to pass the mortgage bond to Greenslade, with this condition therein. This was in July, 1899. Later on in that year one of the power holders, Mr. Fairburn, retiring, and McGrath's ill-health still continuing, application was made to the Eastern Districts Court to appoint a *curator bonis* in the estate of McGrath, who had meanwhile had an apoplectic seizure, and was unable physically to attend to his business; but there is no allegation anywhere in the documents that his mind was not perfectly sound and keen. The Eastern Districts Court, after giving notice to McGrath himself, and after, according to the evidence, McGrath had consented to this procedure, appointed the present defendant, Mr. Booty, as *curator bonis* of his estate. After Booty had been appointed *curator bonis*, the plaintiff exercised his option, giving notice to Booty that he required transfer of the property, and tendered payment of the purchase price. At that time Booty, who was then looking into the affairs of the estate had discovered that McGrath's wife had died in the previous March, and as far as he could ascertain, there was no ante-nuptial contract registered in Cape Town; whereupon he concluded that McGrath and his wife had been married in community, and consequently that half of the property was vested in the wife's estate. Subsequent enquiry, however, showed that, although no ante-nuptial contract was found or registered in Cape Town, such a contract had in fact been in existence, and the fact of its having been passed, was noted in the Deeds Registry of Kaffraria, though the document itself, in accordance with the then practice of that office had not been registered. Since the case came into Court, however, the defence on

this ground has been given up. The other defendants who intervene are, firstly, the *curator ad litem*, appointed by the Eastern Districts Court to the minor children of McGrath, and, secondly, the major children of McGrath. These intervening defendants make the very important allegation that McGrath was incapable of understanding and managing his affairs at the time the contract was entered into with the plaintiff, and that the plaintiff knew such was the case. On this important issue of fact, after hearing the evidence and after hearing what the plaintiff himself has said, and considering that the negotiations over this contract took place with able and experienced men like the power-holders, I am forced to the conclusion, first, that the contract was executed in the interests of McGrath, secondly, that the plaintiff had no notice whatever of any incapacity on the part of McGrath, and, thirdly, that there was no such mental incapacity at the time the contract was entered into. Therefore this defence, in my opinion, also fails. These defences having failed there is no other reason why the prayer of the petition for transfer should not be granted. The defendant Booty was only the *curator bonis* of the estate, and as has been stated by the Master of the Court, Booty could not have transferred or alienated any part of the estate without an order of the Court or without the consent of McGrath himself. It is said that McGrath himself is in such a condition that he has had to be removed to an asylum, and consequently could not legally give consent, and that the curator therefore was bound to come to the Court. It must be remembered when the plea was filed Booty had no knowledge of the registration in the Kaffrarian Registry of the ante-nuptial contract, and under these circumstances I do not think the Court can blame the *curator bonis* for defending this action. The plaintiff must have his judgment for transfer with costs against the curator, not *de bonis propriis*, but out of the estate. The second prayer in the declaration is a claim for £2,000 damages, the declaration alleging that these damages arose from the loss of interest on £10,000, unused and uninvested. But when we come to investigate this case, we find, and the plaintiff himself admits, that this £10,000 was not lying unused and uninvested. Plaintiff did

lodge certain securities at the bank, upon which the bank agreed to advance the money, but no advance was ever made or any interest paid. This is the only allegation in the declaration upon which the plaintiff has based his claim for damages, and upon this allegation of fact the plaintiff himself proved that he had not suffered any damages. No doubt in a breach of contract, the plaintiff would be entitled to nominal damages, but considering the circumstances of this case, considering that the defendant Booty had to consider the interests of other parties, and that he would not have been justified in acting without an order of Court, this is not a case even for nominal damages. Plaintiff is entitled to judgment in terms of prayer "a" of the declaration. I have only to add that the only question which remains is the question of costs of the *curator ad litem* and the other intervening defendants. The Court is prepared to hear counsel with regard to this.

After argument, the Court ordered that all costs be paid out of the estate, excepting the costs of the intervening defendants other than those of the *curator ad litem*.

[Plaintiff's attorneys: Walker and Jacobsohn. Defendant Booty's attorneys: Silberbauer, Wahl, and Fuller. Intervening defendants' attorneys: Michau and De Villiers.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

GILLET V. COLONIAL GOVERNMENT. 1902. (Dec. 5th.)

Water — Railway purposes —
Acquisition of water rights
under contract.

The Colonial Government had expropriated a portion of a certain farm for railway purposes. Thereafter they entered into certain contracts with the then owners of the remaining

extent whereby they were authorized to take such water as they might require from the said remaining extent, but not more than 15,000 gallons a day. The Government had sunk a well on the farm, and shortly after they had entered into the aforesaid contract the plaintiff bought the remaining extent and sunk two bore-holes thereon, thereby increasing the supply of water to defendant's well. Subsequently the plaintiff contracted to give defendants the right to take and use all the water on the farm, subject to the condition that he might use all such water as the defendants should not require. Thereafter the plaintiff sunk a third bore-hole on his property, and having found a further supply of water sold both it and the bore-hole to the defendants.

Held, that the plaintiff was not entitled to an interdict to restrain defendants from taking water from the two original bore-holes

This was an action brought by Nicholas Joseph Gillet against the Commissioner of Public Works for an interdict restraining the Government from using certain property, and for the sum of £200 as compensation and damages for interference with the plaintiff's property. The declaration stated that the plaintiff was a hydrologist, residing at Fraserburg road, and was the registered owner of the farm known as Kleinkruitfontein, situated in the division of Prince Albert, upon which farm were certain two bore-holes, which, together with all water rights, was the property of the plaintiff. On the 24th August, 1900, the defendants' predecessor purchased another bore-hole on the farm for the sum of £750. On September 19, the defendant, in addition to using the bore-hole so purchased, proceeded to pump and use water from one of the other two bore-holes referred to. Defendant continued up to the present time to so wrongfully appro-

priate the plaintiff's property, in spite of repeated protests. The plea set forth that on the 1st December, 1897, plaintiff and defendant entered into a certain notarial agreement regarding the taking and use of the water on the farm. Under this agreement the defendant, for valuable consideration, acquired the right to use all the water on the farm. At the date of this agreement the two bore-holes in question were already in existence, and defendant was entitled to take all the obtainable water therefrom. Defendant admitted the payment of the £750 in respect to a third bore-hole, which he said was constructed after the date of the agreement of 1897. Defendant claimed that he was entitled, by virtue of the agreement of 1897, to free access over the farm, and to pump and use the water. The replication was general.

Mr. Searle, K.C. (with him Mr. Burton), for the plaintiff; Mr. Schreiner, K.C. (with him Mr. Nightingale), for the Colonial Government.

From counsel's statement it appeared that the two bore-holes in question were put down in 1886 and 1887. The third—the one in respect to which the £750 was paid—was about 900 feet deep in 1897, and was completed to a depth of over 1,500 feet in 1899. Counsel put in documents dated July 25, 1889, between Gillet and the Coal Syndicate, who then had the farm; of the 25th September, 1890, in which the Government was given the right to take 15,000 gallons of water a day on payment of £100 a year; and also the agreement of the 24th August, 1900. The dispute was in respect of the two bore-holes constructed in 1885 and 1897.

Nicholas Joseph Gillet said he was a water expert and contractor, and resided at the farm Kleinkruitfontein, of which he had been the owner since 1889. Witness was largely interested in the Coal Syndicate, from whom he bought the farm. When the agreement of 1890 was entered into, witness was the owner, but he did not think he had taken transfer. One of the bore-holes was started in 1886, but the drill broke, and it was abandoned at 110 feet. The second was started at a distance from the first of 2 feet 9 inches in March, 1887, and was completed to 1,242 feet in August, 1887. Water was obtained therefrom, first at the rate of 96,000

gallons a day, but it gradually diminished, the water percolating into the Government well situated within 30 feet of the railway line, and about 206 yards from these bore-holes. The two bore-holes acted as one well. In 1890 witness took transfer. He never lived permanently on the farm. The third bore hole was commenced in October, 1897, 29 feet from the other two. In December, 1897, the depth was 900 feet. This was at Christmas. On the 29th November it was 710 feet. The Government knew witness was sinking this bore-hole when the agreement was entered into. The bore-hole was completed on the 29th October 1899. After the agreement of 1897 the Government deepened the well nearer the line and sunk two others wells. This they did in May, June, and July, 1899. In the third bore hole made by witness strong water was found. On March 24 witness wrote stating that he was prepared to take £3,000 for the water then supplied by him to the Railway Department with engine, pump, and fittings complete, but on April 20 he wrote stating that he could not include the pump and engine. On May 16 Mr. Heatlie (the district engineer) wrote as follows: "I have more than once recommended that your bore-hole and plant be purchased outright for the sum of £3,000, according to the offer as stated in your letter of March 24 last, and should be pleased to hear, in the event of the recommendation being accepted, whether you are prepared to forego any charge for the use of your plant for the last six months, or if any charge is to be made, kindly state what it is." On May 16 witness wrote to the General Manager stating that he was prepared to treat with the Department for the water from the bore-hole now existing on the farm Kruitfontein, for the sum of £750, with a proviso as to when that agreement should come into effect. Later on witness wrote further on the matter, pointing out that the reduction in the price was owing to the withdrawal of the engine, pumping plant, and the sinking of a shaft. On July 23 a letter was received from the defendants accepting the offer contained in the letter of May 16. Afterwards there was some misunderstanding, the Department apparently confusing the offer to sell the pumping plant, bore-holes, and everything for £3,000, and the offer to sell the bore-hole

and water only for £750, but on inquiry the Department gave up the claim to the pumping plant. In the course of further correspondence witness submitted that he had only sold the Department the one bore-hole, viz., No. 3. Witness detailed the general damage he had sustained through not being able to cultivate seven acres of land he had prepared, owing to the Department taking his water. He suffered more than £200 damage. Witness went to England, and returned during November last year. He then found that the Government had built bricks over No. 1 bore-hole to protect the bore-hole. The second bore-hole had filled up with earth, owing to the workmen working round about there. The Government were then pumping water out of both bore-holes, No. 1 and No. 3, and taking all the water. Witness wrote to the General Manager, stating the above facts, and saying that as the Government were using the other bore-hole he would charge five per cent. per annum on an expenditure of £3,000 from March 31 until the Department arranged to purchase that bore-hole also. The General Manager replied, drawing witness's attention to the servitude and the receipt granted by witness. The latter replied that he had sold one bore-hole only to the Government, who were now making use of both, instead of finding other water for themselves. Ultimately the Department refused to recognise witness's claim. Witness had in November, 1900, been asked to connect the two bore-holes, Nos. 1 and 3, on the surface, and he replied that the Department could do so for a time until he required the water. On September 1 last the Department removed the brickwork round the bore-hole, but there was a suction pipe still in the bore-hole. It had been left there because it could not be got out without special machinery.

Cross-examined: The expenditure of the syndicate was incurred in searching for coal, and during that search water was found. Bore-holes Nos. 1 and 2 were on the farm at the time the agreement of 1897 was entered into. Bore-hole No. 3 was the one sold to the Government.

Re-examined: Witness could not pump from No. 1 unless the suction pipe was extracted, and as to No. 2 it was blocked up. Up to last year the Government had never used bore-holes Nos. 1 or 2 without asking witness's permission.

By the Court: Witness claimed the right to retain the water from bore-holes Nos. 1 and 2, as the Department had never bought these from him.

After hearing counsel in argument on the facts the Court gave judgment for the defendants with costs.

Buchanan, J.: Plaintiff is the registered owner of the farm Kleinkruitfontein, in the division of Prince Albert, over which farm the railway to Beaufort West runs, and the plaintiff claims that when he purchased the farm there were certain bore-holes, by means of which subterranean water was obtained, already sunk on the farm. Plaintiff sunk a third bore-hole, and obtained a further supply of water, and this water from the third bore hole he sold to the Government; but he alleges that the Government had no right to go to the other bore-holes and take water from them, not having specifically bought this water. The defendants, who are the Colonial Government, justify what they have done, namely, taking water from these other two bore-holes, on the ground of a certain contract which has been put in. The matter has been before the Court on a previous occasion, and it appears from the previous case that after the Government constructed their line, they expropriated a portion of the farm for railway purposes from the then owner, for which they paid him the sum of £140. After they had made this expropriation, they entered into certain two contracts with the subsequent owners, a coal syndicate, the effect of which was to give the Government the right to take any water they wanted from the farm to the extent of 15,000 gallons per diem. The Government had sunk a well on the farm, and they were obtaining their water supply from this well. Shortly after this contract was entered into, which is registered against the title, the plaintiff bought the property, and he sunk the two bore-holes mentioned in the declaration. The effect, as was shown in the previous action, of these two bore-holes was to increase the water supply, especially in the well which the Government had sunk on the farm. The plaintiff brought an action in May, 1897, complaining that the Government were then taking more than 15,000 gallons per diem from the well. He also alleged that the water supply of the farm had been greatly increased by the bore-holes which had been sunk, and that this

water found its way into the well, and said that if the Government limited their takings to 15,000 gallons per diem, he would have a very considerable supply of water which he could use on the farm. The Government justified their conduct in that case on the ground that the well was within the land expropriated by them, but the Court held that the Government, not having registered this expropriation against the title, and it not being shown that the well was in such a position as any purchaser must consider that it would necessarily fall within the limits of the land expropriated, the purchaser was not bound by the previous expropriation, and the Court therefore held that the well was to be considered as a well on the farm, and not within the expropriation, and that the Government must be restricted to taking 15,000 gallons per diem from the farm. On December 1 of the same year, apparently in consequence of that decision, a contract was entered into. By this contract the plaintiff agreed with the Government that the latter should have the right to take and use all the water obtainable on the farm for a substantial consideration, viz., the payment of the sum of £2,050. The present plaintiff further agreed to do nothing which would have the effect of drawing off, diminishing, or interfering with the water supply, and it was further agreed between the parties that the plaintiff might use all water that was not required by the Colonial Government. The clear meaning of this document is that all water obtainable on the farm was sold to the Government for the sum of £2,050, but that if the Government did not use all this water, they were not to act as a dog in the manger, and keep it for themselves, but plaintiff, as owner of the property, might use any that the Government did not require. At the time the contract was entered into there was this well and these two bore-holes in existence, and I think it can be fairly said that these were within the consideration of the parties as means by which water was obtainable on the farm. Shortly after this the plaintiff, who is interested in a coal-prospecting syndicate, began to sink a third bore-hole, and the plaintiff very candidly admits that this third bore-hole was not sunk for the purpose of obtaining water. He has given his evidence in the most candid way, and I think he has put his case before the

Court with perfect candour and fairness. He admits that this third bore-hole was sunk for the purpose of testing whether there was any coal supply, and in carrying out this speculation he struck another supply of water at a depth of some 1,450 feet, and this water came to the surface. The Government during the time of the war were very anxious to get a further supply at this place, and the plaintiff having pumping machinery, very generously obliged the Government, without any charge for two months, with the use of this machinery, and allowed the Government to take all the water they could obtain by using this machinery. After this some question having arisen as to the water, the Government entered into a further contract with the plaintiff, on the 24th of August, 1900, by which, in consideration of the payment of £750, this bore-hole was sold to the Government. Plaintiff alleges that he sold the water so obtained to the Government as well as the bore-hole, but, looking at these previous documents, in my opinion the water alleged to have been sold was already the property of the Government. It is true that it was not obtainable with the means in existence at the time of the previous contract, but by that contract the Government were allowed to use any means they liked to obtain a further supply. I think the plaintiff having obtained this further supply it would have been highly inequitable for the Government to take this water without compensation. Here, however, we have to deal with the contract and not the question of equity. Having obtained this supply of water, and having compensated plaintiff for the sinking of the bore-hole by the payment of the sum of £750, the Government obtained this supply of water, but what the plaintiff complains of now is that the Government are taking this supply of water from the two bore-holes already in existence at the time the original contract was entered into. He claims that he never disposed of the water in these bore-holes, but I think that the proper reading of the contract of December, 1897, is that he disposed of this water just as much as he disposed of the water in the well, which, by the judgment of the Court, was declared to be his property. I think, therefore, that the Government were entitled

to take any water that was obtainable on the farm; that these two bore-holes being in existence when this agreement was entered into, stand in the same position as springs, which might be opened up to increase the supply of water, and also in the same position as the well. Plaintiff does not seem to object to the Government taking any water from this well. I, therefore, do not think he can object to the Government taking water from the bore-holes existing on the property at the time the agreement was entered into. That is really the test in this case. If the Government could take water from these existing bore-holes they are entitled to do so. It is clear under this contract that the Government are entitled to this water. They cannot, of course, force the plaintiff to increase his supply of water, but by this subsequent agreement of August the plaintiff has further stipulated that he would not sink any further bore-holes or use any other means of obtaining water. No doubt the sinking of the bore-hole was a very expensive work, but it was not sunk for the primary purpose of obtaining water. It was sunk for the purpose of obtaining coal, and while doing so plaintiff was fortunate enough to strike water, and the Government very fairly substantially compensated him for what he had done. I do not wish to say anything about what the Government has done with regard to the not very generous treatment in respect of the use of this machinery. That is something outside this case, and as far as this action is concerned I must say that the plaintiff has shown he is not entitled to an interdict preventing the Government from using this water. No doubt there is a great deal of force in what Mr. Searle said as to the Government not having taken up this clear position at any one time, and it seems clear from the correspondence that the different officers do not seem to have understood the position, but took up different positions inconsistent with the real one. But these statements in the correspondence do not amount to a novation of the real contract, which contract is still binding. Judgment must therefore be given for the defendants in this case with costs.

Maasdorp, J.: Under the terms of the 1897 agreement the Government obtained all the water obtainable on the farm, and it seems to me that whatever water was obtained by plain-

tiff by any means whatever became part of the obtainable water, and if the Government by any means could get at that water they had the right to take it. Plaintiff went further, and undertook not to interfere with this obtainable water. He retained a qualified right to the water which the Government did not require, but he agreed not to interfere with the water supply to the Government. If at any time he interfered with the water supply so as to deprive the Government of what they might require, then he would be infringing his contract. I think plaintiff had agreed that the Government should take water from the then existing boreholes, and that he would not interfere with their right to take it, but as has been admitted by counsel for the defendant in this case, he still reserved some qualified right to take such water as the Government did not require.

[Plaintiff's Attorneys: Sauer and Standen; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. LE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

REX v. KADIR. { 1902.
Dec. 8th.

Public Health — Municipality —
Regulations—*Ultra vires*.

Under the Public Health Amendment Act, 1897, every urban local authority may make regulations for regulating the trade in articles intended for the food of man. The Municipal Council of M. made a regulation prohibiting the keeping of food in any shop, room or other place used as a sleeping apartment, or directly connected with any sleeping place or any sanitary convenience. The appellant was tried before the

Resident Magistrate of M. for a contravention of the regulation by keeping bread in a shop which was directly connected by a door with a sleeping apartment used as such by the inmates, and evidence was given that the rush of foul air into the shop from the bedroom would have a deleterious effect on the food.

Held (in the absence of any conclusive evidence to the contrary) that the regulation was not ultra vires.

This was an appeal by Ebrahim Kadir, a shokkeeper, of Mafeking, from a conviction of the Acting Resident Magistrate of Mafeking.

On October 24 Kadir was charged with contravening section 8, subsection 1, of the regulations of the municipality of Mafeking, as confirmed by Government Notice, No. 43 of 1902, in that on October 18 he wrongfully kept food and aerated waters intended for sale in premises directly connected with a sleeping apartment. The regulation, which was framed on section 9, subsection 5 (clause D) of the Public Health Act, No. 23 of 1897, was in the following terms: "No person shall keep or prepare or expose for sale any fruit, vegetables, food, or aerated or mineral waters in any shop, room, or other place used as a sleeping apartment or directly connected with any sleeping apartment or any sanitary convenience." The defendant was fined £5, or in default one month's imprisonment with hard labour. The prosecution pointed out that in order to comply with the regulations the defendant must block up the door between his shop and sleeping room. The defendant took exception to the conviction on the ground that the regulation was *ultra vires*, and that it was unreasonable. The Magistrate, in his grounds for conviction, said that the Municipal Council had power to frame bye-laws such as the accused was charged with contravening, and that he was infringing the bye-laws so long as there was a door between the shop and the sleeping apartments directly commu-

nicating, and capable of being opened at any time by any one in the place or directly connected together in such a manner as was prohibited by the regulations. If this were not so the door might be opened and foul air from the sleeping apartment admitted to the shop.

Mr. Buchanan for the appellant; Mr. Burton for the Municipality.

Mr. Buchanan: The powers given to local authorities by section 9 (sub-section 5.d.) of the Act 23 of 1897 were intended to deal with a nuisance. The Municipality must go so far as to say that the shop must have an outside door, and that there must be no communication between it and any sleeping apartment; and that the bedroom and shop must not even be allowed to open into a common passage. The Act 23 of 1897 was never meant for a case of this kind, and even if it were, the summons is bad on the ground of uncertainty. This regulation is in restraint of trade, and is unreasonable. How, *e.g.*, can aerated waters in closed bottles be contaminated by microbes? It would have been reasonable if proper ventilation of the sleeping apartments had been insisted on. No English authority supports such a contention as that of the Municipality.

Mr. Burton: The whole of sub-section 5.d of section 9 is wide enough to deal with the sale or the keeping of food which is unsound or dangerous to health. Appellant's counsel admits that if the food were kept in a sleeping apartment the regulation would be reasonable. The onus was on the defendant to show that no harm was done to the food by people sleeping in the next room, but the appellant had closed up the outside entrance to his shop.

Mr. Buchanan (in reply): Respondent's counsel says that if the door between the shop and the bedroom were closed the regulation would not be broken, but if the door were left open it would. But it would be most unreasonable to require a small tradesman to go round from one outside door to another as often as he wished to enter or leave his shop. Again the prevention of sale in this section does not extend to preventing the sale of such goods as may *possibly* be injurious to health, but only of such as *are* injurious. The respondent must show that these regulations are reasonable.

[De Villiers, C.J.: You have to show that they are unreasonable. They have been duly sanctioned and promulgated. The presumption is that they are reasonable.]

Then again there is no evidence to show that the door between the bedroom and the shop was left open at night. If it was not, the goods could not be injured by people sleeping in the next room.

De Villiers, C.J.: The regulation which is objected to as *ultra vires* reads as follows: "No person shall keep, or prepare, or expose for sale any fruit, vegetables, food, or aerated or mineral waters in any shop, room, or other place used as a sleeping apartment, or directly connected with any sleeping place, or any sanitary convenience." I confess that, so far as aerated and mineral waters are concerned, with my little knowledge of sanitary matters, I see some difficulty in holding that microbes which originated from a sleeping apartment or sanitary convenience would penetrate those bottles so as to injure the water. But, in regard to the food, it seems not unreasonable to hold that food would in some manner be contaminated by microbes issuing from sleeping apartments or sanitary conveniences. Now by sanitary conveniences I suppose are meant water closets. Supposing the water-closets were attached to the shop, connected directly with the shop by a door, it is reasonably clear that that would be injurious; but if they were separated by a passage or a small room, the danger would not be so great. The object of the regulation is to prevent a direct connection between any shop in which food is kept and any sleeping apartment or sanitary convenience. In my opinion, it lies upon the appellant to show that this is unreasonable, and the only evidence given upon the point is that of the sanitary inspector, who states "Two windows in the sleeping room were closed; in opening the door communicating with the shop the rush of air into the shop would have a deleterious effect on the food kept in it." There was no evidence given to the contrary, and this evidence is in favour of its having a deleterious effect. In the absence of any conclusive evidence to the contrary, the Court can only bring its own knowledge to bear upon the case, and as far as my know-

ledge goes, I am of opinion that food in a bedroom would be most likely to be contaminated, and the food in a shop adjoining, and directly connected by a door with a bedroom, would be exposed to danger, although in a less degree, and that the Council was justified under the powers of the Act to frame this particular rule. My remarks, of course, are confined to the food, because, as regards mineral waters, I think it is not important, but in the present case the appellant kept bread in the shop. I think, in the absence of proof to the contrary, that there is a danger of contamination to the bread through its being in the shop which is so closely connected with a bedroom occupied by the inmates. The appeal will, therefore, be dismissed with costs.

Buchanan, J., concurred.

[Appellant's Attorney: H. Sonnenberg; Attorneys for the Municipality: Findlay and Tait.]

Ex parte TEMPLEMAN.

Mr. Russell moved in this matter for an order authorising the amendment of certain mortgage bonds. He stated that the object of the application was to empower the Registrar to make a correction of the petitioner's name on certain mortgage bonds upon property at Rosebank.

[Buchanan, J.: Have the mortgagees consented?]

Not as far as I know.

[Buchanan, J.: They are interested parties, and they ought to have some notice.]

There is no reference to them that I can see. The object of the application is to alter the name in the title deeds already bonded.

[De Villiers, C.J.: You had better apply again, after obtaining the consent of the mortgagees.]

Ex parte D'OLIVEIRA.

Specific fidei-commissary bequest

—Failure of *fidei-commissarius*

—Insolvency of heir.

A. had made a special testamentary bequest in favour of B. subject to fidei commissum in favour of B.'s lawful issue, if

any. B., who left no issue, became insolvent.

Held, that on failure of issue the bequest rested absolutely in B.

Held further, that on her insolvency it rested in her trustees, but as all her creditors had been paid in full, the bequest must be paid over to her executrix.

This was an application for an order authorising the Master to pay out certain money.

The petition of Catharina Reiniera D'Oliviera, widow of the late Adriaan van Schoor D'Oliviera, showed:—

1. That the petitioner is the executrix testamentary in the estate of the late Alida L. M. D'Oliviera, widow of the late Manuel J. D'Oliviera, who resided at Jonker's Hoek, in the district of Stellenbosch.

2. That the said Alida L. M. D'Oliviera is now deceased, and that your petitioner in her aforesaid capacity is required by the Master of the Supreme Court to file with him a liquidation and distribution account.

3. That by the last joint will and testament of the late Carel F. H. B. von Ludwig and his deceased spouse, Alida M. von Ludwig, widow of the late Carel F. H. Altenstadt, there was specifically bequeathed to their daughter, the said A. L. M. D'Oliviera, then married to Gerrik Cruywagen, as from her mother, the sum of £500.

4. That the bequest of the said amount was qualified in manner following, viz.: "The capital was to be invested on mortgage of landed estate, and the interest to accrue on such investment was to be applied during the lifetime of the said legatee in terms of the said mutual will. On the death of the said legatee the capital was to devolve upon her lawful descendants.

5. That the said A. L. M. D'Oliviera was married twice, first to the said late G. Cruywagen, and subsequently to the said late M. J. D'Oliviera, and that there was no issue of either marriage.

6. That the said late A. L. M. D'Oliviera, born Von Ludwig, by her last

will and testament instituted your petitioner and Rosier R. R. D'Oliviera her sole and universal heirs.

7. That the said sum of £500 was paid into the Guardian's Fund by the executor in the estate of the said late A. M. van Ludwig on March 1st, 1867, and that the interest of the same was paid to the said late A. L. M. D'Oliviera during her lifetime.

8. That before paying out to your petitioner as executrix aforesaid the said capital sum, with any interest accrued thereon, the Master of the Supreme Court doth require the authority of an order of Court.

Wherefore your petitioner prays for an order authorising the Master to pay out to her in her capacity aforesaid the said sum of £500 with all unpaid interest attaching thereto, your petitioner being agreeable to the retention by the said Master of all succession duty claimable under the circumstances, or for alternative relief.

The Master's report was as follows:— "The will directs that at the death of the legatee the capital must devolve on her legal descendants. The legatee having died without leaving any descendants, the will does not direct to whom the money has to be paid; but the legatee has disposed of it by will and her executors now claim it."

The late Mr. Porter gave his opinion as follows:—"Upon referring to the will of Mr. D'Oliviera I find that the £500 burdened with *fidci commissum* in the manner stated was part of the inheritance. The effect thereof was that this sum was, after her death, to go to her children if she had any. But property becomes absolute in the fiduciary heir in case the *fidci commissary* heirs fail. *Voet* (36—1—66.) The £500 will therefore, as Mrs. Oliviera's property, pass to her creditors in case she has no descendants. It is another reversionary interest."

Mrs. Oliviera surrendered her estate, but her creditors were paid in full.

On the motion of Mr. Russell the Court granted an order as prayed.

[Applicant's Attorneys: Walker and Jacobsohn.]

MABERLEY V. SEALE. { 1902.
Dec. 8th.

Bailment—Watchmaker—Negligence.

A watchmaker to whom a watch has been entrusted for repairs is bound to exercise ordinary care and diligence in the custody of the watch.

This was an appeal brought by Dr. John Maberly, of Woodstock, against the decision of the Resident Magistrate of Cape Town in an action instituted by the appellant against H. F. Seale, jeweller, Cape Town, to recover the return of a watch, or its value, £20. A fire had spread from neighbouring premises to those of the defendant, and plaintiff's watch was thereby destroyed.

The evidence in the Court below showed that the plaintiff in May last took a certain gold watch to the defendant's premises for the purpose of repairs, a certain time had elapsed in which those repairs could have been done, and the defendant, although requested, had refused to return such watch. The plaintiff claimed that the watch should be returned, or that the defendant should pay the value. The plea was the general issue. The plaintiff said that he handed a watch to Mr. Hamilton, who was in the defendant's employ. Some little time after a fire took place in the defendant's shop. Plaintiff again applied for his watch after the fire. He saw Mr. Hamilton, who told him that the watch had been destroyed by the fire. The plaintiff said that the watch was a double-cased gold English lever, which he valued at £20, though he did not deny that the value was to some extent sentimental. The defendant valued the watch at £10, and said it was described in his books as a gold hunting Geneva. The Magistrate, in his reasons for his judgment, said it was not proved that it was through defendant's negligence that the fire occurred, and that the fire, as a matter of fact originated in other premises. The first question, he thought, was, was any negligence proved against defendant? He thought not. It was well known that all watches sent there were taken to pieces, and, as defendant stated, taken to the workshop. Was it reasonable, then, that defendant should take up all the pieces of every watch every night and

convey them to the safe? It was certainly not the custom of every jeweller so to do. He (the Resident Magistrate) thought it would be most difficult to take up the pieces of every watch every night and place them in the safe, and he thought the workshop was the proper place for watches undergoing repair. The watch, when the fire took place, was not yet finished. Although it might seem hard on the plaintiff, he (the Resident Magistrate) thought the defendant had the law on his side. The defendant was under no obligation to insure the property, because there was no contract to that effect, and there was no obligation on defendant when the watch was handed to him to take precautions against accident and fire. Judgment was therefore given for the defendant with costs.

Sir H. Juta, K.C., for the appellant; Mr. Schreiner, K.C., for the respondent.

Sir H. Juta, K.C.: After the decision in *Firiers v. Juta and Co.* (12, C.T.R., 381), the important question is, has the defendant been guilty of negligence; has he treated the plaintiff's property in the same way as his own? Clearly he has not. Either he is responsible for property entrusted to him for repairs or he is not, and yet he makes a distinction between what he calls valuables and non-valuables, between his own property and that of his customers. The former was deposited in a safe every night; the latter was left about to take its chance. Why, for instance, should diamonds be placed in a safe and not other things. He was bound to take the same care of our property as of his own.

[De Villiers, C.J.: He did; he put his valuable goods in the safe, but not the non-valuables.]

But surely a bailee is not allowed to have a tariff of negligence; so much for £500, so much for £50, and so on. You cannot draw distinctions based on the value of the article. There can be no difficulty about putting a watch into a safe, and to do so was only an ordinary precaution which the defendant was bound to take.

Mr. Schreiner, K.C.: The principles laid down in *Firiers v. Juta* go to show that all the bailee is bound to is ordinary diligence, that is to say, to such diligence as he shows in his own affairs. Seale put only a small portion of his own goods into the safe. Customers' watches were not put into the safe unless they were

very valuable. Watches under repair were not put into the safe. There is no evidence to show that it is the practice of the trade to put all watches into the safe at night. *Pothier on Obligations* (Vol. 1, p. 633) states the whole of the principles which underlie this case. Maberley's original position was that the watch was not repaired within the time stipulated; his evidence, however, on that point was not particularly clear. Now he relies on the fact that his watch was not put into the safe. The watch was not handed over to the respondent in trust, as challenge shields, prize cups, etc., might have been. *Hunter's Roman Law* (19, 2, p. 512); *Van der Keessel* (Th., 532); *Digest* (50, 17, 23); *Voet* (19, 2, 31); *Scherer's Note* (No. 332). The fire did not originate on our premises; had it done so, we should have had to give some evidence as to how it broke out.

Sir H. Juta (in reply): We could not blame the respondent for not having done something unreasonable. The question is, has he taken reasonable precautions? He has called no watchmaker to prove that it is not a custom of the trade to put watches which are under repair into the safe, while the plaintiff called two prominent jewellers, who stated that they always put watches away. Therefore, the practice of doing so is neither impossible nor unreasonable. Here, then, we have clear evidence of negligence.

De Villiers, C.J.: It is common cause in this case that the plaintiff's watch was in the defendant's premises at the time of the fire. It is admitted also that the fire took place without any fault on the defendant's part. The fire originated from outside, and extended on to the premises of the defendant, where, in addition to this watch, many articles belonging to the defendant himself were destroyed. The question to be determined in this case is whether the loss of the watch was occasioned by the defendant's negligence. Now the degree of negligence for which an artificer to whom an article has been entrusted for repair is liable is not the want of extraordinary care and diligence, but want of ordinary care and diligence. By the application of an extraordinary care and diligence this watch might have been preserved. If it had been placed in the safe the probabilities are that it would have been

saved, but that would only have been by application of greater care than the defendant was in the habit of applying to his own watches of similar value. Was there a want of ordinary care and diligence? In my opinion, there was not. The defendant dealt with this watch as he dealt with all other watches handed to him for repair. They were not placed in the safe, and defendant himself was not in the habit of placing his own watches in the safe not watches of this particular class and price. There was no evidence of a general custom to keep watches in safes. It is unnecessary to refer to the different authorities cited by counsel. The one which is most in point is *Voet* (19, 2, 31). According to him, if a material is delivered to an artificer to work it into a new form for a fixed reward and before he has completed the work the material is destroyed by fire without any negligence on his part, the loss of the material falls on the owner, but the artificer loses his reward. The negligence mentioned by *Voet* is obviously ordinary negligence. The appeal must be dismissed with costs.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorneys: Berrangé and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.U.M.G., LL.D.), and the Hon Mr. Justice MAASDORP.]

HOTZ V. SHAPIRO AND ANOTHER. { 1902.
{ Dec. 9th.

Malicious prosecution—Malice—

Want of reasonable and probable cause.

In an action for malicious prosecution for perjury it was proved that the plaintiff had been acquitted, but that he had in fact sworn falsely in regard to a matter which was not material to the issue on which the evidence was given. It was further proved that the defen-

dants honestly believed at the time of the prosecution that the plaintiff was guilty on all the charges of perjury.

Held that, although there was proof of malice on the part of the defendants, the plaintiff was not entitled to succeed.

This was an action to recover £1,000 damages by reason of alleged malicious prosecution and wrongful arrest. The plaintiff was one Daniel Hotz, and the defendants one Isaac Shapiro and one Hyman Bailey. The declaration stated that on the 17th May Shapiro sold to the plaintiff's son a number of goats to the value of £50. On June 25, he sued plaintiff to recover this amount, and obtained provisional judgment in the absence of plaintiff. Plaintiff was then away from home, and when he returned the case was re-opened, and the Magistrate gave judgment of absolution from the instance. On the 4th August Shapiro sued the plaintiff's son, and obtained judgment against him for the amount due in respect to the sale of the goats. It was alleged that on the 13th August Shapiro caused certain affidavits to be made alleging perjury on the part of the plaintiff, and Bailey procured plaintiff's arrest on a charge of perjury. The plaintiff was arrested, and indicted at the Circuit Court on a charge of having committed perjury, and was acquitted. In September Shapiro sued plaintiff as alleged guarantor for the payment of the £50, the case being dismissed. The plea was to the effect that plaintiff had become surety for his son in regard to payment for the goats, and that there was reasonable and probable cause to believe that the plaintiff had committed perjury.

Sir H. Juta, K.C. (with him Mr. Wilkinson), for the plaintiff; Mr. Upington (with him Mr. Bisset) for the defendants.

John Freyling, magistrate's clerk, produced the records of the civil and criminal proceedings referred to in the declaration, including the affidavits upon which the warrant for plaintiff's arrest for alleged perjury was issued.

Mr. Maasdorp, the Registrar of the Circuit Court before which the original case was tried, produced the judge's record of evidence at the trial.

Graham J. Ree, chief clerk in the Master's office, produced documents relating to the sequestration of the estate of Hotz, junior.

Daniel Hotz, the plaintiff, deposed that he was a speculator in stock, and lived at the Paarl. He formerly had a butcher's shop there, which he sold to his son, Philip Hotz. On the 25th June Shapiro issued a summons against witness, claiming the purchase price of forty-two goats, which he alleged he had sold witness. Witness was away at the time the summons was issued, but when he got back the case was re-opened. Witness's defence was that he had not purchased the goats, and the Magistrate gave absolution from the instance. A couple of years ago, witness gave evidence on behalf of a Mr. De Villiers, in an action brought against the latter by Bailey, who lost the case. Bailey then said he would do his best to injure witness. On the 16th August witness was arrested at the Worcester Railway Station by a policeman. He was kept at the railway station for about an hour, and was then taken in police custody through the public street to the police-station. The police superintendent not being in, witness was taken back to the railway station, and after being detained there for a short time, he was taken back to the police-station, where he was stripped and taken to the gaol. At nine o'clock the same evening he was taken to the railway station, and was thence conveyed to Lady Grey Bridge. The two defendants were in the railway carriage, and Bailey said, "Now we have the fox in the trap." Witness was taken to the police-station at the Paarl, put in a cell, and kept there until Monday morning, the 18th, when he was released on bail. He was not given any food from the Saturday morning until the Sunday evening. Upon hearing that he had been arrested his wife was greatly affected, and fell in a swoon. She had lost her reason, and was now confined in an asylum. Witness was committed for trial at the Circuit Court, where he was acquitted. The different appearances in court had cost witness a lot of money. He had been unable to do any work, as he had had to watch his wife. In September he was again summoned by Shapiro, who alleged that witness had become surety for the payment of the £50. In consequence of the prosecution he had had to sell stock

at considerable loss, as he was unable to bestow any attention on them.

Cross-examined by Mr. Upington: Witness could not say whether the position that Shapiro had taken up all through the case was that witness bought the goats for his son. Are you responsible as guarantor for your son?

Witness: I suppose so.

Witness sold the butchery business to his son in June, 1900. A refugee named Van Steyn and a man who had since gone to America were witnesses to the sale of the business.

Didn't Shapiro lend you money?—Yes, five years ago, and I lent him some.

Has he lent you any since?—No.

Then how do you account for this cheque in 1901?—I suppose I got money from him.

In further cross-examination, the witness said he did not know anything of his son's intention to leave the Paarl. The £150 found on witness when he was arrested belonged to a person named Tynn. Witness was going to use it for buying horses. Witness told the police-constable that it belonged to Tynn; he did not say it was his (witness's) money.

Was not your wife temporarily insane before?—She was 40 years ago.

In reply to the Chief Justice, witness said his son was now in the Transvaal.

John Heenan deposed that he was a trooper in the District Mounted Troops at the Paarl. Witness arrested the plaintiff. The defendants came to his house on the morning of the 14th August. Witness accompanied them to Worcester, arriving there on the 16th. Bailey pointed out plaintiff to witness, who arrested him, cautioned him, and took him to the police-station. He took Hotz back to the Paarl. In the carriage they spoke a good deal in Yiddish.

Cross-examined by Mr. Upington: Did not Bailey try to get bail for Hotz?

Witness: I cannot say. Hotz told witness that he had got £500 from a man named Tynn to buy horses, and had spent £350.

Re-examined: Witness never meant to say that the money belonged to plaintiff's son.

Louis Weintrob, proprietor of the Lady Grey Bridge Hotel, said he remembered the trial of the case in which Bailey

sued De Villiers. Bailey said he would have his revenge on Hotz. Witness bailed Hotz out when he was arrested. The night before the trial of Hotz, witness saw Bailey in the hotel. Bailey told witness that he (witness) was to blame for the whole affair, as if he had left Hotz alone, the latter would have paid some money, and there would have been an end to the thing.

Cross-examined: There was no arrangement by which witness undertook to be responsible for part of the costs of this action. Witness never told a man named Tolski that he was contributing towards the costs of the action. Witness was not a creditor of Philip Hotz. Witness was as friendly towards Shapiro as towards plaintiff.

Sir H. Juta closed his case.

Mr. Upington called

Hyman Bailey, who said he was a general dealer residing at the Paarl. He was a witness in the case of Shapiro and Hotz on the 24th July, and heard the evidence of Hotz. He had reason to believe that the evidence was untrue. He heard Hotz say he did not see his son on the 11th June, upon which day witness had seen them together on the Parade. Witness had heard the evidence of Hotz to-day; it was untrue. Witness was present at the transaction about the goats. Witness heard Hotz tell Shapiro that he was going away, and that if he did not return before the sheep arrived, he was to give his son the sheep on his account. In consequence of what Shaverin told him, witness made an affidavit. Witness had previously seen the affidavit made by Shaverin, and believed what was stated in that affidavit. Witness also had communications with other people who made affidavits. In his affidavit, witness prayed for a warrant for perjury.

[De Villiers, C.J.: What made you take such an interest in the matter?]

I saw Hotz with his son when he swore he had not seen his son.

But you had a grudge against him?—No; nothing of the sort.

Further examined, the witness said he was a creditor in the son's estate.

As a matter of fact witness believed absolutely that Hotz had committed perjury. With regard to the statements witness was alleged to have made as to De Villiers' case, that case was heard about five years

ago. He lost that case, but he did not bear a grudge against Hotz on that account. He never said he would have his revenge against him. Witness did not on one occasion when Hotz came in the same train say, "Now we have got the fox in the trap."

Cross-examined: Witness made the affidavit asking for Hotz's arrest. There was a statement in that affidavit to the effect that Hotz had tried to compromise the debt. On one occasion Hotz was at Shapiro's place, and in the presence of witness, Mrs. Shapiro and her daughter, he said to Shapiro, "Don't be in a hurry for the money; I will pay the money." In conversation at the end of April or beginning of May witness understood Hotz to say that the sheep were sold to him, and he would see that it was made right. Witness said in his affidavit that he believed Hotz was leaving the country. He had been told so.

Isaac Shapiro a general dealer, residing at the Paarl, said he gave evidence in a civil case in which he sued Daniel and Philip Hotz. He adhered to the evidence he then gave. Witness did not make any affidavit, and had nothing at all to do with this arrest or prosecution. The cheque for £50 produced had been given by witness to Hotz.

Cross-examined: Before the Magistrate witness said he had latterly had two transactions with Hotz. One was in January. He had never had any transaction with Philip Hotz. The latter had given him a cheque, and also paid him cash, but that was for sheep supplied on the father's order.

Joseph Salonbog, a fruit and produce seller, living at Lady Grey Bridge, said that on June 11 last he saw Philip and Daniel Hotz together on the Parade at Cape Town.

George Randall also deposed to seeing Philip and Daniel Hotz together on the Parade. Witness spoke to Daniel Hotz.

By the Court: That was on a Wednesday.

E. Morice, a hairdresser at Wellington, said he knew Daniel Hotz and also Bailey and Shapiro. Witness deposed to hearing Daniel Hotz tell Shapiro to send some goods to his son. Shapiro asked to whose account it should be put, and Daniel Hotz said to his.

Maurice Shaverin, a general dealer and bookkeeper, said he had been subpoenaed by both sides, and had given a statement

to the plaintiff. Witness had made an affidavit, but it was exaggerated, and witness refused to sign until Mr. Van Eyk assured him that it would be all right. Witness gave evidence before the Magistrate. That was true to some extent. He meant the affidavit. Witness came to Cape Town with Daniel Hotz. On arrival at Cape Town Station the son was at the barrier, but as soon as he saw his father he ran away. Witness purchased a ticket for Philip Hotz at the shipping office. Daniel Hotz was then with witness, but he waited outside.

[De Villiers, C.J.: Now you see you said in your evidence before the Magistrate that you were joined at Paarl Station by accused (meaning Daniel Hotz), that you travelled together, and that on arrival at Cape Town the accused was met by his son Philip. Now you say that as soon as the son saw his father he ran away?]

He was at the station, but he ran away.

But how could he meet his father if he ran away?—As I say, the son was standing at the barrier and ran away.

But in your evidence before the Magistrate you go on to say that all of you, the father, the son, and yourself, went together to the hotel. Is that right?—We found him there subsequently.

Then your evidence before the Magistrate is false?—Well, it is partly incorrect. Mr. Van Eyk told his clerk what to write down in his office.

[De Villiers, C.J.: pointed out that this was the evidence given by the witness before the Magistrate, and had nothing to do with Mr. Van Eyk.]

Further examined, witness said that Daniel Hotz went with him to the shipping office, but did not go inside. Witness had received certain assets in the estate of Philip Hotz. He acted upon the latter's instructions, and distributed them. He did not distribute any assets to Daniel Hotz. He sold Daniel Hotz a horse and cart belonging to Philip Hotz, and received £20 for them.

[De Villiers, C.J.: Before the Magistrate you said that you did not receive any money for the horse and cart.]

I acted as agent for Philip Hotz. I received the £20, and I gave it back to Philip Hotz when he returned from England. Continuing, witness said that the receipt he had given to Verster he had made out in his name because

Philip Hotz had instructed him to do so. The money he received from the father he had given to the son when the latter returned from Europe. The son was insolvent, but then nobody had asked witness for the money.

Henry P. van Eyk, attorney, said he acted for Shapiro in the civil case. His clerk took down statements on affidavit from Bailey and others. They were sworn before witness. In the prosecution for perjury witness was not instructed by Shapiro. He was instructed by Feldman. The evidence of Shaverin was absolutely untrue as concerned witness. The only question Shaverin raised was whether they could touch him for getting a ticket for Philip Hotz. Witness did not suggest a compromise to settle the criminal proceedings. He suggested in the presence of Mr. Brady that Hotz should pay the debt. Weintrob came to witness and offered to pay a lump sum down to settle the claims of Hotz's creditors.

Cross-examined by Sir Henry Juta: When Weintrob made the offer, witness understood that Hotz wanted to pay because he had taken the assets of his son. Witness had heard plaintiff had taken his son's assets.

Mr. Upington closed his case.

Sir H. Juta, K.C.: I submit that the question as to whether the defendant was or was not seen on June 10 on the Parade was immaterial. The whole question was whether a sale took place on May 17.

[De Villiers, C.J.: Even if the evidence was not material to the issue, if a man swears falsely on one point he may swear falsely on another. In order to support the present case, you must show that the defendants committed deliberate perjury.]

In this case there was no possibility of a mistake, either they spoke the truth or they did commit perjury.

[De Villiers, C.J.: Suppose that these people honestly believed that they were speaking the truth, could they be prosecuted for malicious prosecution?]

No, but one party could not go to a Magistrate for a warrant, particularly if his object was to extort money. Looking to the evidence of Shapiro, it is clear that there was no misunderstanding. He is contradicted by his own son as to when the entries were made in his book. If he was speaking the truth, why should he try to bolster up his evidence by that of Morris, who was

brought forward only at the last moment? Why was he not brought forward earlier? There was no probable or reasonable cause to induce Bailey to apply for a warrant against Hotz. Throughout the entire proceedings Bailey showed a most vindictive spirit.

Mr. Upington was not called upon.

The Court gave judgment for the defendants, with costs.

De Villiers, C.J.: This is an action for damages for malicious prosecution against the two defendants, Shapiro and Bailey. In regard to the first defendant, Shapiro, there is no evidence whatever that he has taken any part in the prosecution; that he has either originated or taken part in the institution of criminal proceedings. What he did was to give evidence at the preliminary examination and afterwards before the judge, but that is not sufficient to connect him with the criminal proceedings so as to render him liable for malicious prosecution, in case the prosecution was malicious. In regard to Bailey it is clear that he had much to do with the prosecution, and that it was on his initiative that the plaintiff was arrested, that the prosecution was instituted, and if, therefore, the prosecution was malicious, if Bailey was guilty of malice in the matter, and if he had no reasonable or probable cause for the prosecution, the Court would have given judgment against the defendant Bailey. It is a case in which the Court would probably have given heavy damages, because I believe that the plaintiff was subject to considerable indignity, and that Bailey did show some degree of malice in these proceedings. He considered that he was very badly treated in regard to another matter by the present plaintiff, and I think he had some malicious pleasure in seeing this man, whom he believed to be acting fraudulently, brought to justice. But plaintiff has to prove not only malice, but an absence of reasonable and probable cause, and in my opinion the plaintiff has wholly failed to prove there was such an absence of reasonable and probable cause. It appears to me that both the defendants honestly believed that the plaintiff had sworn falsely. They were honestly convinced in their own minds that an order had been given by the plaintiff for the goats to be delivered to the son. It is not necessary now for the

Court to decide upon this point as to whether the plaintiff has spoken the truth or not. He has been acquitted by a jury, and I think he should have the benefit of that acquittal. I do not wish to say a word therefore on this point, but on the other point, in regard to his presence in Cape Town on the 11th June. I am bound to say I am of opinion that he did not speak the truth. I am quite satisfied he was in town on the 11th June, with his son, that he was aware of his son leaving, and that he was instrumental in his son leaving. The learned judge was quite justified, in my opinion, in holding that even if the plaintiff had not spoken the truth upon this point it was not so material to the case as to justify a prosecution for perjury. I believe if it had been a material point the jury would have found the plaintiff guilty of perjury. But if this question of the plaintiff's presence in Cape Town was not material, it had a very important bearing on the question whether there was reasonable and probable cause for the prosecution. The defendants honestly believed that the plaintiff had given the order for the goats, and if, therefore, they found the man had not only sworn falsely upon this point, but had clearly sworn falsely upon another point, namely, his presence in Cape Town, I think it was an additional reason for believing that their whole impression of what had taken place was a correct one, and that the statements of the plaintiff were false. Therefore, this incident of the 11th June has an important bearing on the question whether they had reasonable and probable cause. We have these facts established, that the defendants honestly believed that an order had been given by the plaintiff for the goats on the day in question, and that there had been a false statement by the plaintiff on oath as to what took place on the 11th of June, and they were, therefore, justified, and had reasonable and probable cause in coming to the conclusion that there was perjury on the part of the plaintiff. They consequently did no more than their duty in instituting proceedings against the plaintiff. The fact that the plaintiff was acquitted does not conclude the matter. If this Court now, in deciding the question as to whether there was malicious prosecution, comes to the conclusion that the de-

defendants had reasonable and probable cause, then the Court is bound to give judgment for the defendants, which must be done now with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney: W. Brady; Defendants' Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

EDWARDES V. MOUILLOT { 1902.
AND ANOTHER. { Dec. 10th.
" 11th.

Interdict—Play.

Interdict to present a play refused, although the applicant was registered in Stationers' Hall as the person entitled to the sole right of presentation in South Africa, the respondent alleging that the applicant had sold to him such right.

This was an application by George Edwardes, through his representatives in this country, B. and F. Wheeler, for an interdict forbidding the respondents, Frederick Mouillot and Frank de Jong, to produce in the Opera House, Cape Town, a certain comic opera entitled "La Poupee." The play was advertised to be produced at the Opera House on Thursday evening.

The affidavit of B. Wheeler set forth that, ascertaining that the respondents contemplated performing the comic opera "La Poupee," he made inquiries from the applicant, Mr. Edwardes, asking if he had authorised the respondents to produce the piece, the South African rights of which had been reserved for them (B. and F. Wheeler). By the last mail he had received a letter, dated 12th November, from J. A. E. Malone, the applicant's business manager, enclosing a certified copy of an entry in the books of the Registry of Copyrights and Assignments kept at the hall of the

Stationers' Company, showing that on the 12th November, 1902, George Edwardes was the sole assignee, and had the sole right of representing at a public performance "La Poupee," as regarded the whole of Africa south of the Zambesi, and in his note Malone added that he hoped that would settle any dispute in regard to respondents' right to play the piece in South Africa. That they held the sole right of representation of "La Poupee" in South Africa, and he had caused a letter to be written to respondents' manager on December 8, intimating that they were infringing the applicant's rights, and that, if the notice was not withdrawn, an application would be made for an interdict. He had, however, been informed that the respondents intended going on with the performance. "La Poupee" was one of the plays which deponent intended to produce, and he said that he would suffer damage if the respondents performed it. Therefore, as soon as he saw the poster announcing the play, he had instructed his solicitors.

Mr. Schreiner, K.C., for the applicant; Mr. Burton for the respondents.

Mr. Burton said the above affidavit had only been served upon them the previous night, and he therefore asked that the matter be postponed until tomorrow (Thursday) morning. There would then still be time for the Court to interdict the performance if they thought fit. Counsel pointed out that the difficulty was that Mr. De Jong was at Matjesfontein, and they might want an affidavit from him.

[De Villiers, C.J.: The play may be allowed to proceed, and an account kept of the receipts.]

Mr. Schreiner submitted that the matter should be postponed until two o'clock that afternoon only.

Ultimately the matter was allowed to stand over until two o'clock.

On the case being again called, Mr. Burton read an affidavit by Mr. Edmund Lockwood, in which the latter said that he was a theatrical manager and proprietor, having offices at 23, Bedford-street, London, W.C., and that he was at present managing the theatrical company known as Frederick Mouillot and Frank de Jong Musical Comedy Company, which was performing in Cape Town. The notice of motion

in this matter was served upon him at the Opera House last night (Tuesday) at about seven o'clock. That as far back as the 13th November last it was known to Messrs. B. and F. Wheeler that respondents intended to play and claimed the sole right to perform "La Poupee" in South Africa. The said play had been advertised for Thursday, 11th inst., and a great number of tickets had been disposed of to the public. That on the 22nd April, 1898, deponent entered into an agreement with Messrs. B. and F. Wheeler to bring out to South Africa during that year a first-class musical comedy company, the repertoire to be not less than eight musical comedies, and to include the said comic opera, "La Poupee." Frank Wheeler, one of the partners of the said firm, was engaged at a salary of £40 per week to play as principal comedian in the said company. While in England at the time referred to Frank Wheeler acted as deponent's agent in purchasing from the present applicant the South African rights of "La Poupee," which rights the deponent purchased from the said applicant for the sum of £150, which amount was duly paid to him. He annexed letters dated the 23rd and 29th August, 1898, from J. A. E. Malone, the applicant's manager, and a letter of 28th September, 1893, with cheque for £50, to which he craved leave to refer the Court. Pursuant to the agreement of April, 1898, with Messrs. Wheeler, a company was brought out to this country, which played, *inter alia*, the piece "La Poupee." No other theatrical company had played the piece in South Africa, and save as set out below he had not given the right to any other company to perform the piece. He had the sole right to the play in South Africa. One Charles P. Levilly and he had the right to perform the piece in the United Kingdom of Great Britain and Ireland, but although they had acquired that right by purchase they had never registered their rights at Stationers' Hall. The right to perform plays was very rarely registered there. He had the right to other plays, but had never registered any of them at Stationers' Hall. By agreement with the respondents he had given them the right to perform "La Poupee," and they were justified in play-

ing the same, as the South African rights belonged solely to him.

The letter of August 23, 1898, from Mr. Malone to Mr. Lockwood, referred to above, was as follows: "I have received a communication from Frank Wheeler, saying he has instructed you to pay Mr. Edwardes £150 for the right to play 'La Poupee' in South Africa. Will you kindly let me have this cheque at once, as the arrangement with Mr. Edwardes was that the money should be paid before the departure of the company." Mr. Lockwood forwarded a cheque for £100, and received the following reply from Mr. Malone: "Thanks for cheque, £100. 'La Poupee,' but it was distinctly arranged between Mr. Edwardes and Frank Wheeler that the money should be paid before the company sailed, as Mr. Edwardes paid this amount to Mr. Lowenfeld some months ago for the rights to the piece."

The cheque for the other £50, which had been given before this, was also put in. It was endorsed by Mr. Edwardes.

Mr. Schreiner said that after that affidavit he would ask the Court to allow the matter to stand over until next morning. Of course that agreement was in 1898, and it was not clear on the face of the affidavits that whatever rights Mr. Lockwood had then were still in existence. There might or there might not be some mistake.

Mr. Burton said that if the matter stood over they might be able to obtain an additional affidavit from Mr. De Jong.

[De Villiers, C.J.: I still think the better course would be to allow the play to proceed to-morrow night and an account kept of the receipts.]

Mr. Schreiner said he would be in a better position next morning to say what should be done.

The matter was then allowed to stand over until the following day (December 11.)

Postea (December 11): The affidavit of Mr. Frank de Jong stated that while in England on the 7th November he acquired from Mr. Edmund Lockwood the right to play "La Poupee" in South Africa. He annexed the agreement between himself and Mr. Lockwood. Before he left England he had paragraphed in the London newspapers a notice to the effect that his repertoire included "La Poupee." He met ap-

plicant at his office in London, and then agreed that he would resign his rights of certain two pieces in consideration of his getting the rights of three others. Applicant then distinctly told him that as regarded "La Poupee," he (applicant) had no interest in it. He was surprised to learn that applicant had since registered his name at Stationer's Hall as the owner of the South African rights in respect to this play.

The affidavit of Mr. Frank Wheeler, to which was attached certain correspondence, stated that on the 7th November Mr. De Jong wrote to Mr. F. Wheeler, claiming, on behalf of Mr. Lockwood, the South African rights of "La Poupee." but deponent repudiated this. That in 1898 he conducted negotiations between Lockwood and Edwardes for the purchase of the rights to produce "La Poupee" in South Africa, and it was then arranged that in consideration of Lockwood paying a specified sum, he would have the right to play "La Poupee" in South Africa. The right, however, was strictly limited to the tour of 1898. Lockwood afterwards visited South Africa, where his repertoire included "La Poupee." Deponent denied that the sole right was acquired by him for Lockwood from Edwardes. He attached to the affidavit a letter dated 17th October, 1902, from Mr. Malone, agent for applicant, who denied that the rights had been given to Lockwood. The first advertisement of respondent's intention to produce "La Poupee" on the 11th December was published on the 9th December.

Mr. Schreiner contended that the right acquired by Lockwood in 1898 was not a right in perpetuity. There was evidence, he submitted, that the right was limited to that particular tour of 1898. Counsel urged that the interests of the applicant would be seriously prejudiced if the respondents were allowed to go on with the production. If the respondents had acted innocently such a course might be followed, but they had prepared to play the piece, well knowing, as was evidenced by written statements, that they had no right to do so.

Mr. Burton: The applicant has not shown any clear right, still less has he proved that he will suffer irreparable damage if the interdict he applies for is not granted. He has therefore no

right to an interdict. We are, however, quite willing to keep an account if we are allowed to proceed.

Mr. Schreiner (in reply): See section 22 of the English Copyright Act. This play was registered here.

[De Villiers, C.J.: After it had been produced?]

Yes, but the system of registration in such matters has been very loose, as the Court has often pointed out. The present Company of 1902 is quite a different one from the Company of 1898. We have our registered rights, and the Court will support us in upholding them. The respondents claim the sole right to perform this play in South Africa, but the correspondence put in does not support any such contention. We shall suffer irreparable damage, unless the performance of this play by respondents is interdicted, for the public will go to see this evening's performance, and, having once seen the play, will not be so likely to go and see it again.

The Court refused to grant the application.

[De Villiers, C.J.: It is impossible for the Court at this stage to give a final decision as to the rights of the parties. On the one side there is the fact that the applicant is registered in Stationer's Hall as the owner of the sole liberty of the presentation of this play in South Africa; on the other hand we have the statement by the respondents that the right of playing "La Poupee" in South Africa was purchased from the applicant in August, 1898, and the letters in which this purchase is acknowledged, are without any qualification whatever. The letter of the 23rd August is as follows: "Dear Lockwood,—I have received a communication from Frank Wheeler, saying he has instructed you to pay Mr. Edwardes £150 for the right to play 'La Poupee' in South Africa. Will you kindly let me have this cheque at once, as the arrangement with Mr. Edwardes was that the money should be paid before the departure of the company." There is, no doubt, considerable force in Mr. Schreiner's argument, that the mention of the word "company" here would seem to show that it was intended to apply only to the tour, but this is not perfectly clear. It is quite possible that the respon-

dents may prove at the trial that the right intended to be conveyed was a perpetual right, and the letters have weight in them to uphold such a view. There is a reference in one of Mr. Malone's letters attached to Mr. Frank Wheeler's affidavit, to the fact that he had written to Mr. Frank Wheeler to the effect that this was to be confined to that particular tour. That letter is not produced. Mr. Frank Wheeler is the one who must have received the letter. Mr. Burton suggests that the letter referred to might be the letter of the 23rd August, 1898, but it could hardly be that letter, because that was addressed to Mr. Lockwood, whereas the letter referred to in the affidavit was a letter addressed to Mr. Frank Wheeler. But Mr. Wheeler ought to have that letter, and he does not explain why he does not produce it. If he had produced it, it would no doubt confirm Mr. Malone's statement. But as I said before, it is impossible for the Court, upon the present evidence, which is very equally divided, to say who have the right, whether the respondents have the sole right, or any right at all. But it rests upon an applicant who seeks an interdict to make out a clear right, and in this case the applicant has not done so. Besides, it has to be borne in mind that the applicant has his remedy. No doubt, it is not the exact remedy he wants, but if we granted an interdict, and it should ultimately turn out that the respondents were entitled to produce the piece, it would be doing a great injustice to the respondents, without any corresponding advantage to the plaintiff, whereas if we refused the interdict, it will be understood that respondents will keep a true account of their receipts, and the applicant may proceed with a claim for damages. He will have ample remedy in law for any infringement of his rights. On the whole, therefore, the Court is of opinion that the applicant should proceed to trial, and that respondents should be ordered to keep accounts of their receipts in respect of these performances of "La Poupee" in the Colony. Costs will be costs in the cause.

Their lordships concurred.

[Applicant's Attorneys: Van Zyl and Buissinné: Respondent's Attorneys: Tredgold, McIntyre, and Bisset.]

HEYNES, MATHEW AND CO. } 1902.
V BERLYN. { Dec. 10th.

Mr. Benjamin moved as a matter of urgency for an interdict restraining the removal of certain furniture. The petition of J. A. Mathew set forth that his firm were the owners of certain property situated at the corner of Longmarket-street and Adderley-street, and known as Adderley-street Chambers. The respondent Berlyn had for some time past occupied certain rooms in these chambers at a rental of £14 per month, and being now four months in arrear with his rent, owed the petitioners £56. The petitioners had ascertained that the creditors of Berlyn had obtained judgment against him in the Magistrate's Court, and were now about to take steps to attach the furniture in the rooms. Petitioners therefore asked for an order, restraining the said Berlyn or any other person from removing any goods from the premises tenanted by Berlyn pending an action to be brought by the petitioners.

In reply to the Court, counsel said that it was an *ex parte* application, and no notice had been given to Berlyn.

The Court granted a rule *nisi*, calling upon all concerned to show cause why the interdict should not be granted; rule to be returnable on December 1, and to operate as an interdict in the meantime.

MYBURGH V. PHILLIPS AND } 1902.
CO. { Dec. 10th.

Transfer deed — Diagram — Surveyor — Mistake.

A land surveyor, appointed to make a survey of land for the purpose of sub-division, framed a diagram which included a road not falling within the land, and such diagram was attached to the transfer of the sub-divided portion given to the plaintiff.

Held, that the mistake of the land surveyor could not effect the rights of the defendant as the owner of the adjoining land within which such road was situated.

This was an action in which the plaintiff claimed £250, as damages suffered by him owing to defendants having wrong-

fully and unlawfully, and without leave or licence of the plaintiff, cut down or removed certain oak trees and a wire fence situated on property belonging to the defendant at Lady Grey-street, Paarl, and also for a perpetual interdict restraining defendants from in any way trespassing upon the said property.

The declaration stated that the plaintiff is the owner of a certain piece of land on the one side which there is a road and a triangular piece of ground, with a hedge composed of small oak trees, brambles, and quinces, through which runs a wire fence. The defendants purchased certain land adjoining, and in the course of their building operations on the same they cut down a large number of the oak trees, and removed a portion of the wire fence so as to get access to the road claimed by plaintiff as a private road. Plaintiff therefore claimed £250 damages and an interdict. The defendants in their plea claimed that it was a public road, and denied that they had in any way trespassed over plaintiff's property.

Mr. Burton (with him Mr. C. W. de Villiers) for plaintiff; Mr. Schreiner, K.C. (with him Mr. Benjamin) for defendants.

Mr. Burton called.

Jan Gerard Cloete Luyburgh, the plaintiff, who said that in August, 1897, he bought privately from Messrs. Retief, De Ville and Co. certain property. The pegs were pointed out to witness by three of the partners of the firm. Mr. Moll was employed by the sellers to survey the property. When witness bought there was a road running through the property, and on the western side of the road there was a hedge consisting partly of oak trees, partly bramble, and partly quince. The oaks used to be kept cut yearly by witness, so that they formed a hedge six or eight feet high. About May last defendants bought, at a sale by public auction, the property belonging to Mrs. Du Toit. Mr. Moll at witness's instance, attended the sale, and warned intending buyers not to be misled, as witness claimed the fence on the triangular piece of ground mentioned, and further warned them that they would not get out on to the street, as he (witness) would not allow them to go there. Before the sale Mrs. Du Toit did not use witness's road. She had a road on the other side, and used that. After they bought the

property defendants broke down a portion of the oak hedge referred to, so as to get into their land, where they commenced building from witness's road. The oak trees, 50 or 60 in number, cut down were claimed and removed by the defendants. They were now carrying on the business of wagon and cart makers on the premises erected there in May last. The value of the trees would be about £60.

Cross-examined: He believed the private road was known as Fabriek-street. He had been told that it was originally the road used to get from the Upper to the Lower Paarl instead of going round by the mill. Defendants had had for twelve or thirteen years a plot lower down, adjoining the plots they bought this year.

Reynier Johannes Moll, a Government land surveyor, said he knew the Paarl well, having been there nearly all his life. He surveyed the property sold to the plaintiff. Witness described beacons, upon which he framed his survey. Witness was seventy-two years of age, and had known the private road now in question since his childhood. He had always been told it was the property of Mr. Enslin, who was plaintiff's predecessor in title.

Mr. Schreiner objected to this evidence. Prescription was not relied upon, and what was the opinion of any witness need not be considered. The question was whether or not the road was shown on the diagrams.

[De Villiers, C.J.: The point is that if Mr. Moll's survey was incorrect, no amount of evidence can make it correct. The question of prescription is not raised.]

Mr. Burton said that in that case he would apply at once for an amendment of his declaration and replication, so as to bring in prescription.

[De Villiers, C.J.: And then the question will be whether or not the defendants are prepared to meet that. For the present we had better confine ourselves to the diagrams.]

Mr. Burton then formally moved for an amendment of the replication, which would allow plaintiffs to set up a claim founded on prescription.

Mr. Schreiner contended that that set up a completely new case, and he was not prepared to go into that question. He submitted that if plaintiff now found the diagrams against him he should take ab-

solution from the instance on this case and bring a new action founded on prescription. Absolution being granted in this case would not prejudice the plaintiff.

Mr. Burton said he had only said there was an unexplained discrepancy in the titles, but he never admitted that the diagrams were against them.

[De Villiers, C.J.: Upon the pleadings the defendants cannot be expected to be prepared with evidence of prescription as to occupation for thirty years, and therefore if the plaintiff fails in establishing the present case the course will be to give absolution, then it will be competent for the plaintiff to institute a fresh action founded on prescription. In such an event the expenses would not be greater than if the case were now postponed in order to take evidence upon the fresh point raised. The application for amendment will therefore be disallowed.]

Witness (continuing) said that in framing the diagram he worked on the diagram attached to Enslin's transfer in 1818. Witness came to the south-western corner, dug, and found a beacon. On the strip shown as running into defendant's property there was a hedge, which abutted on the road. Witness surveyed the whole property; he surveyed all along Lady Grey-street, and found the points as shown in the diagram. This was in Kriel's time.

Cross-examined by Mr. Schreiner: The extent of the road was about 54 rods. Witness showed the pins and flags when Phillips bought. Witness placed the hedge inside the property bought. According to Ahlin's diagram, Phillips had done nothing outside his property. At the sale Mr. Myburgh made a protest. The secretary of the Board gave instructions to sell according to the pins and flags. The extent of the eastern portion would be reduced owing to its being bounded by the Berg River. The road was not so wide formerly. Witness did not go to Lady Grey Bridge because it was a river boundary.

[De Villiers, C.J.: I see that in the transfer from Hesselmeyer to Enslin, it says, "The dividing line of this land shall be the newly-planted quince-hedge, whilst the other bit of land between the quince-hedge and the hedge of Jan du Toit shall serve as a free road as well for the purchaser as for the seller." That is the road now in question?]

Witness: Yes.

If that is right then, the boundary must be on the other side? Supposing you had been guided by what was written in the transfer?—That I did not see. If I had seen that it would have been a different thing.

When you made the survey you only saw the diagram; you did not see the transfer itself from Hesselmeyer to Enslin?—No.

James H. Douglas, Government land surveyor, said he went to survey the property in November last. He tested all the beacons, starting from the eastern side. The actual beacons were correct according to Moll's diagram. He went about 900 or a thousand feet towards Lady Grey Bridge and gave the sub-divided lots up the street the full distance. Witness found the road fell within the boundary of Mr. Myburgh. Witness had all the diagrams before him.

Mr. Burton closed his case.

Mr. Schreiner called

Charles John Pritchard, Government land surveyor, who produced a plan prepared by him after making surveys. Witness started at "A," the corner of No. 13, as shown on Ahlin's diagram. It was so well described that witness considered it the original beacon. Witness's plan agreed with the survey of 1857. The oak hedge was within Phillips's boundary.

Cross-examined by Mr. Burton: If "A," as shown by Mr. Moll, were the boundary of Myburgh's property, Moll's diagram was correct. Witness gave evidence, showing that the road in question was according to previous title deeds, set apart as a free road.

Ludwig P. Borchers, a clerk in the office of the Registrar of Deeds, gave evidence as to the old transfers.

Henry J. Avingale deposed that there had always during his life been a road publicly used. There was a quince-hedge where the iron rails now were. Witness had bought property in the neighbourhood. On witness's side there was an oak fence. Witness cut this off.

Mr. Schreiner said this was the fence which it was complained defendants had taken away.

Witness said the road had been freely used by the public for 36 years.

Mr. Phillips, senior partner in the defendant firm, said that at the sale Mr. Myburgh protested. Witness asked the

secretary of the Board whether he was selling the ground within the pins and flags, and was answered in the affirmative. Witness bought on that understanding. Witness cut down the hedge in order to get a frontage to the road. He had developed the property in that direction.

Mr. Schreiner closed his case.

After hearing Mr. Burton in argument on the facts, the Court gave judgment for absolution from the instance.

De Villiers, C.J. : In this case it is necessary to trace back some of the transfer deeds of the property which is now in question. It appears that as far back as the year 1816 Horak transferred to Louw, and the diagram is attached to the transfer. In the body of this transfer there is a description of the land. It is stated therein to be 70 morgen and 372 square roods, and the boundaries are defined, the westward boundary being that of the land of the widow Roux. In 1817 Louw transferred to Hesselmeyer, and in that transfer there is merely a reference to the previous transfer. There is no description of the boundaries, but a reference to the previous transfer, and the land is stated to be exactly the same number of morgen as in the previous transfer. Then we find that Hesselmeyer, in the following year, transferred to Enslin, and in that transfer, instead of doing as had been done previously by Louw in transferring to Hesselmeyer, there is again a definition of boundaries, and the definition of the boundary on the west side is different. It is stated to be "the remaining extent of the land thus divided." And the extent of the land, instead of being 70 morgen, 372 square roods, is stated to be 70 morgen. Clearly, therefore, there is an intention to leave a portion as a remaining extent. Then the matter does not rest there, because in the body of this fresh transfer we find this: "The dividing line of this land shall be the newly-planted quince hedge, whilst the other bit of land, between the said quince hedge and the oak hedge of Jan du Toit, shall serve as a free road, as well for the seller as for the purchaser." Clearly, then, the intention was to retain a portion of this land on the western boundary, that land being a road. The seller therefore retained to himself this road. This seems to have been done in conse-

quence of a previous arrangement between the former purchaser and seller, Hesselmeyer and Louw, that this piece of road should remain free and undisturbed. It seems clear to me that Enslin never got transfer of this piece of land. Then subsequently, in 1898, when the then owners, De Villiers and others, sold the land to the present plaintiff, a surveyor was asked to survey, and the surveyor called to-day candidly admitted that he did not see the body of the transfer, and he admits that, if he had seen it, he would have made a very different diagram. Now the Court has continually decided that where there is a conflict between a diagram and the body of the deed, it is the deed which shall be accepted, and in this transfer it is quite clear that it was intended to exclude the road. When, therefore, the successors of Enslin transferred to the present plaintiff they could not transfer more than they had; they did not have that bit to transfer. It was impossible for them to transfer that. It was a mistake on the part of the surveyor to make this diagram include the road, but that mistake could not give plaintiff the land. The diagram showed he had got a bit of land which the transferor had no power to grant. But as it is possible that the plaintiff may intend hereafter to bring an action to establish his right of ownership, the Court will not preclude him from doing so by giving judgment absolutely for the defendants. The judgment of the Court will therefore be for absolution from the instance, and the plaintiff will have to pay the costs.

Buchanan, J., concurred.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr Justice MAASDORP.]

VAN DER BYL V. WEIDNER. } 1902.
 } Dec. 11th

Mr. Bisset applied for judgment for the sum of £41 6s. 8d., balance of account due for goods sold and delivered.

Defendant was in default, and judgment was given as prayed.

STEFFENS V. BAM.

1902.
Dec. 11th.
1903.
Jan. 12th.

Servitude—Merger—Registration.

In 1893 S. sold to B. certain premises. The deed of transfer stated that the said property extended as per deed of transfer passed in 1830 in favour of one M., and was subject to the conditions thereof. In this latter deed a certain passage, between the property of the purchaser and the remaining extent, was reserved as common to the two properties. Between 1830 and 1893 the properties had been merged under one and the same owner, and during the period of this merger the aforesaid passage had ceased to exist. In 1893 the property was again sub-divided and sold to different purchasers. No servitude had been registered on any of the successive transfers of the property, and it was proved that there had been no user of this said passage since 1874. B. now claimed from S. the use of a passage as it existed in 1830. Held, that as no servitude had been registered, B. was not entitled to judgment, but that as S. might have a good defence to any action for registration of a servitude which B. might be advised to bring, absolution from the instance should be granted with costs.

Richards v. Nash (1 Juta, 312) distinguished.

This was an action instituted by the plaintiff Steffens, against Johannes Andries Bam, for an order declaring him entitled to the user of a passage leading from his property in Strand-street, and restraining defendant from in any way obstructing or interfering with plaintiff's access to that passage, or preventing plaintiff from making lawful use thereof.

The declaration set forth that in November, 1893, the defendant was the owner of certain property situated at the corner of Long-street and Strand-street, Cape Town. On November 30, 1893, the defendant sold and transferred a portion of the said property to one Megalis, and plaintiff, as successor in title to Megalis by purchase, was now the registered owner of the said portion. The said portion had been sold by defendant, subject to the conditions mentioned in the deed of transfer and diagram annexed, made in favour of one J. G. Muller, in 1830, and one condition of this old title-deed was that there should be a common passage leading to Strand-street. It was alleged that defendant unlawfully and wrongfully obstructed plaintiff's access to that passage. The defendant, in his plea, denied that any such passage existed as claimed by the plaintiff, and said that he had never allowed any access from plaintiff's premises through to Strand-street.

The replication was general.

Mr. Schreiner, K.C. (with him Mr. Gardiner), for plaintiff; Mr. Burton (with him Mr. J. E. R. de Villiers) for defendant.

Mr. Schreiner said their contention was that the granting of transfer subject to the conditions of the 1830 transfer constituted afresh the servitude which had been merged by confusion of properties in one hand. His client's object was to get a declaration of rights of access by a passage, 3½ feet wide, to the back of his property from the Strand-street side. The question really was whether the old servitude was revived in 1893, and if so, what was its scope?

Mr. Schreiner called

Ludwig P. Borchers, clerk in the office of the Registrar of Deeds, who put in the originals of the deeds of transfer.

Archibald McIntosh, a surveyor, gave evidence as to the correctness of the plan he put in. From Strand-street access to the passage was obtained by a large folding door, which was open, and being used when he went there. Witness worked upon Noble's diagram attached to the transfer of 1843. The dotted line represented the passage. The end of the passage was built over.

Cross-examined: The lower portion was evidently used as a store, boxes of merchandise being piled up there.

Mr. Schreiner closed his case.

Mr. Burton called.

Johannes Andries Bam, the defendant, who said he purchased the property in question in 1886. There was then no lane or passage running through from Strand-street. He could see no trace whatever of such a passage. The general state of the buildings was the same to-day as it was in 1886. It was also in that state when witness transferred a portion to Magelis in 1893.

Cross-examined: Witness purchased the property at public auction in 1886.

Joseph Holberry said that in 1877 he was in the employ of Wilson and Glynn, who were then the owners of the property now held by Mr. Bam. There was no lane leading from Strand-street up to the end of the property. There was no sign of a passage. Witness had seen the premises that morning, and found the premises in the same condition at the portion in question. In 1877 there was no communication between the properties now held by plaintiff and defendant respectively.

Cross-examined: There were no cross-walls or doors from the entrance right up to the back-wall of plaintiff's premises. It was an open space with archways at intervals.

By the Court: There was no wall at the back of the store.

Johannes Andries Bam, junior, son of the defendant, deposed that when his father bought the property in 1886 there was no passage.

Harry Thomas Standen, attorney notary and conveyancer, said he put through the transfer of 1886. Witness adopted the ordinary course in referring to the original and last deeds of transfer and diagrams.

Mr. McIntosh (recalled) stated, in answer to Mr. Schreiner, that the wall extended to the boundary of Lot 3. The Long-street store extended to the back boundary.

Cross-examined by Mr. Burton: The wall connecting represented the boundaries of Lots 3 and 5. There was now no vestige of an ancient passage. If such a passage were found to have existed, and were now granted, the wall between the two lots would have to be broken open, and pegs would have to be placed to mark the passage.

Mr. Schreiner put in certain correspondence.

Mr. Schreiner, K.C. (for plaintiff): On the title deeds which we received in 1893 there was a clear grant of a common passage to Strand-street. This right we can trace back to Sprengler's title granted in 1779. Again, Bielman's title of 1843 clearly alludes to Lot No. 5, and makes reference to a certain arrangement between one Gray and Bielman. In order to explain the situation, I must refer to Ordinance 97 of 1833, which has been superseded by Act 28 of 1881 (the Derelict Lands Act). The committee referred to in the Ordinance made the report referred to in this case. The various provisions of the Ordinance were complied with, and the transfer passed in 1830 had a retrospective effect up to 1802, since which time there had been a possession of this servitude *pro domino Voet* (8, 1, 2). As to the extinction of the servitude by Merger, see *Voet* (8, 6, 2 and 3), but *Voet* is the authority least favourable to me. *Van Leeuwen* (Vol. 1, p. 283, Kotze's Tr., 2, 18, 96) is much stronger than *Voet*. See also footnote by *Dekker* (*loc. cit.*), who points out the difference between the views of *Voet* and *Van Leeuwen*. See also *Hollandsch Consultatie* (Vol. 2, p. 288; Consult. 285). A servitude lost by merger can be revived, *Hollandsch Consult* (Vol. 5, 75). In this case, though the passage was used as a store, it was primarily a passage. As to the absence of registration of this servitude, see *Richards v. Nash* (1, Juta, 312). It is sufficient that Bam's title deed, as received from his predecessor shows this servitude, and Muller's diagram and title deed in 1893 shows it also.

Mr. Burton (for defendant): I propose to take the case back to 1830. Then Muller obtained a formal transfer from the Master, and on the same day the property was re-transferred to defendant's predecessor in title. The right to a passage was not really a servitude, because it never went with the land. The right was merely personal, and so is the present claim. The plaintiff's case is based upon a mere legal technicality. For years these properties have been merged, and during all this time no passage existed. Even now all that plaintiff claims is a right to the same user which Muller had. All that he was entitled to was the use of a passage leading into Strand-

street; but when transfer was passed to Bam there was no passage in existence. There is no ancient lane or passage on our property. The very subject matter of the right has disappeared. The mention of the passage in the transfer to Michaelis is clearly a mistake, because no such passage exists.

Mr. Schreiner in reply.

Postea (December 12): The Court delivered judgment.

Buchanan, J.: This is an action for an order declaring the plaintiff to be entitled, in common with the defendant, to the use of a passage over defendant's property, and for an interdict restraining the obstruction of the said passage, or for other relief. The land in question is situated at the corner of Strand and Long-streets, Cape Town. From the old records, which have been produced, it would appear that in 1830 the whole extent of ground belonged to the estate of one Carel Dieleman, then deceased, though, as a fact, at that time no title was in existence for the portion over which the passage is now claimed. The portion of the ground furthest from Strand-street, but having a frontage to Long-street, described in the plan put in as sub-division No. 4, now the property of the plaintiff, was in that year cut off and sold in execution by the Master to one Muller. The transfer to Muller, after describing the property as per diagram, contained the following stipulation: "On condition that the wall between this and the remaining part shall be common, as well as the passage leading to Strand-street." No registration, however, of any servitude of passage was then, or at any time, subsequently made against the title of the remaining extent. Muller retransferred sub-division No. 4 on the same day to C. C. and A. Dieleman, who about the same time appear to have acquired all the other sub-divisions. Afterwards, in 1843, the Dielemans petitioned the Government, and after the formalities then required by law had been complied with, obtained a grant of the land over which the passage is now claimed, and thus completed their title to the whole extent. It is common cause that whatever servitude had been created in 1830 was extinguished through merger by the whole extent becoming the property of the Dielemans. Since then the property has frequently changed

hands, and at length, in 1886, the defendant became the registered owner of the whole estate. At some date prior to 1874, but no evidence has been led to show when, an archway in the party wall between the sub-division No. 4 and the remainder of the property, had been bricked up, and the ground over which the passage is now claimed was roofed over and converted into a store. It is clear there has not been any user of a passage since 1874, and, indeed, there has not been proof of such a user at any time. The defendant in 1893 cut off and sold the original sub-division No. 4 to one Michaelis, who resold to one Brendt, who recently sold to plaintiff. It is the effect of this re-sub-division of the estate, and of the construction of the transfer passed thereupon by the defendant to the purchaser, that has to be determined in this suit. As to the re-sub-division of the estate, authorities have been cited to show that some of the commentators on our law are not altogether in accord as to the effect after merger of the subsequent separation of the dominant and servient tenements upon a previously existing servitude. The rule, however, as laid down by Voet (8, 6, 3) may be taken as well established. He says: "If the fusion has been made with no intention of any subsequent separation of the two tenements unless some new cause arises (whilst the dominant or servient tenement has been acquired by the owner of the other tenement, whether servient or dominant, without any intention of again parting with the property so acquired), and then after all the two tenements become separated, the servitudes which the fusion destroyed are not revived by such separation, unless it was specially agreed that they should be revived: and this happens in every case where a man simply purchases a tenement subservient to his own, and then afterwards alienates one or other of them." Exceptions are mentioned to this general rule, as, for example, where the merger is temporary or conditional, such as where one of the properties is given as dower, or has been bequeathed, or is subject to *fiduci commissum*; but as the case before us is governed by the general rule above cited, no claim can be founded on the mere fact of the subsequent separation of the two properties. The case made for the plaintiff rather is

that the servitude was expressly re-created by the deed of transfer from defendant to Michaelis. The declaration founds the plaintiff's claim on the reference to Muller's title in this transfer. It also alleges, it is true, that the passage claimed was, and is a lane or passage of great antiquity; but this allegation of fact has not been proved; and in his replication the plaintiff admits that in 1893, and subsequently, neither Michaelis nor his successors in title, including the plaintiff, had, in fact, had the use of this passage. The pleadings do not allege that when the sale took place in 1893, any agreement was made between the defendant and Michaelis to give the servitude claimed; and the defendant has deposed that he never at any time knew of any right of passage, nor was any such right set up until after the plaintiff became owner of the sub-division. This brings us to the consideration of the construction to be placed on the title deeds themselves. The transfer of sub-division No. 4, passed in 1893 by defendant to Michaelis, describes the property sold as extending "as the deed of transfer with a diagram annexed made in favour of Muller on November 2, 1830, and several subsequent deeds of transfer, the last of which made in favour of appearer's constituent (the defendant) on July 27, 1886, will more fully point out, and further subject to such conditions as are therein mentioned or referred to." The only condition to be found in Muller's title which can be relied on is the one already cited, viz., "that the wall between this and the remaining part shall be common, as well as the passage leading to Strand-street." As far as the property transferred by this deed is concerned, the effective part of this condition is that relating to the common wall, as to which the property transferred may itself be said to have become a servient tenement. And from an annexure registered with plaintiff's own deed it appears that in 1896 there was a notarial contract executed between Michaelis and the defendant dealing with the heightening of this very party wall. But the transfer of the sub-division does not in itself create a servitude upon the remaining extent. The registered title to this remaining extent is not by such transfer burdened with a servitude, nor has such a burden been imposed on that title in

any other way. It is taken for granted that had the defendant transferred this remaining extent to a third person who had taken without notice, no claim would lie against such innocent holder; but it is contended that as the transferor to Michaelis still possesses the remaining extent, he remains liable to give the passage; and it is sought to bring the case within the rule laid down in *Richards v. Nash* (1 Juta, 312). But that decision was based on quite a different principle. In that case the purchaser of property over which a servitude had been granted obtained a clean transfer. In other words, he obtained transfer of more than the seller possessed, and with distinct knowledge of the existing servitude; and the Court decided that his title should be amended by having the servitude registered against it. This, however, is not an action to have the registration corrected. The reference to the conditions in Muller's title contained in the transfer to Michaelis, might perhaps be evidence in an action on a contract to give a servitude, but it cannot be taken to be notice of a servitude which, in fact, did not exist. If there was any such contract which has not been completed by registration against the title of the servient tenement, possibly an action might be founded thereon. But, as already pointed out, no such contract is alleged or proved. The plaintiff founds this claim solely on his title deed as it stands. Such title cannot by itself create a servitude over the remaining extent. Plaintiff's claim is one of strict law based on the registered titles. These documents do not establish the right set up. A servitude is part of the dominium, and the necessity for registration against the title of the servient tenement is an elementary proposition. This requisite has not been complied with. It is possible the plaintiff may have a right upon which to secure such a registration founded on some good cause not shown in this action, and if so, not to prevent him hereafter from establishing such a right if it exists, the present judgment will be one of absolute from the instance, with costs.

Maasdorp, J.: It appears from the evidence in this case that on or before the 24th November, 1893, the defendant sold to Michaelis a store and premises situate in Long-street, and on the 30th of that month transfer was passed of the pro-

perty. In the transfer deed appear the words: "Extending as the deed of transfer with the diagram annexed, made in favour of J. S. Muller, on 2nd November, 1830, and several subsequent deeds of transfer, the last of which made in favour of the appearer's constituent on 27th July, 1896, will more fully point out, and further subject to such conditions as are therein mentioned and referred to." On reference to the transfer to J. G. Muller, of the 2nd of November, 1830, it is found that the transfer was made "on condition that the wall between this and the remaining part marked with crosses shall be common, as well as the passage leading to Strand-street." The passage here referred to is that claimed by the plaintiff, and the condition amounted to an agreement to constitute a real servitude in favour of the property sold to Muller over the other property of Adriana Berrange, across which the passage passed. Beyond ascertaining the effect of the condition mentioned above, it is unnecessary to go into what further took place in 1830. If that condition forms part of the agreement of sale between Bam and Michaelis in 1893, it would amount to a promise on the part of Bam to constitute a real servitude of right of way along the passage over his property to Strand-street in favour of Michaelis, as owner of the property sold to him by Bam. No passage was properly speaking in existence at the time of the sale, nor has any been opened since, or used by any of the owners of plaintiff's property, nor has any servitude been registered against the property of the defendant. Such being the case, the plaintiff, who became owner of Michaelis' property on the 13th of January, 1902, on the same conditions as those on which Michaelis bought it, now claims an order declaring him to be entitled in common with the defendant to the use of the said passage, and an interdict restraining the defendant from obstructing such use. If the plaintiff is entitled to any rights in this case, he has mistaken his remedy. This Court cannot upon the evidence in this case declare him entitled to the use of a servitude of which he is not the owner. It has been clearly established that in our law a real servitude which is the subject of a contract can be validly constituted only by registration upon the transfer deed of the servient tenement. I need refer upon that point only to the

case of *Jansen v. Fincham* (9 Juta, 288) and *Judd and Fourie* (2 E.D. Court, 41). In the former case the Chief Justice said: "The effect of registration on the title deeds of the defendant would have been to carve out of the defendant's rights of ownership certain limited but real rights affecting his land, and to transfer them to the plaintiff." In this case the plaintiff asks the Court to declare him entitled to certain rights of ownership before he has become the owner. There may be cases where under a special agreement the purchaser might be entitled to the use of a servitude before actual transfer of such servitude by registration, or where the seller, having allowed him to use the servitude before registration, would be prevented from obstructing such use. But there is nothing of the kind in this case. The plaintiff alleges that by virtue of a certain agreement he is entitled to a servitude, if so he should claim from the defendant the performance of that agreement by the registration of the servitude. If this were only a technical objection to his declaration, it might have been amended, but it is quite conceivable that the defendant may have a good defence to an action for registration of the servitude against his transfer deed. However that may be, I concur that upon the case as it stands, judgment must be one of absolution from the instance with costs.

[Plaintiff's Attorney: E. J. Schultz; Defendant's Attorneys: Sauer and Standen.]

SUPREME COURT

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir J. BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSION.

{ 1902.
{ Dec. 12th.

Mr. Close moved for the admission of Llewellyn John Pritchard van Breda as a conveyancer.

Order granted and the oaths administered.

PROVISIONAL ROLL.

MENDELSON AND CO. V. SOLOMON STERN.

Mr. Russell moved that the provisional order for the sequestration of defendant's estate as insolvent be made final.

Order made final as prayed.

MCLEOD V. LE GRANGE. { 1902.
{ Dec. 12th.

Provisional sentence—Mortgage bond—Repayment of Instalments—Evidence.

One G. had advanced to L. £100 for which sum L. gave a promissory note. Thereafter L. paid to G. certain instalments of this £100, thereby reducing his debt to £69. These instalments were indorsed on the note by G. Thereafter G. ceded the said note to M. and L. granted a power of attorney to pass a mortgage bond in favour of M. for £75, L.'s note being thereupon returned to him. The bond was, however, passed for £100. Plaintiff now asked for provisional sentence for interest on the said £100.

Held, that as the bond had been given in settlement of the promissory note, and as payments of the aforesaid instalments were indorsed on this note, apparently at the time they were paid, provisional sentence for interest on £75 only should be granted.

This was an application for provisional sentence for £27, being 4½ years' interest at the rate of 6 per cent. *per annum* on a certain mortgage bond for £100, given by the defendant in favour of the plaintiff.

The affidavit of William James McLeod (the plaintiff) stated:

1. That he admitted the promissory note, dated August 4, 1893, ceded by Greeff to him.

2. He denied that the sums of £16 3s. 7d. and £15 4s. appeared endorsed on the said note when deponent became holder of the same, but said that £100 was due and owing to deponent by virtue of the said promissory note, and that if such endorsements now appear thereon, they were made subsequent to deponent handing said defendant the said note.

3. Deponent denied that the said defendant signed a blank power of attorney to pass the bond of £100 in favour of deponent.

4. On the said power of attorney having been duly completed, deponent returned the said note to said defendant.

5. Thereafter the said mortgage bond for £100 was passed by said defendant in favour of deponent.

6. Deponent admitted that on or about November 30, 1899, summons was issued against the defendant for payment of £100 and interest due on said bond, but provisional sentence was refused, owing to a defect in the notice calling up the bond, and to the terms of the bond itself.

7. No exception was then taken by defendant to the amount claimed by deponent, but he promised to pay the said bond, interest and costs in full.

8. Deponent informed defendant's agent that he was prepared to accept the instalments in terms of the bond.

9. Deponent admitted having summoned defendant for payment of £27 being interest due under the said bond of £100 from January 1, 1898, to June 30, 1902.

10. Deponent denied that £75 was the amount due to him by virtue of the said bond, or that any reduction on the original sum of £100 had ever been made.

11. Defendant paid deponent interest at the rate of 6 per cent *per annum* on the said bond of £100 from January 1, 1896, to December 31, 1897, for which payments deponent duly handed defendant receipts.

The affidavit of Johannes Adolph le Grange (the defendant) stated:

1. That he admitted his signature to the promissory note, dated August 4, 1893, in favour of Hendrik Greeff, and subsequently ceded to the above plaintiff.

2. In reply to paragraph 2 of plaintiff's affidavit deponent referred the

Court to the two distinct endorsements on the back of the said note, and stated that they both existed when he received the same from plaintiff.

3. With regard to paragraph 3 of plaintiff's affidavit, deponent admitted he signed the power of attorney, but denied all the other allegations therein.

4. Deponent admitted paragraphs 5 and 6, but denied all allegations set forth in paragraph 7; but said that he wrote to plaintiff to accept the sum of £75 in instalments with interest and costs according to the conditions in the bond.

5. In reply to paragraph 11 of plaintiff's affidavit deponent states that he paid interest to plaintiff on £75 only at 6 per cent. per annum, and it was only when deponent paid said interest that he found that the said existing bond was for £100 instead of £75 as amount due by him. He thereupon drew plaintiff's attention to it; and he replied that it was an error, as the promissory note originally was £100, but that it would always be clearly understood that he only owed the plaintiff £75, and interest would only be payable on that amount, and undertook to have said bond altered in the meantime.

The deponent said that the reason the bond was to be passed for £75 instead of the actual balance due by him on the said promissory note was that plaintiff included the costs of completing the bond, and secondly plaintiff acceded to deponent's proposal to pay the capital in three equal instalments.

The affidavit of Hendrick Thomas Greeff stated that he had made an endorsement on the back of the note before ceding it to McLeod, showing that a sum of £16 3s. 7d. had been paid.

Mr. Benjamin (for the defendant): If the bond stood alone the defendant could hardly oppose the granting of provisional sentence; but there is also the promissory note, and it is admitted that the bond was given for this note. Mr. Greeff, an independent witness, says that there were two indorsements on the promissory note. It is not likely that defendant would come into Court to oppose the application for the sake of such a small sum, unless he had a good case. The plaintiff can only claim his interest on the £75. As to the bond being passed for £100 defendant said

he had signed the power in blank, and the £100 must have been filled in afterwards.

Mr. Gardiner (for plaintiff): We deny that the power was signed in blank. The bond moreover renounces the exception *non numerata pecunia*. Then there are our letters to defendant, in which we claim £100, and he never denied that this sum was due. After the alleged payments, and before the bond was passed, we claimed the same sum. The case was previously before the Court (see 10, Sheil, 3). It is true that then the Court refused provisional sentence, but defendant raised no objection to the sum claimed. Again, if interest has been paid on £75 only, why are the receipts not produced to prove this. Greeff in his affidavit speaks of only one indorsement. I submit that provisional sentence should be given, and then, if defendant feels aggrieved, he can be ordered to go into the principal case.

De Villiers, C.J., said it would be well if the Court could see the original power of attorney.

After the original of the power of attorney had been produced, the Court gave provisional sentence for interest on £75, the plaintiff to pay the costs.

De Villiers, C.J.: If this case had depended only upon the bond the Court would have given provisional sentence for interest on the full sum of £100, but the bond in this case was given in settlement of a promissory note for £100 made by defendant in favour of one Greeff. That promissory note has been produced, and on the back of it there are endorsements stating that two instalments of £16 3s. 7d. and £15 4d. respectively have been paid. If these instalments were noted on the promissory note at the time that Greeff assigned it to the present plaintiff, then clearly here was notice to the plaintiff of the payment of these amounts. The plaintiff now says that these endorsements were not there, but on this point I am satisfied that he is mistaken, as they have every appearance of antiquity, while Greeff himself states that he received at all events one of these amounts and endorsed it upon the promissory note. He says nothing about the second instalment, but that also seems to be in exactly the same handwriting, and I

am satisfied, so far as the Court can be satisfied upon the evidence before it, that these endorsements were upon the promissory note at the time of its assignment. That being so, I think it was understood that the bond was to be passed only for the amount actually due, or rather for a little more, the sum of £75. The Court will therefore give provisional sentence for interest from the 1st July, 1898, to the 30th June, 1902, on £75. As this interest was tendered before the issue of the summons the plaintiff must pay the costs. The plaintiff can, if he wishes, go into the principal case.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorney: G. Trollip.]

LARMER V. BATHGATE. { 1902.
Dec. 12th.

Mr. P. S. Jones moved for provisional sentence upon a mortgage bond for £1,200 with interest. He also asked that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest

Provisional sentence granted as prayed, and the property declared executable.

GOODSON V. BATHGATE.

Mr. P. S. Jones moved for provisional sentence upon a mortgage bond for £600 with interest, and also for judgment for £1 4s. 9d., being insurance paid. He also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable. Judgment was also given for the £1 4s. 9d., subject to the production of the receipt.

GOLDER V. HOWES.

Mr. Benjamin moved for provisional sentence upon a mortgage bond for £150 with interest. The bond had become due by reason of the non-payment of the instalments as provided in the bond. Counsel also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

HOFMEYER V. BRADBURY.

Mr. De Waal moved for provisional sentence upon a promissory note for £100.

Provisional sentence granted.

HEROLD V. CHERRY.

Mr. Benjamin moved for provisional sentence upon a mortgage bond for £1,200 with interest, and also for judgment for £4 19s. 9d., being amount of insurance premium paid. He further asked that the property specially hypothecated be declared executable.

Provisional sentence and judgment as prayed.

B. G. HEYDENRYCH V. HAMILTON.

Mr. Uppington moved for provisional sentence on two promissory notes for £250 and £35 respectively, with interest due.

Provisional sentence granted as prayed.

LE ROUX AND GARLAKE V. OPPERMAN.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

LE ROUX AND GARLAKE V. HATTINGH.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

HOWELL AND CATINIA.

Mr. De Waal moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

MUNDER AND ANOTHER V. HAMPSON.

Mr. Burton asked for an extension of the return day in this matter until January 12.

Extension of return day granted.

VAN DER BYL AND CO. V. ISAACS.

Mr. Gardiner moved that the provisional order for the sequestration of defendant's estate be set aside.

Provisional order discharged.

JACKSON V. ISAACS.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £300, with interest due. The bond had become due in terms of the bond. Counsel also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

LINDER V. LINDER.

Mr. Buchanan moved for provisional sentence for £58 10s., less £10 paid on account, upon a judgment of the Court of Session in Scotland. The defendant was a builder at Newlands, and the judgment given in the Court of Session had been in an action for alimony brought by his wife against him.

Provisional sentence granted as prayed.

HEYMANN AND MARTIN V. BLACK.

Mr. M. Bisset moved for final judgment in terms of a consent paper for £732 9s. 4d., due upon certain bills of exchange, less a sum of £475 6s. 7d. paid on account.

Order granted.

HEATLIE V. WHITE.

Mr. Buchanan moved for provisional sentence upon two promissory notes for £85 each with interest.

Provisional sentence granted as prayed.

MACKIE, DUNN AND CO. V. DAWSON.

Mr. Benjamin moved for provisional sentence upon a promissory note for £750 and bills of exchange for £15 3s. 7d., £27 17s. 8d., and £1,270 9s. 4d.

Provisional sentence granted as prayed.

HOGG V. BERLYN.

Mr. Alexander moved for provisional sentence for £413 6s. 8d. upon a certain notarial bond.

Provisional sentence granted as prayed.

HEYDENRYCH V. HAMPSON.

Mr. Currey moved for provisional sentence upon promissory notes for £206 16s. 4d., £103 6s. 5d., £36 10s., £50, £159

8s., £77 10s., £28 7s., £28 6s. 8d., and a good-for for £20. There was a covering bond for these amounts, and counsel asked that the property specially referred to in the covering bond be declared executable.

Provisional sentence granted as prayed and the property declared executable.

ILLIQUID ROLL.

CARM CHAEL V. CHETTY. } 1902.
Dec. 12th

Mr. P. S. Jones moved for judgment for £53 7s. 6d., money lent and advanced. Judgment granted as prayed.

ALLAN AND SHAW V. KOTZE.

Mr. Howel Jones moved for judgment for £126 15s. 6d., for goods sold and delivered.

Judgment granted as prayed.

CUMMINGS V. MILNE.

Mr. Benjamin moved for judgment for £30, for board and lodgings.

Judgment granted as prayed.

S. A. MILLING CO. V. WARNSTEIN.

Mr. Russell moved for judgment for £591 13s. 10d., cash lent and goods sold and delivered.

Judgment granted as prayed.

SCOTT V. ROOS.

Mr. Russell moved for judgment for £46 8s. 2d., goods sold and delivered.

Judgment granted as prayed.

REVIEW.

REX V. KALP AND OTHERS. } 1902.
Dec. 12th.

Martial Law — Resident Magistrate — Review.

This was an application for a review of certain proceedings in the Magistrate's Court of Colesberg. The applicants had been charged before Mr. Wrensch, Resident Magistrate of Colesberg, in March, 1901, with contravening martial law regulations by neglecting to report to the military authorities within a reasonable time the presence of the enemy on the farms Onverwacht and Mealie-

fontein. The Attorney-General was called upon to show cause why these proceedings should not be set aside, owing to the incompetency of the Court, the alleged offence not being an offence known to the Colonial law. It appeared that the charge sheet was headed "Martial Law Jurisdiction. In the Court of the Resident Magistrate for the district of Colesberg, before F. Wensch, specially deputed by the Commandant." The prisoners, on being arraigned, pleaded not guilty, but were found guilty, and sentenced each to pay a fine of £30. or go to prison for three months. This was signed "F. Wensch, R.M."

Mr. Buchanan (for applicants): The circumstances of these cases are precisely similar to those in *Rex v. Van Vuuren* (12, C.T.R., 902), and *Rex v. Vander Merwe* (12, C.T.R., 786). I ask that the proceedings be set aside.

Mr. Nightingale, who appeared for the Attorney-General, said that as the case was identical, so far as he could see, with the cases of *Van Vuuren* and *Van der Merwe*, where the proceedings in the Magistrate's Court, so far as they took place in such, were set aside, he could only leave this matter in the hands of the Court.

De Villiers, C.J., said the Court would make a similar order to those made in the cases referred to, for the setting aside of the proceedings.

Buchanan, J., said this was the first case of the kind that had come before him. As he had said before, all cases tried in the ordinary courts of the Colony, such as the Magistrate's Courts, were subject to review by the Supreme Court. But if the applicants had been tried before a military court, he thought the Supreme Court had distinctly laid down that it would not interfere with the proceedings. There it was shown that the case was tried in the Court of the Resident Magistrate of Colesberg, and the Resident Magistrate, as such, had no right to administer martial law. He therefore concurred that in this particular case the proceedings should be quashed.

RETIEF V. JACOBUS B. RETIEF.

Mr. De Waal applied for an order declaring respondent of unsound mind, for the appointment of a *curator bonis*, and for leave to sell certain movable pro-

perty in his estate, to provide for the maintenance of the wife and minor children, and for the education of the latter.

Mr. J. E. R. de Villiers appeared as *curator ad litem*.

Dr. William John Dodds stated that respondent was at present an inmate of Valkenberg Asylum, having been admitted on the usual medical certificate. He suffered from delusions. He was now somewhat better, but still of unsound mind.

Mr. J. E. R. de Villiers said he had had a long interview with the respondent, and was satisfied that he could not oppose the application.

An order was granted as prayed, the wife being appointed *curator bonis* of the respondent's property, and his major son curator of his person.

HILLS V. COLONIAL GOVERNMENT. (1902. Dec. 12th.)

This was an action brought by Arnold Frank Hills against the Commissioner of Public Works.

Mr. Searle, K.C. (with him Mr. Close), appeared for the plaintiff; Mr. Schreiner, K.C. (with him Mr. McGregor), for the Government.

Mr. Searle said that since the matter was last before the Court on motion, the plea had been filed. Broadly, the plaintiff's claim was of two characters. The first was a claim for certain alleged breaches of the different contracts which had been entered into by the Colonial Government on the one hand and by the Grand Junction Railways (Limited) and Hills on the other hand. The contracts ranged over a period between 1896 and 1900, there being altogether four contracts, and three Acts of Parliament relating thereto. Hills alleged breaches by the Government extending over a period of several years, during which these contracts were in operation, and he claimed also that certain work had been done under the contracts. He said that the work actually done might be separated into two portions—that done before 1898 and that done after 1898, in which year the Thames Ironworks and Shipbuilding Co. took over the contracts. He claimed the sum of £492,000 odd, being made up of two sums—£269,000 odd, up to

July, 1898, and £223,000 odd since that date. The case had been set down that day merely to take the evidence of Mr. Hills, who was about to leave for England, and Mr. Hills's evidence on the point of the actual cost of the work would be confined to the second item—that of £223,000. With regard to the claim for damages, Mr. Hills would give evidence upon a number of the breaches, but not upon all. The alternative claim was simply one for the cost of the work and labour. In the plea, the Government denied all the breaches, and further denied that Hills should, or could, claim as the trustee of the Grand Junction Railways (Limited). The Government had rendered certain accounts showing how the amounts should be made up, and this account showed a balance due by Hills to the Government of £90,000, which the Government claimed in reconvention as against Hills.

Mr. Schreiner said the pleadings were not yet closed. On the previous day a voluminous replication was filed which would require a special answer. He merely mentioned this to show that the case was not at all ripe for ordinary hearing. Since the matter was last before the Court the plea had been filed, and the Government referred therein to clauses 52 and 53 of the general contract, whereby it was provided that the amount of the actual cost should be ascertained by the certificate of the Engineer, or in such other manner as the Government should approve. The cost had been ascertained and particulars furnished to the plaintiff. Upon the point of the actual working cost his (Mr. Schreiner's) argument would be that according to the contract the cost was to be ascertained by the certificate of the engineer. He said this in order that it should not be assumed that he agreed to the admissibility of any evidence by Mr. Hills relating to the actual cost.

Mr. Searle called

Arnold Frank Hills, the plaintiff, who said he had come out to the Cape for the purpose of this suit. He was the chairman of the Thames Ironworks Co. He had been managing director of the company for about 20 years, and chairman for ten years. The company had the largest engineering and ship-building works in London, and had a

capital of over £900,000, and employed over 5,000 men. The company now had contracts to the amount of a million and a half with the Imperial Government. In 1898 there was an agreement entered into, and the manager, Mr. Urquhart, came out to negotiate certain alterations in the contract with the Colonial Government. A contract was drawn up in 1898, whereby the Thames Co. took over the Grand Junction Railways contract. Witness came out in 1901. There was an application to the Court in March, 1899, in reference to the contract and after that a further contract was entered into. Later there was a cession from the Thames Ironworks Co. Witness entered into a partnership in 1898 with Mr. Walker. The cession was in 1900. There were difficulties, and in December, 1901, witness came out here. He had certain correspondence with the then Commissioner, Dr. Smartt. In March, 1902, the works had to be closed down for the reason that there were no finances to carry them on. Witness's position was that the Government neglected to pay monies due in respect of the contract, which monies were required to keep the work going. One of the main difficulties was the betterment question. In the original Act it was specified that if the Government purchased the line they should pay betterment at the price mentioned in the Act. There was no price actually mentioned in the Act, but it was stipulated that the Government were to pay the actual cost, plus 10 per cent. profit, less certain allowances for wear and tear. Schedules were made from time to time. There were two schedules in 1896, and a third was drawn up in 1900. This was first made in 1898. The Government took up the position that witness was only entitled to schedule payments. Witness's account attached to the declaration referring to the second portion showed the actual cost since the Thames Company took over the work. This account was taken from witness's books. Since the taking over of the line in June last the Government had made no request to inspect the books. In witness's account witness showed an item "less one-fifth to be charged to Mossel Bay." The Mossel Bay contracts were not concerned in the present case. Witness explained certain details in the account, which he said represented actual

cost, and which showed a balance in his favour since 1898 of £223,310 4s. 7d. The Government account was made up on a different basis, and only a small allowance was made for betterment. Witness estimated the actual cost of betterment at £2,000 a mile. Witness deposed as to certain correspondence between himself and Government officials. Witness had been over the lines, which were, in his opinion, well constructed—better, he thought any expert would say, than any other line in the Colony. Witness gave evidence as to the nature of the work in the three betterments which had been made. About 180 miles out of the 300 miles were now open and running. From Willowmore to Klipplaats (sixty - two miles) the line had been running for over two years. Witness had tried to come to a settlement with the Government. Witness had represented to the Government that the work would inevitably cease if they persisted in their short payments. Dr. Smartt had promised that if witness pushed the work on, the Government would give every assistance. Witness wanted the Court to determine the actual cost, and with this decided he was perfectly prepared to endeavour to come to some arrangement with the Government. Some of the items in the Government account were absolutely fallacious. The main difference was in regard to betterment. Witness estimated that on that alone there was a difference of £300,000. In regard to the alleged breaches, the Government in 1899 made application to the Supreme Court for an order on witness to give security. Witness was ordered to give security. The reduction of £300 per mile was not in the original agreement at all. That would represent the sum of over £90,000 altogether. With regard to the security of £50,000 required, the lodging of that dislocated their finances, and led to their financial difficulties afterwards. He had also suffered damage from the delay in payment for the Gouritz Gorge survey. The Government took up the position that they were not liable for that. Eventually the Government paid for that survey.

By the Court: Witness continued the work after the passing of the Act which altered the contract, because he was then committed to an expenditure of about a quarter of a million for the purchase of material.

Examination continued: He claimed damages for illegal detention for about two years of the money for the Gouritz Gorge survey. For two months from October, 1899, the Government suspended payments for work done by witness, and this put him in great difficulty, as it affected his financial arrangements. He presumed that Dalton's report and estimate were incorporated in the contract. There was a question as to some tanks which witness claimed he was entitled to charge for. There was great delay in conveyance of material owing to the rails being occupied by the military. They therefore could not get on with the work. This enormously hampered the contractors. Witness did not wish to lay stress upon the allegation that there was dilatoriness on the part of the Government in making the monthly payments. There was no great difficulty about that. There was a serious difficulty about the joint measurement, the Government only making a joint measurement when they chose, and not recognising it as a duty on their part. The witness gave evidence as to other allegations in the declaration relating to the failure of the Government to fulfil the conditions of the contract. He complained of unfair inspection and rejection of work by the Government. It would have been better to have rebuilt the whole line to Willowmore than to carry out the alterations insisted upon by the Government; the work in making the alterations was inconceivably difficult. The Government put apart old rolling stock for their use, the military having the best stock, and the result was that there were continual breakdowns, and the costs of repair to the stock were deducted as "wear and tear" from the payments to the contractors. Witness deposed as to land which had been expropriated. He considered that 10 per cent. on the total amount expended would be a fair amount to ask as damages. He estimated the value of the Oudtshoorn-King William's Town line at £10,000 more than had actually been spent on it, and the value of the other at £25,000 more than its cost. Witness had made a claim against the Imperial Government for £15,000 for damage caused by the enemy. The workmen defended Willowmore, and but for their efforts that place would have been taken. For more than a year the war had interfered with the progress of all the sections, and witness had only

been granted a three months' extension. He had made every sacrifice in order to get the work completed.

Cross-examined by Mr. Schreiner : So far as witness knew the vouchers for every item in his account were in this country. During the last three months the labourers complained that they had insufficient food, and did not get their wages. It was originally calculated that a quarter of a million capital would be required for the work; whereas half a million had been spent. Witness had an appointment in England as receiver to formulate a claim against the Government on behalf of the Grand Junction Railways. Witness was debarred by order of the English Court from letting the Colonial Government see these proceedings.

The Court ordered the case to stand over until next term.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir J. BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1902.
{ Dec. 15th.

Mr. Alexander moved for the admission of Thomas Frederick de Kock as an attorney.

Granted, applicant taking the usual oaths.

NICHOLLS V. GREENING.

This was an application for a decree of civil imprisonment, by virtue of provisional sentence having been obtained on the 6th November on a judgment of the Supreme Court of Natal and a writ of execution having been issued and a return of *nulla bona* made.

Mr. Buchanan appeared for the applicant; Mr. Rowson for the respondent.

Mr. Buchanan read an affidavit showing that the sale of goods belonging to the defendant realised £32, which the Messenger divided between two writs lodged ten days previous to this writ. Counsel said he wished to take the ruling of the Court as to whether it was necessary to lodge a certified copy of a judgment of the Supreme Court of Natal. It seemed an unnecessary expense in cases of this kind, where nine cases out of every ten the costs were never recovered.

De Villiers, C.J.: I understand from the Registrar of the Court that it has been the invariable practice to require these certificates, and the inconvenience is really not so great as it has been represented to be. At the utmost, the cost would not amount to more than 10s. or 15s. The records of the Court have to be filed, and after such filing it is not a convenient practice to produce the originals in Court.

Mr. Rowson read an affidavit made by the respondent. The defence was that the case really involved a question of account. Defendant had a larger claim against applicant, and intended to reopen the case in Natal, but he was unable to leave Cape Town at present to do so. He asked that this case should be ordered to stand over until the first day of next term.

The Court granted a decree of civil imprisonment, with costs, but postponed execution until the 15th February.

Plaintiff's Attorney: D. Tennant;
Defendant's Attorney: W. G. Coulton.]

APPEAL CASES.

REX V. STERN. { 1902.
REX V. ROSENBERG. { Dec. 15th.

Public Health Act—Government regulations—*Ultra vires*.

In the absence of evidence to show that a regulation prohibiting the sale of liquor to aboriginal natives would not prevent, check or eradicate bubonic plague.

Held, that a regulation to that effect published in the terms of the 15th section of the Public Health Act is not *ultra vires*.

but that such a regulation should be repealed when the necessity for its continuance ceased to exist.

These were appeals from judgments of the Resident Magistrate of Uitvlugt and of the Resident Magistrate of Wynberg, respectively.

From the record in the Court of the Resident Magistrate of Uitvlugt, it appeared that the appellant Stern, who was the holder of a liquor licence, was charged with selling a bottle of Cape brandy to an aboriginal native, and was convicted and fined £10. The defendant's attorney objected that the proclamation (Government Notice 241), under which defendant was charged was *ultra vires*. The proclamation, which purported to be made by virtue of section 15 of the Public Health Amendment Act of 1897, prohibited the supplying of liquor to natives, by reason of the prevalence or threatened outbreak of a contagious disease—bubonic plague. Section 15 of the Act of 1897 provided that in cases of urgent necessity arising from the prevalence or threatened outbreak of any infectious or contagious disease, it should be lawful to proclaim such regulations as might be required to prevent the outbreak or check the progress of such disease. The first point raised on appeal was whether the prohibition contained in the proclamation was authorised by the section of the Act referred to. There was a further ground of appeal that the person served by the defendant was not an aboriginal native.

Mr. Wilkinson for the appellant Stern; Mr. Rainsford for Rosenberg; and Mr. H. Jones for the Crown.

Mr. Wilkinson: See Sec. 15 of the Public Health Amendment Act (23 of 1897). The whole question is whether the Proclamation (No. 241) is authorised by this section. There have been many English cases as to the powers of public bodies to make regulations under special Acts of Parliament, and our principles in this matter are identical with those which obtain in England. Powers to make bye-laws must be confined to the purposes for which those powers are conferred. *Brice on Ultra Vires* (p. 570);

The Proclamation in this case goes far beyond the terms of the Act. To say that no person of a certain class shall be served with liquor amounts to total prohibition. There is nothing to show that the supply of liquor to natives is more likely to spread disease than is the supply of it to white people. No argument can be drawn from the fact that natives congregate in canteens. They congregate at their work, and bars frequented by white people are often just as crowded as any canteen. If the crowding together of natives is the danger, why not make a rule that only a certain given number shall be in a canteen at one and the same time? No total prohibition affecting a whole class of people can be valid, unless the power to thus prohibit has been expressly conferred.

[De Villiers, C.J.: Is there any evidence that the plague still existed when this sale was made?]

None whatever. This was really a liquor regulation pure and simple, and had nothing whatever to do with public health. See *Wortley v. Nottingham Local Board* (21, L.T.N.S., 582).

Mr. Jones: I submit that the Proclamation comes under the very wide terms of the Act. By Secs. 3 and 6, it is for the Minister to decide on what must be done in the interests of the public health—of course after consulting the Medical Officer—and it must be presumed that the Minister did so consult him.

[Maasdorp, J.: Is there any medical evidence to show that liquor is more dangerous to the constitutions of natives than to those of other people?]

The Medical Officer might say that natives are more likely to spread disease. They are more given to drink than other people, and they herd so closely together. But I rely chiefly on the maxim *omnia quæ acta sunt præsumuntur rite acta*. The cases and principles referred to by counsel for the appellant are not in point. A regulation simply means a bye-law, and it may amount to a prohibition. *Ex parte Stern and Others* (11, Sheil, 106) shows that if the Medical Officer closed a house, it was for the landlord or tenant to show that such closing was unnecessary.

Mr. Wilkinson was heard in reply on the question of *ultra vires*.

The Court ruled that the regulations in question are not *ultra vires*.

De Villiers, C.J.: I quite agree with counsel for the appellant that, if the object of the Government in framing the regulation now in question were, by a side-wind, to introduce liquor legislation which Parliament has refused to sanction, such a regulation would not be *intra vires* of the Act. But the 15th section of the Act of 1897 does give very large powers to the minister in charge of the public health, for it provides: "In case of urgent necessity arising from the prevalence or threatened outbreak in any district of any infectious or contagious disease, it shall be lawful for the Minister to make and proclaim such regulations as may be required to prevent the outbreak, check the progress of or eradicate such disease." Under the previous sections of the Act the Minister is entitled to take the advice of the medical officers of health, and even to obtain the advice of the Medical Advisory Board of Health—the Colonial Medical Council—and the Court may fairly presume that before the Minister issued the regulations now in question, proper advice was obtained from competent persons. Unfortunately, there is no evidence now before the Court to show that that advice was wrong and to show that the regulation that liquor shall not be supplied to aboriginal natives would not tend to prevent an outbreak, or check the progress or eradicate bubonic plague, and in the absence of such evidence to contradict any advice which the Government may have received, I think the Court will not be justified in declaring that this regulation is now *ultra vires* of the Act. It is really a question of medical evidence, and there is something to be said for the view that the assembling together of natives in canteens, and the supplying of liquor to natives would have a tendency to expose people to a spread of the disease. Of course it might be said that if such a regulation is necessary, it is necessary for all—for Europeans as well as for natives, but it is quite possible that such a regulation, when applied to natives, would have a partial effect at all events, and so far as it would have a partial effect it would be *intra vires*. It cannot be said to be *ultra vires* merely because the principle has not been extended to the full extent; that would be

no ground for declaring it to be *ultra vires*. Therefore on the whole, although the matter is not free from difficulty, I come to the conclusion that the Court should not, in the absence of evidence to the effect I have indicated, declare that the regulation is *ultra vires*. But at the same time I am bound to remark that it is the duty of the Government to carefully consider whether the necessity for the continuance of this regulation is necessary. It might be good policy to stop the sale of liquor to natives, but the policy should be carried out by the Legislature. If the necessity for such regulations ceases to exist, I think it is the duty of the Government under the 16th section of the Act to repeal or amend the regulations. The Court is of opinion that the objection on the ground that the regulation is *ultra vires* should not be sustained.

Buchanan, J., concurred. He said he inclined to the view that the prohibition of the sale of liquor to natives would be desirable in the interests and welfare of the natives. But however desirable such a provision might be, it must be enacted by the Legislature. If the question be looked to as one of regulating the sale of liquor, then the regulation would be *ultra vires*. He looked upon this, not as liquor legislation, but as a measure which would prevent, or at any rate check, the spread of the plague—the disease then existent in the Colony. No doubt the Minister of the Crown had taken medical advice on this question, and had come to this conclusion, and in his (Sir John Buchanan's) opinion, there was probably good reason for saying it was not an erroneous conclusion to come to. If, however, evidence had been led to show that such a regulation could not affect the outbreak and spread of the disease, then the Court might consider whether a regulation which had no effect one way or the other was *ultra vires*. As the case now stood, he was not inclined to interfere with this regulation, which he considered probable had had a very beneficial effect on the public health.

Maasdorp, J., concurred.

Mr. Wilkinson then argued that the purchaser of the liquor in Stern's case was not an aboriginal native—and Mr. Rainsford was heard in argument as to whether the purchaser in Rosenberg's case was an aboriginal native.

The Court in both cases decided in the affirmative.

De Villiers, C.J.: The Court is of opinion that there was sufficient evidence to justify the Magistrate in holding in Stern's case that the man was a native. The conviction of the man served was proved, and for the purpose of that conviction it was necessary to prove he was an aboriginal native, and ample evidence was produced in that case that he was a native. Moreover, the Magistrate's own personal opportunity of deciding whether the man was an aboriginal is important. The appeal must be dismissed.

As to Rosenberg's case: In this case also the conviction of the native as having purchased liquor, he being an aboriginal native was put in, and the native himself was called. His evidence is rather contradictory, but still he admits that he is a Damara, and police-constables were called who swore that he was an aboriginal native. The Magistrate has had considerable experience in native districts, and he would therefore be a very good judge as to whether the man is an aboriginal native; and he, upon the evidence, found the man was a native. With that finding I am not inclined to interfere. Then a further objection is raised that the liquor which was sold was wine, and not brandy, as stated in the summons; but it was in a ginger-brandy bottle, and the gist of the offence is the selling of intoxicating liquor. I do not think the mere mistake of saying ginger-brandy instead of sherry would be a sufficient justification for setting aside the conviction. The police were misled in prosecuting by this liquor being in a brandy bottle. The appeal must be dismissed.

Their lordships concurred.

[Attorneys for appellant Stern: Silberbauer, Wahl and Fuller; Attorney for Rosenberg: W. G. Coulton.]

REX. V. VAN DYK. (1902.
(Dec. 15th.

Appeal — Point reserved — Indictment—Theft—Proof of place where crime was committed.

The appellant was indicted before the Victoria West Circuit Court for theft of cattle at E.,

in the district of K., and was convicted of receiving such stolen cattle in the district of G., knowing the same to have been stolen. E. and H. were both within the jurisdiction of the Court.

Held, in the absence of any proof of prejudice to the prisoner, that the verdict and sentence should not be disturbed.

This was an appeal from a verdict and a sentence of the Circuit Court sitting at Victoria West.

The appellant was charged on three counts with theft, and convicted on the first and third. The appeal was against the conviction and sentence on the former. The indictment charged the accused, who was described as a farmer, with having, upon a certain day, between the 7th and 21st April, 1902, at Ecksteenstein, in the district of Kenhardt, stolen six cows belonging to Henry Albertus Cornelis van Niekerk. The jury returned a verdict that accused was guilty of receiving the cows, well knowing them to have been stolen. The point of the appeal was whether the prisoner, who was charged with the theft at Ecksteenstein, in the Kenhardt district, in April, could be convicted for receiving at Keimos, in the district of Gordonia, in May. Both districts were within the jurisdiction of the Court. The judge reserved this point for the decision of the Supreme Court.

Mr. Close for the appellant; Mr. H. Jones for the Crown.

Mr. Close: The point in this appeal is did the evidence support the charge laid in the indictment. Under Act 3 of 1861 the indictment may be amended by the Court, provided that the accused is not prejudiced on the merits. (Sections 2 and 11). But here the indictment alleged the wrong place. The indictment should first have been brought into accordance with the record, and then all subsequent proceedings would have been valid. Section 13 of Act 3, 1861, allows this amendment only, if time and place are not of the essence of the charge. Sec. 11 (as to theft) is much wider. In this particular case, the evidence did not support the charge.

Mr. H. Jones was not called upon.

De Villiers, C.J.: The prisoner was charged with theft on several counts at Ecksteenstein, in the district of Kenhardt, on a day between the 7th and 21st days of April, 1902. He was convicted of receiving six cows at a place called Keimoes, not in the division of Kenhardt, but in the division of Gordonia. The two places seem to be separated from each other only by a river, but they are certainly in different districts, both of which were within the jurisdiction of the Court, and the question is raised whether this discrepancy would justify the Court in quashing the sentence. Now the Act 9 of 1867, which allows persons who are tried for theft to be found guilty of receiving stolen goods, knowing them to be stolen, says nothing upon the point now raised. It must happen in many cases that the person who receives stolen goods receives these goods in different places from those in which they have been stolen, and the fact that the Legislature does not provide for such cases, shows that the Legislature at all events did not attach much weight to the circumstances and I quite agree with the learned judge that it would have been better in this case if there had been an alternative count for receiving; or that it would have been better to have applied for an amendment. The point which arises now is whether the absence of such an application for amendment or the absence of the alternative count is any reason for quashing the verdict. By Act 35 of 1896 it is expressly provided that no conviction shall be set aside by reason of some irregularity or illegality whereby the accused person was not prejudiced in his defence, and by which no substantial wrong was, in the opinion of the Court of Appeal, done to the accused. Now, in the present case, it appears to me that the appellant was by no means prejudiced. The learned judge says so, and it is clear that it could not possibly have prejudiced him, and, therefore, although there was some irregularity, in the absence of prejudice to the accused, I am of opinion that the Court should not disturb the verdict.

Buchanan, J., and Maasdorp, J., concurred.

[Appellant's Attorney: W. G. Coulton.]

REX V. HALES AND (1902.
ANOTHER. (Dec. 15th

Indictment—62nd rule of Court
—Point reserved.

Where two or more persons have been jointly indicted for the same offence and one of them only is convicted, the person so convicted cannot claim, merely by reason of his having been so joined with others, that his conviction shall be set aside.

This was an appeal from the Circuit Court, held at Worcester, on October 14.

The accused, Henry Hales and Robert Airth, were charged on eleven counts with theft. The first, second, and eleventh counts were withdrawn, and the accused were found not guilty on counts 5, 9, and 10. Both the accused were found guilty on the third count, and Airth was also found guilty on the eighth count, while Hales was also found guilty on the fourth, sixth, and seventh counts. Hales and Airth were sentenced to imprisonment with hard labour for 3½ and 2½ years respectively. After the conviction notice was given that the accused intended to appeal to the Supreme Court on a point reserved, viz., whether the indictment was a good one, in view of the evidence given, inasmuch as the evidence showed that the persons were not acting in concert, and whether the indictment should not be quashed on the ground that the form of indictment embarrassed the prisoners in their defence, and on the ground that the evidence disclosed that the offences were separate and unconnected, and committed at different times by different persons. A further ground of appeal was that the conviction was not supported by the evidence given before the Court, and was contrary to law. Both the accused were railway guards, and the counts on which convictions were obtained were in regard to articles stolen from passenger trains running between Touws River and Beaufort West.

Mr. Schreiner, K.C. (with him Mr. Wilkinson), for the appellants; Mr. H. Jones for the Crown.

Mr. Schreiner: In the indictment eleven counts were preferred. Three of these were withdrawn. Hales was con-

victed on three, and Airth on one (No. 8). There is only one count on which both were convicted, viz., on the third count. Hales was found guilty on the fourth count, but on that Airth was acquitted. On the fifth count, both were found not guilty. On the sixth count, Hales was found guilty, but there was no evidence against Airth. On the seventh count, Hales was found guilty and Airth not guilty. On the eighth count, Hales was found not guilty and Airth guilty. On the ninth, tenth, and eleventh counts, both accused were found not guilty. On the case being called, counsel for the defence excepted to the indictment. Searle, J., said that a subsequent opportunity would be given to bring his objection before the Court. As to joint indictments, see Rule of Court No. 62; but for that rule no two persons could be charged jointly.

[De Villiers, C.J.: Do you say that if one person who has been charged jointly is discharged, the other must also be discharged?]

Yes; if by the terms of the indictment they are embarrassed in their defence. Here there were eleven counts; and all that was alleged against Airth was that a soap box and a few ties were found in his possession. This one fact that Airth was jointly indicted with Hales prejudiced his case. There is nothing whatever to show that the two accused were acting in concert, but the allegation that they were must have prejudiced the jury. I submit that the indictment was irregular and illegal, but I could not go upon that point unless there had been prejudice. If the Crown indicts jointly, it must show that the persons jointly indicted were acting in concert, if either will be prejudiced by this joint indictment. A joint indictment of eleven counts is a very complicated matter, and the evidence is even more complicated.

[De Villiers, C.J.: But surely if stolen property is found in a man's possession, he can be convicted?]

Yes; but the evidence as to identification is very weak in the case of the soap box. Then there was a question as to the appellant stealing a Bible, with a name written in it. That was a much stronger case than the case of the ties, and yet he was found guilty of stealing the ties but not of stealing the Bible.

[De Villiers, C.J.: You say that Hales was prejudiced by being indicted with

Airth, and Airth by being indicted with Hales?]

That is the only way I can put it; both were prejudiced by the whole atmosphere of the case. There is no evidence of collusion between these two men, as the evidence shows. The evidence against Hales is much stronger than that against Airth, and Airth would never have been convicted on the evidence had he not been jointly indicted with Hales.

[De Villiers, C.J.: I have known of many convictions on far weaker evidence than that which was given against Airth.]

Yes; but it is more probable that he would have been acquitted than convicted had he not been indicted with Hales. If (as I contend) the indictment was faulty, the *onus* is cast upon the Crown to show that the prisoners were not prejudiced by this indictment.

[De Villiers, C.J.: If he was found in possession of stolen goods, surely he is bound to say how he came by them. He gives two accounts, which cannot readily be reconciled.]

There is some evidence to show that he got these ties from a soldier.

Mr. H. Jones (who was requested by the Court to confine himself to the third count of the indictment): Hales was found in possession of a necklace and ring, which were not sworn to as stolen.

[De Villiers, C.J.: Is there not sufficient evidence to support a conviction?]

Mr. Schreiner: I submit not, as these things were not identified.

De Villiers, C.J.: On behalf of the appellants reliance is mainly placed on the 62nd Rule of Court, which provides that several persons may be jointly indicted in one indictment for offences arising wholly out of the same joint act or omission. The effect of this rule is that if several persons are so jointly indicted, all such persons, if found guilty, may be convicted and sentenced, but it does not follow that, where several persons are jointly indicted and it is found that one of them had nothing to do with the offence, all should for that reason be acquitted. Now, Mr. Schreiner's argument really amounts to that. It is impossible to avoid the conclusion, if he is right in his present contention, that where more than one person is indicted, and one is acquitted, the other can say he sustained

prejudice owing to being jointly indicted with the other person, and ought consequently to be acquitted. I can understand this argument: That where a person is indicted with another person who is known to be a thief, or a bad character, then possibly prejudice may result, but nothing of that sort is suggested in the present case. It is not suggested on behalf of Hales that Airth was a bad character, nor on behalf of Airth is it suggested that Hales was such a bad character that being indicted with him must necessarily prejudice Airth. In my opinion, therefore, this argument, founded upon the 62nd Rule of Court, falls to the ground. The jury seems to have discriminated very carefully between the different counts. Wherever there is any evidence which satisfied the jury as to the innocence of Airth, they gave him the full benefit, but in regard to the soap-box the jury apparently believed the owner when he said the soap-box had been stolen, and were not satisfied with the statement made by prisoner that it belonged to him. Then in regard to the ties, these were clearly identified by the owner, and the statement made by Airth was that he had given a hot dinner for these ties. Here again the jury did not believe his story, and if there had been no connection whatever between Airth and Hales, if Airth had been indicted on these two counts alone, I am satisfied the jury would have convicted him. Therefore, so far as Airth is concerned, I do not think there has been any prejudice. It is admitted with regard to Hales that, on all the counts, except the third, upon which he was convicted, there was evidence to convict him. But I am not prepared to say, even with regard to the third count, that there was not some evidence to justify the verdict. What probably influenced the jury with regard to the third count was not Hales's connection with Airth, but the fact that he had been found guilty upon so many other counts. Finding him guilty on other counts, they did not require, perhaps, such strong evidence on the third count, but his having been indicted together with Airth had, in my opinion, nothing to do with his conviction. There is some evidence with regard to the neckties and other articles. The owner could not

exactly swear to the identity of the articles, but he said he had lost similar articles, and the jury took all the facts of the case into consideration, and came to the conclusion that Hales was guilty on this count. And I am not satisfied that, even if he had not been found guilty on this count, it would have made any difference in the sentence. I am of opinion that the appeal must be dismissed.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

HILLS V. COLONIAL GOVERNMENT. 1912. (Dec. 16th.)

This was an application on notice of motion made by Arnold Frank Hills, the plaintiff in the action, *Hills v. Colonial Government*, praying the Court to hear at an early date counsel's argument on the point of the construction of the sections in the agreement between the parties in which the words "actual cost" appeared. Petitioner expressed the opinion that if the Court decided as to the meaning of the term "actual cost" arrangements might be made with the Government to settle the claim on the basis of the decision of the Court and the expenses of a costly action would thereby be avoided. Petitioner was being pressed by Colonial creditors. It was of the utmost importance that petitioner should proceed to England at once. The correspondence which had passed between the attorneys of the parties was read and put in. On the 12th November plaintiff, through his attorney, wrote pointing out the extreme urgency to him that the point of the meaning of the terms "actual cost" should be immediately decided. The Government replied that the point could not be settled without all the evidence being placed before the Court.

Mr. Searle, K.C. (with him Mr. Close), for the applicant; Mr. Schreiner, K.C. (with him Mr. McGregor), for the Colonial Government.

Mr. Searle: This is a matter of the utmost urgency. The applicant has spent some three or four hundred thousand pounds—nearly all his private fortune in trying to carry out his contract. The question of the sequestration of his estate has already been allowed to stand over for five months, and he says that he will be seriously embarrassed if this matter cannot be settled soon on the basis of actual costs. The whole question turns upon the interpretation of sections 52 and 53 of Act 19 of 1900.

Mr. Schreiner: I cannot consent to the granting of this application. The Court cannot possibly deal with the whole question on the meagre evidence now before it. This is a most unprecedented application. The Government has nothing to do with the action of Mr. Hill's creditors, however imprudent that action may possibly be. Any order such as is now asked for would be very prejudicial; it would be purely interlocutory, and would determine nothing.

[De Villiers, C.J.: It might be to the advantage of both parties if we could determine the meaning of the term "actual costs," and then refer the question to an accountant.]

We should have to call some evidence to show on what basis actual costs have been ascertained. The amounts advanced to Hills are much in excess of the actual costs, as determined by the Government engineers. Then, too, the applicant must produce evidence as to the basis on which he has determined the actual costs. There is a very great discrepancy between applicant's estimate and the estimate of the Government.

[De Villiers, C.J.: The whole question seems to amount to this: That you say "actual costs" mean what your surveyor has found to be due. They say it means what they have actually spent.]

That is the question; but still it would be necessary to lead evidence, and new pleadings would be required.

[De Villiers, C.J.: Why not first determine whether actual costs are due and then refer the matter to an accountant to find out how much is due?]

In any case we should have to call our engineers to show that they had

measured up the work, and this expert evidence is not available to-day.

Mr. Searle (in reply): This application may be unprecedented, but so are the circumstances under which it is made. The whole matter might be settled to-morrow in two hours on the basis of "actual costs." "Actual costs" simply mean our expenditure and liabilities. Counsel for the Government can easily explain from the Bar the basis on which they compute their accounts. One thing is certain, and that is that the engineer's certificate is no basis at all. It is very desirable to avoid prolonged litigation in this case, more especially as some 2,000 creditors are clamouring for payment.

The Court refused the application. Costs to be costs in the cause.

De Villiers, C.J.: I quite see that Mr. Hills is placed in a position of some difficulty and hardship through this case being postponed, and that it would be a great convenience to him, at all events, that the question of law as to what is meant by "actual cost" should be decided at once. That, of course, could not be done unless the plaintiff had been prepared to withdraw all other claims, and confined himself simply and solely to the question of what "actual cost" means, and to the claim which this question involves. If the defendant's counsel had consented, the Court would have been quite willing to hear the matter to-morrow; but the Court is assured by learned counsel for the defendants that this question cannot be decided without hearing the evidence of the engineer who gave the certificates upon which the actual cost ought to be based, and seeing that this assurance has been given by counsel for the defendants, I think it would be impossible for the Court now to hear argument on the question. I should have thought that it would have been possible for the Government to have stated by counsel what instructions had been given to the engineers for the purpose of ascertaining what the cost was, but the Court is assured that that cannot now be stated. The application must therefore be refused, costs to abide the result.

Mr. Searle: Then it is the whole case that stands over, and we withdraw nothing?

[De Villiers, C.J.: Certainly, I think it should be clearly understood that the case will be heard next term.]

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Reid and Nephew.]

BLAKE V. WARREN.

Mr. Schreiner, K.C., moved, on behalf of the defendant, for a commission to take the evidence of a certain witness.

Mr. Benjamin appeared for the respondent.

The application was granted, Mr. Russell being appointed commissioner.

APPEALS.

MCNAIR V. FAEHSE. (1902.
(Dec. 16th.

Lease to partners—Covenant not to assign—Cancellation of Lease—Ejectment.

A declaration alleged that the plaintiff had let certain premises for a term of five years to the defendant and one C., carrying on business in partnership, that one of the conditions was that one of the lessees should not assign or sublet without the plaintiff's written consent, that thereafter the partnership was dissolved and the defendant alone carried on the business and remained in possession of the premises and that the plaintiff never consented to any assignment.

Held, that the declaration did not disclose sufficient grounds for the cancellation of the lease or for the ejectment of the defendant.

The plaintiff in the Court below, now the respondent, was Robert Faehse, of Port Elizabeth. The defendant (now appellant) was William Gibb McNair, carrying on business at Port Elizabeth under the style or firm of McNair, Cordiner and Co.

The facts of the case sufficiently appear from the pleadings, and from the judgments.

The plaintiff's declaration in the action brought in the Court below was as follows:—

1. Plaintiff resides at Port Elizabeth, and is the owner of a certain store and premises situated in Grace and Strand-streets, Port Elizabeth.

2. Defendant carries on business at Port Elizabeth under the style or firm of McNair, Cordiner, and Co.

3. On or about the 18th of May, 1899, plaintiff let his said premises for a period of five years to defendant and to one Edmund Noble Cordiner carrying on business in co-partnership under the style of McNair, Cordiner and Co.

4. One condition of the said lease was that the lessees should not assign or sublet the said premises without plaintiff's consent in writing.

5. In or about March, 1901, the said co-partnership was dissolved and defendant alone carried on business and remained in occupation of the said premises.

6. Plaintiff was not at the time aware of the said dissolution and never at any time consented in writing or otherwise to any assignment of the said lease to defendant.

7. By the said dissolution the said lease was cancelled, and on hearing of the dissolution plaintiff, as he was entitled to do, called on defendant to quit and give up the said premises.

8. Defendant wrongfully and unlawfully remains in possession of the said premises, and refuses to give them up to plaintiff.

9. Plaintiff has suffered damage in the premises amounting to £100.

10. Wherefore plaintiff prays:

(a) That the defendant be ordered forthwith to quit and give up to him the said premises.

(b) £100 as and for damages.

(c) General relief and costs of suit.

To this declaration the defendant pleaded as follows:—

In a plea to the plaintiff's declaration the defendant says:—

1. He admits the first four paragraphs thereof save that for greater certainty he craves leave to refer to the written contract of lease entered into between plaintiff and McNair and Company.

2. As to paragraph 5 of the declaration, he admits that in April, 1901, the co-partnership previously existing between himself and the said Cordiner was dissolved, and that thereafter he (the defendant) alone carried on business and remained in occupation of the premises, but he denies that the above facts constituted an assignment of the lease or a sub-letting within the meaning of the said lease.

3. He denies all and singular the allegations in paragraphs 6, 7, 8, and 9 of the declaration save that he admits that he refuses to give up possession of the said premises.

4. In or about April, 1901, the said Cordiner retired from the partnership with defendant, and thereafter with the knowledge of plaintiff the defendant remained in the said premises under the said lease, but in or about January, 1902, the defendant made arrangements to admit one Sellick, as a partner in the said business to be styled McNair, Sellick and Company, and on or about January 18th, 1902, called on the plaintiff in order to obtain his consent to the substitution of the new firm as tenants under the said lease.

5. The plaintiff on the said date assented so to do and agreed to do all things necessary to substitute the new firm of McNair, Sellick and Company, constituted as aforesaid, as tenants under the said lease.

6. Thereafter the plaintiff wrongfully and unlawfully refused to execute the agreement arrived at and repudiated the same.

Wherefore defendant prays that plaintiff's claim may be dismissed with costs, and for a claim in reconvention, the defendant now plaintiff, in reconvention says:—

7. He craves leave to refer to the matters above pleaded.

8. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff in reconvention to call upon the defendant in reconvention to do all things necessary to carry out and to execute the agreement of January 18th, above referred to, and to accept the firm of McNair, Sellick and Company as tenants under the said lease, but the defendant in reconvention wrongfully and unlawfully refuses so to do.

The plaintiff in reconvention claims:
(a) An order on the defendant in reconvention to perform the agreement entered into by him by executing the document substituting the firm of McNair, Sellick and Company as tenants under the said lease.

(b) Alternative relief.

(c) Costs of suit.

Plaintiff's replication and plea in reconvention:—

1. Plaintiff specially denies that he at any time consented to accept the firm of McNair, Sellick and Company as tenants or agreed to substitute them as tenants as stated in paragraphs 4 and 5 of defendant's plea.

2. Plaintiff generally denies all the allegations contained in the plea save in so far as it admits facts stated in the declaration and joins issue thereon with defendant, and again prays for judgment with costs.

3. And for a plea in reconvention:

Plaintiff craves leave to refer to paragraph 1 of his replication and prays that defendant's claim in reconvention be dismissed with costs.

After evidence had been led and argument by Council, Sheil, J., delivered the following judgment:

This is an action for ejectment, for £100 damages, general relief and costs of suit. The plaintiff is the owner of certain premises in Grace-street and Strand-street, Port Elizabeth. On the 18th May, 1899, he entered into a contract of lease with the firm of McNair, Cordiner and Co., for a period of five years. The lease contained a covenant that the lessees would not have the power to assign or sub-let the premises without the consent in writing of the plaintiff. In March, 1901, the partnership, between the defendant and Cordiner was dissolved, and defendant carried on the business in the name of the old firm. Plaintiff alleges in the declaration and stated in the witness-box that he had no knowledge of the dissolution until January this year, and contended that the dissolution of partnership, accompanied by the cession which Cordiner made to McNair, of his rights, interests, and assets constituted a breach of the covenant in the lease, the assignment having been made without the consent in writing of the plaintiff. The defendant admits that Cordiner retired in March, 1901, but denies

that this fact operated as an assignment of the lease; and he further pleads that on the 18th January this year, plaintiff undertook to make such an alteration in the original lease as would admit the substitution of Mr. Sellick in lieu of Cordiner. This is denied by the plaintiff in his replication.

The Court has thus to decide two points:—

1. Whether the dissolution of the firm coupled with the cession or assignment of Cordiner's rights in the lease, operated as a breach of the conditions of the lease.

2. If it did, whether there was a waiver on the part of the plaintiff in January this year. In regard to the breach of covenant no case directly in point was cited at the Bar, but I find that in England a similar point had to be decided in the case of *Varley v. Coppard* (7 C.P. 505). In that case, two partners were assignees of a lease which contained a covenant similar to the one in the present case.

The firm dissolved, and one of the partners assigned all his interests in the premises to the remaining partner.

The assignment took place without the consent of the lessor, and it was held to be a breach of the covenant.

In the present case, as Cordiner on the dissolution of the partnership assigned all his assets in the business, in which was included his interest under the lease to his partner, the present defendant, without the consent in writing of the plaintiff. I am of opinion that this cession by Cordiner to McNair, operated as a breach of the covenant, and that the reasoning of Mr. Justice Willes in *Varley v. Coppard* would apply with equal force to the present case.

The second point to consider is whether there was a waiver by plaintiff of his right to cancel the lease. There is a great conflict in the evidence; and in all cases of this kind, where this is so, the Court must look at the written documents, if there are any, and also at the probabilities of the case, in order if possible to arrive at the truth. With regard to what the defendant said took place on the 4th January, that could scarcely be contended to have amounted to anything like a waiver of the rights which plaintiff had under the lease.

It is clear that no concluded contract was entered into on that occasion. If proof of this were required, I think it is furnished by the defendant's letter of the 14th January, which is quite inconsistent with the position now taken up by him as to the interview of the 4th January that the plaintiff had undertaken to consent to a substitution of Mr. Sellick for Cordiner. If any such agreement had been come to I am sure the letter would have been framed in different terms. The defendant would have said, "You agreed to give your consent, and I now call upon you to do so." There was, however, nothing said in the letter indicating that there had been a concluding contract on the 4th January.

We next come to the interview on the 18th January, and what do we find? We find that on the 18th January Sellick approached the plaintiff, as he says, not to see about a renewal of the lease, but with regard to some alterations in the store. But if plaintiff was not aware of Sellick's connection with McNair, it was quite possible he may have discussed generally questions of alterations with him. It seems to me that all the probabilities point to its being very unlikely that the plaintiff who said he was waiting for counsel's opinion before being sure of his position under the lease, would have told Mr. Sellick that the matter of the lease was "all right," and would be finally "fixed up" on the Monday or Tuesday following.

Admittedly nothing was said as to the terms of the renewal, and it was very unlikely that a shrewd man of business like the plaintiff would have consented to enter into a new lease of this kind, and would have given an unconditional promise to enter into it under the circumstances described in this interview. It has been frequently held in our Courts that oral agreements having reference to land and interest in land should be proved by clear and unimpeachable evidence. No such evidence had been produced in this case, and it is impossible on the evidence to find that either on the 4th or 18th January last the Plaintiff entered into a final concluding agreement to so amend the lease as to admit of the substitution of Mr. Sellick for Mr. Cordiner, or that he waived or in any

way intended to waive his rights under the lease.

No evidence has been given by the plaintiff as to damages, and consequently it will be unnecessary to consider prayer [B] in the declaration.

On the claim in convention judgment will be given in terms of prayer [A] of the declaration, and the defendant will be ordered to quit and give up possession of the premises on or before the 30th November next, he undertaking to pay the rent payable under the lease, that is £37 10s. per month.

On the claim in reconvention judgment will be given for the defendant in reconvention with costs.

Against this judgment the defendant now appealed.

Mr. Schreiner, K.C. (with him Mr. Benjamin) for the appellants; Mr. McGregor (with him Mr. Buchanan) for the respondent.

Mr. Schreiner: Sellick was in McNair's employ, and as long as McNair was in possession, it did not matter what partner he took in.

[Buchanan, J.: There was no consent in writing to allow him to take in a new partner.]

No; but that was not necessary. We have no Statute of Frauds. The admission of a partner is neither an assignment nor a sub-lease. If a man takes up a purely technical position (as the respondent did), he must prove his technicalities up to the hilt. The admission of a partner in a business does not imply that the new partner is also a partner in the lease. The plaintiff did not attempt to eject the defendants on the ground that Sellick had been admitted as a partner, but on the ground that Cordiner had retired. Even had he taken the former ground, he would not have been justified in his action. The meaning of the restriction in the lease was that McNair and Cordiner should not make a joint assignment of the lease, and they have never done so. If Cordiner had assigned his rights to McNair, and McNair had then assigned the whole of the rights to some third person that assignment would have been invalid. But here there was no assignment whatever. Cordiner never assigned anything to McNair. Suppose a lease had been granted to a partnership, and one partner died, would the lease be cancelled. Even *Varley v. Coppard* (7,

C.P., 505), and 26 L. Rep. (882) does not go so far as this; and English law goes further than ours in this respect. In this case the covenant was not similar to that in *Varley's* case, but *The Mayor and Corporation of Bristol v. Westcott* (41, L.T., 117) is much nearer the present case. *Varley v. Coppard* is clearly distinguishable from this case. I do not think that the judgment in that case would ever have been given in this Court, because our law is far more in favour of the tenant than English law is. If once a landlord has assented to an assignment, any new tenants may come in. As to Sellick, it is neither an assignment nor sub-letting to take in a new partner. Suppose that a sleeping partner had been taken in, would that have broken the lease? An extensive interpretation ought not to be given to such a clause as the second clause of this lease. I ask for absolution from the instance, with costs.

Mr. McGregor: It is not quite clear whether the appellant's counsel directed his argument to the first three paragraphs of the plea, or whether he went on the evidence. The issue raised in the Court below was: (1) Whether a lease is cancelled by assignment; and (2) whether the taking in of a new partner is equivalent to an assignment. It is clear from the pleadings that the plaintiff knew nothing of any assignment, and the defendants deny in their plea that there was any assignment of the lease. I submit that all the facts are now before the Court, and that it is in a position to do justice without putting the parties to the expense of further litigation. We are not springing a surprise upon them. (See letter of January 24, which was put in by consent.) This Court will not decide this matter on a mere technical point which was not taken in the Court below. Then as to the case of *Varley v. Coppard* (7, C.P., 505). There two people assigned their joint lease to one of themselves. In one point, *Varley v. Coppard* is rather in the favour of the respondent than otherwise. It is a most important case, and really governs the present case. See also *Woodfall on Landlord and Tenant* (p. 701); *Smith's Leading Cases* (Vol. 1, p. 63, 8th edition); *Finch v. Underwood* (34 L.T., 779). It is true that *Varley v. Coppard* was not a very clear case, because there there had been a waiver.

But see *Horsley Estate, Limited, v. Striiger* (Vol. 2, Q.B., 1899, p. 79).

[Buchanan, J.: In this case there was no covenant against giving up possession, but only against assignment. It has been held that the re-construction of a company does not amount to the formation of a new company.]

True, but there can be no assignment unless it is made to somebody. *Executors of Paterson v. Webster, Steel and Co.* (1, Juta, 350). In order to divest property of a joint character the partners must agree. Here they did agree, and the partners were divested of the property, which was assigned to McNair. As to the question of dissolution, the defendant in the Court below has failed to justify his position. It is quite immaterial whether Cordiner was solvent or not. There is no partnership and no partnership person when once the partnership is dissolved. McNair is not McNair and Cordiner. As to the assignment of a lease, see *Green v. Griffiths* (4, Juta, 346).

[Buchanan, J.: Suppose the lessor did not wish to determine the lease?]

Then it would not be determined. A man must not take advantage of his own wrong. See *Smith's Leading Cases* (Vol. 1, p. 58), and *Pothier on Partnership* (Sec. 146). Our contention is that there was an assignment, and that this assignment was a breach of the covenant.

Mr. Schreiner was heard in reply.

Cur. Adv. Vult.

Postea (December 17). The Court delivered judgment.

De Villiers, C.J.: This is an appeal against the judgment of the Eastern Districts Court in an action brought by the plaintiff, now respondent, to have a certain lease cancelled, and to eject the defendant, now appellant, from the premises leased. The declaration alleges that on the 18th of May the plaintiff let the premises for a period of five years to the defendant, and one Cordiner, carrying on business in co-partnership under the style of McNair, Cordiner and Co., that one of the conditions of the lease was that the lessees should not assign or sub-let the premises without the plaintiff's consent in writing; that in March, 1901, the partnership was dissolved, and the defendant alone carried on business and remained in possession of the premises, and that the plaintiff was not at the

time aware of the dissolution, and never consented to any assignment of the lease. As a conclusion of law the declaration avers that the lease has been cancelled, and that the plaintiff is entitled to re-enter on the premises. In my opinion this conclusion of law is not justified by the allegations of fact. It does not follow that, because the partnership was dissolved, and one of the lessees was allowed to remain in possession of the premises, there has been such an assignment of the lease as was prohibited by the conditions of the lease. It is quite consistent with the dissolution of the partnership and the sole possession of the defendant that the lease to both the lessees remained in force, and that Cordiner made no assignment of his interest in the lease to the defendant.

It is said, however, that the defendant's own plea supplies the lack of proof of such an agreement by averring that the plaintiff had assented to arrangements made by the defendant for the admission of one Sellick as a partner in lieu of Cordiner, but this averment does not go so far as to state that Cordiner's interest in the lease had actually been assigned to Sellick. If there had been proof of such an assignment to Sellick the important question would have arisen whether the assignment of the interest of one lessee to a new partner introduced in his place would amount to an assignment so as to create a forfeiture of the lease. The introduction of a stranger would stand on a very different footing from an assignment by one lessee of his interest in the lease to the other lessee. At the trial the deed of dissolution executed by the defendant and Cordiner in 1901 was produced, and by that deed Cordiner assigned to the defendant his share of the assets of the partnership. Cordiner's interest in the lease is not mentioned in the deed, but the plaintiff contends that as the lease was not executed, Cordiner's interest in it must be deemed to have been included, and that this Court, as a Court of Appeal, should not disregard the evidence afforded by the deed of dissolution, although not relied upon by the plaintiff in his declaration. There is much force in this contention. If it were certain upon the facts that the plaintiff would have succeeded if his declaration had set out

the terms of the deed of dissolution I would not have been prepared to allow an appeal which would only have entailed fresh costs without any advantage to either party. But is it certain that the plaintiff would have succeeded? Assuming that Cordiner did assign his interest in the lease to his co-lessee, would that amount to such an assignment by the lessees as to justify the Court in holding that the lease has been forfeited? If it did it would follow that if Cordiner had died and his executors had transferred his interest to the defendant there would equally have been a forfeiture. The learned judge in the Court below founded his decision upon the case of *Varley v. Coppard*, which certainly is an authority for the proposition that the law of England would have regarded an assignment by Cordiner of his interest in the lease to his co-lessee as a breach of the covenant not to assign to any person whomsoever. It is difficult, however, to reconcile that case with the subsequent case of *Bristol Corporation v. Westcott*. In the latter case there was a covenant that the lessees, who were partners, would not assign or part with possession without the consent of the lessor. The lessees dissolved partnership, and requested the lessor to consent to an assignment by one of the lessees to his co-lessee, but consent was refused. Thereafter one of the lessees gave possession of the premises to his co-lessee, and allowed him to remain in sole possession of the premises. The Court of Appeal held that there had been no breach of the covenant, and the reasoning of the learned judges in favour of a lessee being allowed to give possession to his co-lessee seems to be equally applicable to an assignment to a co-lessee. In the present case the condition appears to me to have been intended to prohibit any assignment to a stranger without the written consent of the plaintiff. Even, therefore, if there had been an averment and proof of an assignment of his interest in the lease by Cordiner to the defendant I should not, as at present advised, have supported a cancellation of the lease as against the defendant.

The appeal must be allowed with costs in this Court, and the judgment altered into one of absolution from the instance with costs in the Court below.

Buchanan, J.: In the Court below the learned judge said that in regard to the breach of covenant, no case directly in point was cited at the Bar, but that he himself had found the case of *Varley v. Coppard*, in which a similar point had to be decided. This case of *Varley v. Coppard* had some similarity to the present action, but he (Sir John Buchanan) thought that the facts of that case and of this were so dissimilar that the Court might well discriminate between the two. In the first place, there, Coppard, who was alleged to have made a cession of his lease, was sued - here it was McNair; and there was no allegation that he had made any assignment of the contract. The whole declaration was founded upon the dissolution of the partnership. If anyone made an assignment it was Cordiner. If the learned judge had had his attention drawn to the later case of the *Bristol Corporation v. Westcott* he would have found that case much more in point; and, applying that case to the one now before the Court, he (Sir John Buchanan) thought the decision of the learned judge could not be supported. The question to be decided was rather one of the construction of the document than a question of law, and in such cases where similar documents had been construed by the English Courts, these decisions, although not necessarily binding upon this Court, were very helpful. He saw no reason why this Court should not follow the decision of the Court of Appeal in the case of the *Bristol Corporation v. Westcott*, and he concurred in allowing the appeal and altering the judgment in the Court below to one of absolution from the instance, with costs.

Maasdorp, J., concurred.

[Appellants' Attorneys: Van Zyl and Buissinné; Respondent's Attorneys: Findlay and Tait.]

Ex parte ROBBINS AND OTHERS.

Mr. Schreiner, K.C., moved for an order authorising the cancellation of a certain mortgage bond.

Granted.

HOLT AND HOLT, LTD., AND (1902.
OTHERS V. HILLS.) Dec. 17th.

Mr. Upington asked leave to move in this matter, which was one of urgency.

Mr. Scarle, K.C., appeared for the respondents.

Mr. Upington said the motion was on notice calling upon the respondent, Arnold Frank Hills, to show cause why he should not be prevented from leaving the jurisdiction of the Court unless (1) he paid or furnished security to cover the claims of the applicants, and (2) authorised the Government of the Colony to give an undertaking that no money due or payable to respondent by them should be paid to him, so as to go out of the jurisdiction of the Court.

In the affidavits filed on behalf of the applicants the claims on respondent were set forth, and it was stated that at a meeting of the Port Elizabeth creditors of Hills, applicants were authorised to make application to the Court in terms of the present motion. One of the applicants had applied for a writ of arrest, but the Registrar had refused to issue the same, stating that, without an order of Court, he could not interfere with the respondent's movements. The respondent stated, on affidavit, that his presence was urgently required in England, he being chairman of the Thames Ironworks Company. Immediately on arrival here he called a meeting of creditors and explained the position to them. He had devoted his whole time while in the Colony to the preparation of his case against the Government, and it was impossible for him to see all the creditors personally, which he had originally intended doing. It was impossible for him to do more than he had done, and the delaying of his departure to England would serve no useful purpose, but would be to the serious detriment of the Thames Ironworks Company. It was his firm intention to return to the Colony at the trial of the action against the Government in February. He was not in a position to provide any security, nor to give any undertaking because of an order of the English Chancery Court appointing a receiver. So far as he was concerned he had no objection to a receiver being appointed here to receive all moneys from the Government in conjunction with the receiver appointed by the Chancery Court.

After argument, the Court gave judgment.

The Chief Justice said the applicants mentioned to respondent the terms upon which they would refrain from ap-

plying for an order to prevent his leaving the Colony. One of these terms was that the money owing by the Government to the respondent, if it should be paid, should be paid over to a third party to hold in trust for the applicants. The respondent never unconditionally consented to this course. If he had done so, then upon the question of costs the Court would probably have made applicants pay the costs. But there was no tender in these terms. The respondent said that if the receiver appointed in England allowed him he would do this, but the receiver in England had nothing to do with what this Court might order. The Court would grant an order on the Commissioner of Public Works, restraining him from paying any sums to respondent and directing him to pay any sums he might desire to pay, as being due to Hills, to the Registrar of the Court. Respondent would have to pay the costs of the application.

ROBERTSON V. MOSS.

Mr. Rowson mentioned this as an urgent matter.

Mr. Schreiner, K.C., who appeared for respondent, objected to the motion being now heard.

The Chief Justice said the motion would be heard on Friday.

FORBES AND OTHERS V. THE	1902.
LIQUIDATORS OF THE	Dec. 16th.
TIMBER SUPPLY COMPANY	" 17th.
LTD.	1903.
	Jan. 12th.

Liquidator—Winding up of Company—Misfeasance of directors—Rhodesian Companies Ordinance, 1893 — Acquiescence.

The directors of a company, some of whom had been instrumental, before the formation of the company, of obtaining an important concession—which was transferred to the company after its formation without any stipulation as to remuneration for such transfer—decided upon floating another company with the view of providing fresh capital for the purpose, among

other things, of remunerating the directors for their trouble in obtaining the concession. They were advised, however, by their solicitor that the same object could be attained by increasing the capital of the company and they accordingly entered into a contract with five of their number, being the defendants, by which it was agreed that in consideration of their services 4,000 new shares should be allotted to them and the sum of £3,000 paid to them in cash out of the increased capital. The directors advertised for applications for 7000 additional shares, and in their prospectus mentioned the existence of the contract but did not specify its nature or tenour. These 7000 shares were allotted to different applicants of whom the holders of 6,700 shares were cognizant of the nature and tenour of the contract. The company was subsequently ordered to be wound up, and although there were sufficient assets to pay the debts of the company, the liquidators sued the defendants in the High Court of Southern Rhodesia for damages for misfeasance. The High Court held that the defendants had acted openly and honestly but that, as there had been a misfeasance on their part in allotting the shares and cash to themselves without valid consideration, they were bound to pay the liquidators the sum of £7,000, being the sum of £3,000 allotted, to them in cash and the sum of £4,000 which might have been realised by the issue of the 4000 shares. On appeal the judgment was affirmed, but with a reservation of any right the

defendants might have (a) to restrain the payment of any portion of the damages to any particular shareholders who may have acquiesced or (b) to receive back any portion of such damages from the liquidator or from individual shareholders or (c) to claim a distribution of the damages in such a manner as the Court below shall deem just.

This was an appeal from a decision of the High Court of Southern Rhodesia. The appellants were G. S. D. Forbes, C. W. Villiers, H. N. Moffat, W. Forbes, and G. Grey.

In the High Court, the liquidator of the Timber Supply Co., which was placed in liquidation on August 2, 1901, claimed from the defendants, jointly and severally, by way of damages, the sums of £206 19s. 2d., £4,000, and £3,000, but the claim for the first-mentioned sum of £206 19s. 2d. was abandoned.

The plaintiffs' declaration in the action brought in the Court below was as follows:—

1. The Plaintiff is the official liquidator of the Timber Supply Company Limited, in liquidation, duly appointed by order of this Honourable Court, in which capacity he now sues.

2. The said Timber Supply Company, Limited, was registered under the Companies Ordinance, 1895, in the month of August, 1897, with a capital of £5,000 divided into 5,000 shares of £1 each.

3. The defendant, together with one Moubray Gore Farquhar and Alexander James Forbes, were the signatories of the articles and memorandum of association of the said Company, and as such the first directors of the said company.

4. On or about the 7th day of December, 1897, a resolution was passed at a meeting of the shareholders of the said company, consisting at the said date of the defendants and the said Moubray Gore Farquhar and the said Alexander James Forbes, increasing the capital of the said company to £14,000 divided into 14,000 shares of £1 each.

5. The said resolution was confirmed by a meeting of the said defendants and the said Moubray Gore Farquhar and the said Alexander James Forbes, as shareholders of the said company, held on the said 7th day of December, 1897.

6. There were allotted to each of the said defendants, and the said Moubray Gore Farquhar and the said Alexander James Forbes, 50 full paid shares in the said company, and the defendants paid for the same.

7. Thereafter the defendants, acting as directors of the said company, in breach of trust and *ultra vires* the company, took back the said 350 shares on behalf of the company, and repaid the said allottees the sum of £206 19s. 2d.

8. The plaintiff contends that the said transaction was a purchase by the company of its own shares, and *ultra vires* the company.

9. On or about the 7th day of December, 1897, the directors of the said company, being the said defendants, agreed to and did allot 4,000 shares in the said company as follows: To Moubray Gore Farquhar, shares numbered 351 to 951 inclusive; to George Grey, shares numbered 922 to 1,492 inclusive; to Gordon Stewart Drummond Forbes, shares numbered 1,493 to 2,063 inclusive; to Walter Forbes, shares numbered 2,064 to 2,634 inclusive; to Howard Unwin Moffat, shares numbered 2,635 to 3,206 inclusive; to Alexander James Forbes, shares numbered 3,207 to 3,778 inclusive; to Charles Walter Villiers, shares numbered 3,779 to 4,350 inclusive.

10. The said allottees, excepting the said Moubray Gore Farquhar and the said Alexander James Forbes, are the defendants in this action, and were acting as directors in the said allotment.

11. There was no consideration whatsoever for the said allotment, and the defendants were guilty of a breach of trust, and were acting *ultra vires* in so allotting the said shares. The company has suffered damages for the said breach of trust in the sum of £4,000.

12. The defendants further on the said date agreed to pay to the said allottees above mentioned, being the said defendants themselves and the said Moubray Gore Farquhar and the said Alexander James Forbes, each the sum of £428 11s. 5d., or £3,000 in all, for no consideration whatsoever, and thereafter did pay the said sum out of the capital of the said company.

13. The said payment of the said sums of money was *ultra vires* the company, and the defendants, in so paying the said money, were guilty of a breach of trust. The company has in consequence suffered damages to the sum of £3,000.

14. The said company was placed in liquidation by order of this Honourable Court dated the 2nd day of August, 1901.

15. The defendants, though requested, refuse to pay the plaintiff in his said capacity the said sums of money or the value of the said shares.

16. All times have elapsed, all conditions have been fulfilled, and all things have been done to entitle the plaintiff to claim the said amounts.

Wherefore the plaintiff claims from the defendants jointly and severally: (1) The sum of £206 19s. 2d. refunded in respect of the said 350 shares; (2) the sum of £4,000, being the par value of the said 4,000 shares; (3) £3,000 wrongfully paid by the defendants; (4) interest *a tempore mora*; (5) general relief and costs of suit.

Paragraph 9 of this declaration was afterwards amended in the following terms:—

9. On or about the 7th day of December, 1897, the directors of the said company, being the said defendants, and the said Moubray Gore Farquhar, and the said Alexander James Forbes, agreed to allot and did allot 4,000 shares in the said company as follows: To Mowbray Gore Farquhar, shares numbered 351 to 951 inclusive; to George Grey, shares numbered 922 to 1492 inclusive; to Gordon Stewart Drummond Forbes, shares numbered 1493 to 2063 inclusive; to Walter Forbes, shares numbered 2064 to 2634 inclusive; to Howard Unwin Moffat, shares numbered 2635 to 3206 inclusive; to Alexander James Forbes, shares numbered 3027 to 3778 inclusive; to Charles Walter Villiers, shares numbered 3779 to 4356 inclusive.

To this declaration defendants pleaded as follows:

1. The defendants admit paragraphs 1, 2, 3, 4, and 5 of the declaration.

2. Shortly before the formation of the said company, the defendants and the said Mowbray Gore Farquhar and the said Alexander James Forbes had obtained for themselves a certain concession, or the promise of a certain concession, from the British South Africa Company to cut timber and underwood in a certain portion of Southern Rhodesia,

and the defendants and the said Mowbray Gore Farquhar and the said Alexander James Forbes thereupon formed themselves into a company known as the Timber Supply Company, Limited, for the purpose of taking over and working the said concession.

3. For the purposes of convenience and to save expense it was arranged that the said concession should be granted direct into the name of the said company, instead of into the names of the defendants and the said Mowbray Gore Farquhar and the said Alexander James Forbes.

4. At the time of or shortly before the formation of the said company, each of the said defendants and the said Mowbray Gore Farquhar and Alexander James Forbes subscribed the sum of £50, or £350 in all, for the purposes of the formation of the said company and other preliminary expenses. The sum of £206 19s. 2d., the balance after payment of the said expenses, was afterwards refunded by the company to the said defendants and the said Mowbray Gore Farquhar and Alexander James Forbes.

5. The defendants deny that there was ever any allotment of shares as alleged in paragraph 6 of the declaration, or that any such shares were ever issued, or that there was ever any retaking or purchase of shares, as alleged in paragraph 7 thereof, and save as aforesaid, they deny each and every allegation in paragraphs 6 and 7 of the declaration.

6. As to paragraphs 9 and 10 of the declaration, the defendants admit the allotment of the shares as therein alleged, but say that such allotment was agreed to at the time by all the shareholders of the said company, and was made in pursuance of an agreement in writing between the said company and the defendants, dated the 7th December, 1897, for the consideration therein stated which agreement was entered into and signed on behalf of the said company by two independent directors, other than the defendants or the said allottees.

7. The defendants deny each and every allegation in paragraph 11 of the declaration.

8. As to paragraph 12 of the declaration, the defendants say that the said payments therein referred to were agreed to at the time by all the shareholders of the said company, and were also made in pursuance of the said

agreement referred to in paragraph 5 hereof, and for the consideration therein stated. Save as aforesaid, defendants deny each and every allegation in paragraph 12 of the declaration.

9. The defendants deny each and every allegation in paragraph 13 of the declaration.

10. The defendants admit paragraph 14 of the declaration.

11. The defendants deny the allegations in paragraphs 15 and 16 of the declaration.

Wherefore the defendants pray for judgment, with costs.

This plea was subsequently amended in the following terms:

4. As to paragraphs 6, 7, and 8 of the declaration, the defendants deny each and every allegation therein contained. They deny that any such shares as therein referred to were ever issued to or repurchased from any of them or from any person whatever, or that they or any other person were ever repaid the sum of £206 19s. 2d., or any part thereof, as in the said paragraphs alleged.

5. In or about the month of July, 1897, or at some time prior to the formation of the said company, the defendants, except the defendant Howard Unwin Moffat and the said Mowbray Gore Farquhar, each subscribed the sum of £27 10s., or £165 in all, for the purposes of the formation of the said company and other preliminary expenses. Shortly afterwards, the defendants, the said Mowbray Gore Farquhar and the said Alexander James Forbes, each subscribed the sum of £50, or £350 in all, and the said amounts of £27 10s. were returned to the defendants and the said Mowbray Gore Farquhar. No part of the said £350 was ever repaid to the defendants or any other person, and no shares were ever allotted or issued with respect to the said money.

6. As to paragraphs 9 and 10 of the declaration, the defendants deny that the defendants, Walter Forbes, Howard Unwin Moffat, Charles Walter Villiers, the said Mowbray Gore Farquhar, or the said Alexander James Forbes were directors of the company at the date of the alleged allotment of shares, or at the date of any allotment of shares of the said company. The allotment of shares referred to in the said paragraphs took place after the said parties had ceased to be directors of the said company, and new directors had

been appointed, and such allotment was made by the new board of directors of the company in pursuance of an agreement in writing between the said company and the defendants, the said Mowbray Gore Farquhar and the said Alexander James Forbes, dated the 7th December, 1897, for the consideration therein stated. The said agreement, notice of which was given in the prospectus of the said company, was made with the consent of all the shareholders of the said company after the parties before referred to had ceased to be directors and new directors had been appointed, and was entered into and signed on behalf of the company by two directors other than any of the defendants or the said allottees. The said prospectus and agreement are in the possession of the plaintiff, together with all the other books and documents belonging to the said company.

Save as aforesaid the defendants deny each and every allegation in paragraphs 9 and 10 of the declaration.

8. As to paragraph 12 of the declaration, the defendants say that the said payments therein referred to were also made by the new board of directors, in pursuance of the said agreement of the 7th December 1897, for the consideration therein stated, and under the same circumstances.

The services rendered to the company by the defendants and the said Mowbray Gore Farquhar and the said Alexander James Forbes, for which they received and accepted the said allotment of shares referred to in paragraph 6 hereof, and the said payments herein referred to, were rendered by them before the formation of the said company, and were such in that, having obtained from the British South Africa Company for themselves as individuals, and on account of private and personal reasons, the said concession, or the promise of the same, they afterwards arranged and obtained for the said company in its own name the grant of such concession from the British South Africa Company for themselves as individuals, and on account of private and personal reasons, the said concession, or the promise of the same, they afterwards arranged and obtained for the said company, in its own name, the grant of such concession from the British South Africa Company, and it was in consideration of the said agree-

ment of the 7th December, 1897, being entered into, whereby the company undertook and agreed to pay them as therein stated for such services, and a condition precedent to it, that the defendants and the said Mowbray Gore Farquhar and the said Alexander James Forbes consented to new members being admitted to the said company.

Save as aforesaid the defendants deny each and every allegation in paragraph 12 of the declaration.

The replication was general.

After hearing evidence, Vincent, J. delivered the following judgment:

In this action, the liquidator of the Timber Supply Company, which was placed in liquidation by this Court on August 2, 1901, claims from the defendants, jointly and severally, by way of damages, the respective sums of £206 19s. 2d., £4,000, and £3,000.

The claim for the first-mentioned sum of £206 19s. 2d., having been, during the hearing of the case, abandoned, we have thus to deal only with the sums of £4,000 and £3,000.

Plaintiff's declaration avers that in December, 1897, the defendants, while directors of the company, in breach of trust, and without consideration, and acting *ultra vires* the company, firstly, allotted to themselves and two others, viz., Mowbray Gore Farquhar and Alexander James Forbes, 4,000 shares; and secondly, paid to themselves and the above two mentioned gentlemen, out of the capital of the company, £3,000.

The declaration further alleges that by such allotment and payment the company has suffered damage in the total sum of £7,000.

Defendants' plea, in effect, states that no liability can under any circumstances attach to the defendants Walter Forbes, Howard Unwin Moffat, and Charles Walter Villiers, inasmuch as they were not directors at the dates of the allotment of shares and of the payment of the cash, such allotment and payment having been sanctioned and made by a new board of directors, in pursuance of a registered agreement between the company and the defendants and others.

The plea further states that these allotments and payments were made for good and valid consideration, and with the consent of all shareholders.

The admitted and proved facts of this case are as follows:

In July, 1897, the defendants Grey and Gordon Forbes, on behalf of themselves and Farquhar and Williams, approached the Administrator, with a view to obtaining a timber concession in the vicinity of the proposed railway line.

The late Mr. Rhodes favourably entertained the request and recommended the grant. After several interviews between Messrs. Gordon Forbes and Grey and the Administrator (Lord Grey), Lord Grey, on July 13, 1897, wrote to defendant Grey, stating the conditions of the grant to the syndicate.

After the receipt of this letter, Walter Forbes, Moffat, and Alexander Forbes were taken into the group or so-called syndicate.

On August the 9th, 1897, George Grey wrote to Lord Grey accepting Lord Grey's terms subject to the condition that the agreement should be in writing.

To this Captain the Hon. A. Lawley, the then Administrator, replied by letter asking Grey to have an agreement drawn up.

Thereafter, about August 18, 1897, the Timber Supply Company was formed, the seven signatories to the memorandum of association being the members of the so-called syndicate, viz., the five defendants and Alexander Forbes and Farquhar. The company was, on August 19, 1897, registered under our companies ordinance of 1895. By the articles of association, which specially exempted the application of table A of the ordinance to the company the first directors were to be the signatories to the memorandum of association. The capital of the company was to be £5,000. At the start of the company no prospectus or invitation to the public to take shares was issued. Each of the subscribers to the memorandum of association, i.e., the directors, subscribed for 50 shares, for which they duly paid. At this date no formal arrangement between the British South Africa Company and the so-called syndicate regarding the timber concession had been signed. In consequence of further interviews with the Administrator, it was arranged that, in lieu of the agreement being as between the B.S.A. Co. and the individual members of the syndicate, it should be as between the British South Africa Company and the com-

pany; this being done for convenience, and to save the expense of a transfer of the concession from the individual members of the syndicate to the company.

A draft agreement was discussed at several meetings of the directors, and at a meeting held on the 15th November, 1897, George Grey and Gordon Forbes were empowered to sign the agreement on behalf of the company. At the same meeting, on the proposal of Gordon Forbes, it was decided to offer the concession to the public, and Gordon and Walter Forbes and Farquhar were appointed a committee to formulate a scheme of flotation to be submitted at the next meeting of directors. The agreement between the British South Africa Company and the company was signed on November 25, 1897, the concession being made out in the name of the Timber Supply Company. It is not necessary to detail the various clauses of this agreement.

At a meeting of directors held on December 2, 1897, the signing of the agreement was mentioned, and Gordon Forbes reported on the progress of the flotation scheme. It would seem that the intention then was to refloat the company into a company with a capital of £14,000 in shares of £1 each, and that the vendor, the Timber Supply Company, then consisting of the five defendants and A. Forbes and Farquhar, should, in consideration of the transfer of the cession, receive 4,000 fully paid up £1 shares and £3,000.

Mr. Bannatyne, an attorney of this Court, on being consulted, advised that the proposed re-flotation would involve some expense, and that in his opinion the same object could be attained by a resolution to increase the capital of the company by the creation of 9,000 new shares of £1 each, and by the entering into and filing with the Registrar of Companies of an agreement between the company and the directors, by which the latter were to receive 4,000 fully paid up £1 shares, and £3,000. Bannatyne accordingly drafted an agreement which, after discussion amongst the then directors, was presented to a meeting of directors held on 7th December, 1897. At this meeting it was unanimously resolved to increase the capital as above indicated, and on condition of the payment to the directors of the shares and cash above mentioned.

On the previous day all the then shareholders (directors) had signed a document sanctioning a proposed increase of capital, and the issue of new shares.

At a meeting held on December 7, subsequently to the earlier meeting that day, the resolution to increase the capital was confirmed, and thereafter at the same meeting Messrs. Moffat, Villiers, Farquhar, Walter Forbes, and Alexander Forbes resigned their positions as directors, and it was then resolved to appoint Messrs. Holland, Fort, and Colonel White as directors in their stead. I may mention that these three gentlemen, as well as others, had previously been interviewed, and that they had agreed to take shares in the company, with a full knowledge that it was proposed to allot to the original shareholders (directors) 4,000 fully paid up shares and £3,000.

On December 9 a meeting of directors, Grey and Gordon Forbes being present, was held, at which the minutes of the meeting of December 2 were confirmed, the proposed prospectus and application form for shares were settled, and the agreement between the Timber Supply Company and the signatories to the memorandum of association (called directors) was approved and signed by the signatories for themselves, and by Colonel White and Fort for the company. This document bears date 7th December, and purports to have been signed on December 8, but in reality was not signed until December 9.

On December 9 the prospectus, stating that the subscription list would be closed on the following day at 11.30 a.m., was issued. This prospectus referred to the existence of the two contracts between the British South Africa Company and the company, and the directors and the company, but gave no details whatsoever. It, however, contained a paragraph offering inspection of copies of these documents at the office of the company's solicitors (Messrs. Hovell and Bannatyne).

As a result of this prospectus 7,000 shares were applied for by the public and duly allotted.

The contract between George Grey and others and the company was duly filed with the Registrar, and thereafter the 4,000 shares were allotted to them and the cash paid. The cash, of course, being portion of the money paid by the public for the shares allotted to them.

I can find no record nor evidence that a meeting of shareholders was ever held to sanction the proposed remuneration of the Directors for the alleged services rendered in and about obtaining the concession, but there is evidence showing that all persons, except the holders of about 300 shares who took shares after the issue of the prospectus, were fully cognizant of this proposal, and never raised any objection.

The Company carried on its operations until August 2, 1901, when it was wound up by order of this Court.

The liquidator, in his evidence, states that the company, as a fact, is not insolvent, and from the statement appended to his report to the Court, and which has been put in evidence in this case, it appears that the assets are valued at £761 5s. 11d., and the liabilities at £364 14s. 8d., the estimated surplus thus being £396 11s. 3d. According, then, to the liquidator's estimate, creditors will, out of assets, be satisfied in full, and there is no reason to suggest that this estimated surplus will be insufficient to cover the cost of liquidation.

Such being the facts of the case, I have to consider whether the plaintiff has made out a case against all or any of the defendants.

I propose to deal with this question under two heads.

I shall now, for the purpose of argument, assume that liability has been proved, and enquire on that assumption whether (a) all defendants are liable? If all liable (b) in what proportion should liability be attached? (c) For what total amount should damages be awarded?

Now, I take it to be clear that, given there has been misfeasance, the Defendants Grey and Gordon Forbes must be liable. It was urged that with regard to the Defendants Walter Forbes, Moffat, and Villiers, no liability can attach to them under this action, whatever may be the liquidator's rights in an action or application involving contribution, on the grounds that they were not directors or officials of the company, either at the date of the signing of the agreement or of the allotment of shares and payment of the cash. It has been established to my satisfaction that the proposed agree-

ment between the company and directors was discussed by all the directors at a time when these three gentlemen were on the directorate; that previously to Colonel White and Messrs. Fort and Holland being appointed to the Board, this agreement was in reality a settled matter, its confirmation being merely a matter of form; in other words, that, though the agreement was signed by the directors *qua* the company after the defendants Villiers, Moffat, and Walter Forbes ceased to be directors, the whole scheme was cut and dried and arranged before their resignation. These defendants then took part in an act which I, for the present moment, assume to be a breach of trust. In these circumstances, I feel obliged to come to the conclusion that Messrs. Moffat, Villiers, and Walter Forbes occupy a position no different to Messrs. Grey and Gordon Forbes.

The fact of this resignation at the last moment, in point of time two days before the carrying out of the scheme by the adoption of it by directors, some of whom had been put in their places for the purpose *inter alia* of signing this agreement, does not affect the question. Were I to hold a contrary opinion, I would be opening the door to proceedings which might tend to fraud. I by no means desire it to be understood that there can be imputed to any of the gentlemen concerned fraud or improper motives, for I am convinced that they acted in what they honestly considered a *bona fide* manner, and in the full belief that they were within the law. I am therefore of opinion, on the above hypothesis, that all the defendants are liable, and that the plaintiff is entitled to damages. The next question to consider is in what proportions defendants must pay such damages.

According to *Lindley on Companies* (5th edition, pages 375 *et seq.*), the following appear to be the principles applicable to the liabilities of directors for the acts of each other, viz :

1. All those directors who are actually implicated in misapplying the company's money (even although they only sign cheques prepared by others), are jointly and severally liable for losses arising therefrom, *e.g.*, when they have improperly paid money to promoters, preliminary expenses, dividends out of

capital, etc. So where they have paid up shares of their own out of the monies of the company, and where they have allotted to each other as fully paid up shares which are not paid up (*vide Carriage Corporation Supply Association* (27 C.D., 322).

2. Directors who really know of and sanction such misapplication are implicated in it within the meaning of this rule, although they do not actually take part in it.

3. So are directors who know of the misapplication, but take no steps to prevent it beyond writing a letter of disapproval.

4. Where their liability is to account for monies of the company improperly received by them they are only severally liable for their own receipts, and are not jointly and severally liable for each other's receipts. But even in this case their liability is joint and several, if there has been a joint receipt by them all, and then a division amongst themselves of what they have all received; or if they have all been implicated in some joint breach of trust resulting in profit to themselves. For this last proposition *vide Oxford Benefit Building Society* (35, Ch. D., 502), and *Carriage Corporation Supply Association* (27, Ch. D., 322).

Now, in this case the defendants were all implicated in a breach of trust which resulted in a profit to them all, and on that ground they, in my opinion, are jointly and severally liable for whatever damages may be found to be due.

I am now brought to the question of damages.

I am, of course, assuming that defendants have been guilty of misfeasance, and an *ultra vires* act.

Now, with respect to the payment of the £3,000, there can, I think, be no doubt that that sum should be repaid by the defendants. I have felt considerable difficulty with respect to the damages, if any, which should be awarded as to the allotment of the 4,000 shares. Evidence was led by the defendants to the effect that there was no market for the company's shares after this allotment, and that they were in truth worthless.

If a promoter or director has obtained by misfeasance shares which, if he held

them at all he must hold up as paid up, the company's remedy is to make him account for that which he has acquired by breach of trust. This it may do in one of three ways: First, if the misfeasant still holds the shares and they are valuable, the company can recover them from him; secondly, if he has sold the shares at a profit, they can recover the profit; thirdly, if the shares are valueless or have been sold at a loss, the company can recover as damages the sum which they have lost by being deprived of the right of allotting the shares to persons who would have paid them up. In the third case the Court will estimate the damages at the largest amount of damages which could at any time have been incurred, that is at the full value of the shares at the time the misfeasant acquired them or at any subsequent time. If shares in the company have been taken by solvent persons, it will be assumed against the misfeasant that these shares would have been so taken, and the damages will be the full nominal amount of the shares, *vide Mackay's case* (2, Ch. D., 1), *Pearson's case* (4, Ch. Div., 306), or if the person attacked purchased them at less than their full nominal amount, then the difference between the full nominal amount and what he paid. And, even where it was shown that the misfeasant had in fact transferred some of the shares for a nominal consideration and had made no profit, he was charged with the full nominal amount, for he had deprived the company of the power of allotting them to other persons who might have paid the full nominal amount; *Metcalf's case* (13, Ch. Div., 169). The principle is that, if that which the agent has received is money, he must hand over the money; if something else, then the principal may insist on having it, or, if he chooses, the value of it. The value is to be measured by the best price which the principal could have obtained if the agent had at once told him the facts, and the principal had then taken the property and subsequently sold it at the market value reached. The value, therefore, is the highest value between the date of the wrongful act and the date when it came to the knowledge of the principal, *vide Nant-y-Glo Company v. Grue* (12, Ch. Div., 738).

I find that shortly before the allotment of the 4,000 shares to the defendants and Farquhar and A. Forbes, the public subscribed for and were allotted the whole amount of shares then available (*viz.*, 7,000). I do not forget that, according to Gordon Forbes' evidence these shares were not marketable, and that he, at any rate, did not dispose of any shares, but I am not persuaded that, if these 4,000 shares had been available for issue to the public, they would not have been taken up; the onus of proof of this is on the defendants, *vide Jessel M.R. in Metcalf's case* (13, Ch. D., page 173). On the ruling in that case I consider I am bound to say that the defendants, if liability exists, are liable for the full nominal value of these shares, *viz.*, £4,000.

I now proceed to deal with what is the main point in the case, *viz.*, as to whether the allotment of the shares and payment of the 3,000 can be supported by the Companies Ordinance and the Articles of Association. If the consideration alleged to have been given for the allotment and payment is a legal one, I think it must be conceded that, seeing that there was absolutely *bona fides*, there can be no inquiry into the adequacy or otherwise of the consideration, for that question is considered settled by the decision in *re Wragg* (L.R. 1897, 1 Ch. Div., p. 796), and that the action on that understanding would fail.

It was argued by the liquidator that there was in fact no valid consideration, and that the contract on the face of it shows no legal consideration, it intimating that the true character of the bargain was a payment for past services. To this the defendants reply that there was consideration, *viz.*, the rendering of services, and, as I understood the argument, defendants' counsel further urged that in truth there was no necessity to consider the question of consideration, inasmuch as the contract is supported by the provisions of section 28 of the Companies Ordinance and sub-section 3 of section 115 of the Articles of Association.

Section 28 of our Companies Ordinance is as follows:

"Every share in any company formed under this Ordinance shall be deemed and taken to have been issued and to

be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by a contract duly made in writing, and filed with the Registrar at or before the issue of such shares, and unless such share in terms of such contract has been issued in exchange for a consideration of valuable services rendered to the company in furtherance of its objects or in exchange for or in consideration of valuable property, rights, or privileges acquired by the company in furtherance of its objects, in which case, though not actually fully paid up, such share shall be considered to be fully paid up, and shall entail no further responsibility or liability upon the members to whom it has been or shall be issued, or upon subsequent holders, than would have been entailed upon them if the share had been actually fully paid up in money."

Sub-section 3 of section 115 of the Articles of Association of the company gives the directors powers "at their discretion to pay for any rights acquired by or services rendered to the company either wholly or partly in cash or in shares, lands, debentures, or other securities of the company, and any such shares may be issued as fully paid up or with such amount credited as paid up thereon as may be agreed upon, and any such lands, debentures, or other securities may be either specially charged upon all or any part of the property of the company and its uncalled capital, or not so charged."

Section 25 of the English Companies Act of 1867, on which the authorities I am about to quote are based, is in the following terms:

"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

It has been held that this section really means that there must be paid for shares, money, or money's worth, such as property or valuable rights, or services rendered, and if the latter, there must be a contract duly filed at or before the issue of shares. I can therefore find no substantial difference between section 28

of our Company Ordinance, and section 25 of the English Statute.

I think that where no money is paid, but the payment is in money's worth, it must be such a consideration as can support a contract, i.e., in the case of services, there must be shown to have been an antecedent express or tacit agreement that the services were to be rendered in consideration of payment therefor; this where the payment is out of capital.

In this case, was the consideration good? The contract alleges the shares were allotted and the cash paid for valuable services rendered in procuring the concession for the company from the British South Africa Company. Now, I feel bound to come to the conclusion, after hearing the evidence, that this allotment and payment were in truth and in fact made as being the estimated value of the concession, a concession which was already the property of the company. I do not doubt that Messrs. Grey and Gordon Forbes did perform some valuable work in obtaining for themselves the promise of the concession—work which had been performed previously to the formation of the company. There seems to have been no intention at the time these services were rendered that there should be payment for them, nor at the time the concession was made out in the name of the company was it intended that the company should pay them for the concession. Had the parties acted as was originally intended by Mr. Gordon Forbes, viz., to form another company, a separate legal entity, to take over the present company's rights, and had a contract been filed by which the vendor company was to receive 4,000 fully paid up shares, and £3,000 as the purchase price of the concession, the present difficulty could not possibly have arisen. That transaction would have been fully protected by section 28 of the Ordinance. If the transaction now attacked be invalid, it is no answer to say that, it being possible to have been legally carried out in another manner, it cannot be impeached. Lord Watson, in the *Ooregum* case, to which reference will be presently made, in answer to an argument of a similar nature, viz., that the appellants could have secured by other means all the advantages which were stipulated in the contract with the company, says: "It is needless, however, to consider what the parties might have done, if

what they did is not of legal effect." I am of opinion that the contention of the liquidator with regard to the question of consideration is correct. I do not think that there was established a legal claim on the part of the defendants to claim payment for whatever services were rendered, and, as a fact, what was paid for was in reality the concession. So far as the defendants, exclusive of Grey and Gordon Forbes, are concerned, I can find no evidence that they actually rendered any services in and about obtaining the concession. Each of the defendants was to receive the same number of shares and cash, and there is no suggestion that any attempt was made on the part of the company or of these gentlemen to make any estimate of the value of the services which each had rendered, and to give an equivalent number of shares and amount of cash for such services in each case.

In my opinion, sub-section 3 of section 115 of the articles of association does not assist the defendants in this case; that sub-section has reference to services for the payment of which there is a legal claim, and must be read subject to the provisions of section 28 of the Ordinance.

In my judgment, the allotment of shares and payment of cash must be regarded in the light of a gratuity or bonus. These shares, then, were issued, though said to have been fully paid up, for no payment whatever.

In the *Ooregum case* (L.R., A.C., 1892), it was held by the House of Lords that a company limited by shares under the Companies Act has no power to issue shares at a discount, nor does a registered agreement filed under section 25 of the Companies Act, 1897, make such issue good.

The case of *Welton v. Saffrey* (L.R., 1897, A.C., p. 299), decided that it was *ultra vires* for a limited company to issue shares at a discount or by way of bonus, although authorised to do so by the articles of association, and that the holders of shares so issued are not thereby relieved from liability in a winding up to calls for the amounts unpaid on these shares for the adjustment of rights of contributories *inter se* as well as for payment of the company debts, and the cost of winding up. See decision in that case, and also judgment of Lord Mag-naghten (page 321).

Holding that these shares and the cash must in law be respectively regarded as

having been allotted and paid by way of gratuity or bonus, let us inquire as to whether they have any efficiency. The cases of *Hutton v. West Cork Railway Company* (L.R. 23, C.D. 654), and in *re George Newman and Co.*, are instructive as to the remuneration of Directors. (See head notes of both cases, as well as judgment of Bowen, L. J., in first case.)

In *re George Newman and Co.*, Lindley, L. J., in referring to the case of *in re British Seamless Paper Box Company* (17 C.D., 467), quoted in argument in the present case, and which I may here mention has no application here, states: "The Court held that this could not be done (i.e., the liquidator could not recover), because the transaction being *intra vires*, was honest, and was sanctioned by all the members of the company at the time." But in this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purpose of its business, and this money the Directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them, and, even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company.

"A registered company cannot do anything what all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property, and not the property of the shareholders for the time being; and if the directors misapply these assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as anyone properly sets the company in motion. All this is familiar law, and must be borne in mind in deciding the present case.

"The Court is bound to recognise the company as incorporated, and to give effect to all the consequences of such incorporation. What, then, are the consequences as regards presents to directors? The cases on the subject are few. The law will be found discussed in *York and North Midland Railway Company v. Hudson* (16 Beav., 485), and *Hutton v. West Cork Railway Company* (23 C.D., 654), but there is no case which quite covers this. Directors

have no right to be paid for their services, and cannot pay themselves out of the company's assets, unless authorised to do so by the instrument which regulates the company, or by the shareholders at a duly convened meeting. The shareholders at a duly convened meeting for the purpose can, if they think proper, remunerate directors for their trouble, or make presents to them for their services, out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a manner as this. But to make presents out of profit is one thing, and to make them out of capital is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything that Mr. George Newman desired, but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assets given separately may preclude those who gave them from complaining of what they have sanctioned; but for the purposes of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried, and duly recorded. The articles of this company, wide as they are, do not authorise such presents as these impeached by the liquidator."

Section 87 of the articles of association of this company deal with the ordinary remuneration to directors. Such remuneration is to be decided by shareholders at a duly convened meeting. It is admitted that this article cannot be a guide in this case. Any remuneration to directors outside the usual remuneration for ordinary services can only be granted

by shareholders, and this only out of profits. In the present case this remuneration was out of assets, i.e., capital, and was made without the approval of a duly convened meeting of shareholders.

This being an action for damages, I have not omitted to consider whether, in view of the facts that the company is really solvent, that this action is not on behalf of creditors, but in effect on behalf of shareholders, that the holders of 6,700 shares out of 7,000 issued to the public acquiesced in the arrangement, and that no shareholder has during a period of four years come forward to contest the contract, the liquidator is not estopped from setting up his claims, on the ground that these shareholders cannot be considered under the above circumstances to have been damnified. I, however, have come to the conclusion that such argument is not tenable. The same argument was unsuccessfully advanced in *In re the National Bank of Wales, Limited* (L.R., 1899, 2 C.D., 629). In that case it was held that the liquidator in winding up can recover from directors dividends improperly paid by them, even though creditors have been satisfied in full, *vide judgment of Wright, J.* Wright, J., on page 646 states: "There remains one other point for consideration in this part of the case. The creditors have been paid, and it is contended on the authority of *Tarquand v. Marshall* (L.R. 4, Ch. 376), and *Flitchcroft's case* (1882, 21 C.D., 519), that a claim in the interest of the shareholders for repayment to them of capital, which they have themselves received in the form of dividends, cannot be maintained. In *Tarquand v. Marshall*, however, a bill was filed on behalf of some of the shareholders in a going company, and the expression attributed to Cotton, L. J., in *Flitchcroft's case*, if intended, to be an absolute statement of law, which I think it was not, seems opposed to the opinion of Jessel, M. R., in the same case, and to the doctrine established by many cases since, that in a liquidation the liquidator has a new and independent right to recover what belonged to the company, and even in the case of a company not in liquidation, it is difficult to see how a payment to the shareholders can be a payment to the company in a case in which the payment to the shareholders is itself a fraud on

the company." The ultimate decision arrived at by Mr. Justice Wright was upset by the Court of Appeal, but so much as I have quoted was apparently approved by that Court.

On the question of acquiescence, I should not omit to state that, in my opinion, it cannot enter into the consideration of this case, for if the remuneration was *ultra vires* the company, acquiescence cannot avail, nor can it be of service in a winding up.

Lindley on Companies, 5th Edition (page 377), sets out the principles of the acquiescence, as follows: "Before leaving the subject of the liability of directors to make good assets of the company improperly lost or parted with, or to account for profit made by them at the expense of the company, it is material to consider whether the shareholders have acquiesced in what has been done or not. Cases indeed may occur where their acquiescence is immaterial, but this is only where the company is incorporated and its funds have been applied in a manner which is *ultra vires*. Where a director has made a profit at the expense of the company and this circumstance is known to the other directors, and they, acting *bona fide*, sanction it, having power to do so, the shareholders and the company will be bound by their sanction. But, as will be seen hereafter, when treating of winding up, a liquidator may impeach transactions on behalf of the creditors which neither the company nor the shareholders can impeach themselves."

The liquidator's counsel relied strongly on the case of *In re Eddystone Marine Insurance Company* (1893, 3 C.D., page 9), which, if I am correct in my view that the remuneration in the present case must be regarded in the nature of a free gift or bonus, appears to me to be conclusive.

My conclusion, then, is that there was no legal consideration, that the transaction was *ultra vires*, that all the defendants are proved to have been guilty of a misfeasance, that the damages to be awarded must be the sum of £7,000, and that the defendants are jointly and severally liable for this amount, with costs.

I cannot close this judgment without expressing a decided opinion that the defendants and all parties concerned acted openly, honestly, and *bona fide*.

They implicitly relied on the opinion of their solicitor, who in my judgment advised them wrongly.

There was no attempt to conceal or defraud anyone, but, unfortunately, they have done what, I think, is not authorised by law.

Mr. Schreiner, K.C. (with him Mr. Searle, K.C.) for the appellants; Sir H. Juta, K.C. (with him Mr. Burton) for the respondent.

Mr. Schreiner: The first point in this case is, was there an agreement among the directors of the company? The second is, were they guilty of any misfeasance? In a case of misfeasance, only the person guilty thereof is liable. Some £14,000 went to the shareholder, nominally, but these shares were never worth more than 6s. each, and yet the Court below gave judgment on the basis that they were worth £1 per share. Then when was this right acquired. See Lord Grey's letter of July 13 to Mr. Grey, and Grey's letter of August 9 to Captain Lawley (both referred to by Vincent, J.). These letters show that certain persons had entered into a contract under which they had acquired certain rights. A syndicate was formed on August 19, and the company was organised on November 15. An agreement was entered into between the Chartered Company and the Wood Company, the terms of which seemed to take it for granted that the syndicate had ceased to exist. The position of the directors was that they were appointed to raise a loan of from £5,000 to £14,000. Clearly, by December 2, the company saw that they could not carry on business unless they obtained this money. Between December 7 and December 9, Holland, Forbes, and others entered into an agreement with the Chartered Company.

[De Villiers, C.J.: The agreement shows that an absolute cession had been made by the company. Had any consideration been given?]

Here the whole question is, had these men given up their rights? It is never to be presumed that anybody has done this. They were badly advised not to go to the Court and get the company refloated, no doubt; still, if this property was purchased and cession made, the company could demand payment for their property. These gentlemen never intended to give their

property for nothing. Mr. Grey's evidence shows that there was an agreement between the members of the syndicate and the directors. The shares in question were never issued. The persons to whom shares were granted had given value for them, and surely it will not be said—on a pure technicality—that because the company had not been refloated, the gift or assignment of these shares was a malfeasance. *Newman's case* is not in point. Directors are not in a worse position than outside persons would be. The point of the directors is, that if any one person can say he is prejudiced he may bring his action. See *Langford v. Moore* (17, S.C.R., 1), but his course is not to apply for liquidation. My second point is that there has been no misfeasance, for the defendants and the new directors acted quite *bona fide*. Misfeasance is a statutory offence, and must therefore be restricted to its statutory definition. Here there has been neither misfeasance nor breach of trust. For with whom was the trust broken. Certainly not with my clients, the original directors. Nor with the new directors. Nor with those who took the 7,000 shares, with the exception, possibly, of those who took some 300 of these shares.

[De Villiers, C.J.: Then you admit that there may have been a breach of trust in respect of them?]

Only one of these shareholders objected (Behr), and he afterwards professed himself satisfied. Then there were transfers to Watkins, Davies, Lester, and another. Full notice was given of the burdens on the shares, and if any person felt himself aggrieved, his remedy is an action as an individual against the Company (see Rhodesian Ordinance of 1895, clauses 44 and 45), not for misfeasance or for breach of trust, but for damages. Sections 90 and 91 of our Act No. 25 of 1892 are much to the same effect. The liquidators have no right to represent these shareholders; they read the prospectus and bought with their eyes open; *volenti non fit injuria*.

Mr. Burton: No doubt the defendants have been perfectly *bona fide*, but in point of fact they have done something which the law does not allow. It is quite immaterial that they could have done the same thing by legal means. No consideration was given for these

shares, and by their issue the capital of the company was increased. It is not said that if there had been no misfeasance and no breach of trust that the liquidator would still not be justified in recovering from the directors. (See section 162 of Rhodesia Ord. of 1895). But if a breach of trust must be shown, there is enough to prove it in this case.

[De Villiers, C.J.: Can the liquidator sue for uncertain persons, or for shareholders?]

Had the company been insolvent, counsel for the appellants admits that we should have had a right to sue. If an act is *ultra vires* of the directors, the assent of the shareholders will not affect the position of the liquidator. See *Lindley on Companies* (5th edition, p. 377), cited by Vintcent, J.

[Buchanan, J.: The text does not say that shareholders cannot bind themselves.]

Vintcent, J., towards the end of his judgment discusses the question of acquiescence, and expresses his opinion that (on the authority of Lindley and cases cited by him) it cannot enter into the consideration of the case.

[Buchanan, J.: May an act not be *ultra vires* of the directors, but not of the shareholders?]

Yes; but we have no evidence as to the consent of the shareholders. See *Re National Bank of Wales* (L.R., 1899, 2, C.D., 629). Then if the act of the directors was *ultra vires*, what is the measure of damages? If the transaction was illegal, these funds belong to the company, and I would rather put the matter on that footing than on the ground of misfeasance. These shares were issued out of the capital of the company, and the liquidator claims a refund of these funds wrongfully disbursed. The whole question is, is the liquidator entitled to a return of these funds? If so, the judgment of the Court below was correct. The shares were not worthless, as is shown by the fact that every share offered to the public was taken up; and hence the onus is on the appellants to show that the shares they got for nothing were worthless.

[De Villiers, C.J.: Ought not the judgment to be confined to the 300 shares?]

The question of acquiescence does not arise if the action of the directors was

ultra vires. *Lindley on Partnership* (loc. cit.). As to the general merits of this case, see *Re Eddystone Marine Insurance Company* (3, Ch. D., p. 9, 1893). As to the measure of damages, see judgment of Vintcent, J., in the Court below, citing *Mackay's case* (2, Ch. D., 1), and *Pearson's case* (4, Ch. D., 306). As to misfeasance, even if there were none, the directors may still be liable if they act *ultra vires*. Directors may not pay themselves bonuses out of the capital of the company; and hence their act was *ultra vires*. For a test as to the 4,000 shares, see *In re George Newman and Co.* (64, L.J., Ch. 407—1, Ch., 1895, 674). Then a company may not issue shares at a discount.

Mr. Schreiner in reply.

The Court dismissed the appeal, with reservation of certain rights to parties having interest.

De Villiers, C.J.: This is an appeal from a judgment of the High Court of Southern Rhodesia, by which the sum of £7,000 was awarded to the official liquidator of the Timber Supply Company (Limited) as damages against certain directors of that company for misfeasance as such directors. The alleged misfeasance consisted in their being parties to an agreement by which, in consideration of certain services alleged to have been rendered by them to the company in obtaining a concession of timber-cutting rights, there were allotted to them 4,000 fully-paid-up shares in the company and the sum of £3,000 in cash. The learned Judge in the Court below held that two of the defendants did perform some valuable work in obtaining the concession for themselves, but that, as the work was performed before the formation of the company, and as the concession was granted directly to the company without any reservation of the defendants' rights, and, indeed, without any intention on their part to charge the company for the same, there was no valid consideration to support the allotment to the defendants of the shares and cash. At the time when the allotment was made the capital of the company was £5,000 in shares of £1 each, of which only 350 had been subscribed, and it was part of the agreement for such allotment that the capital of the company should be increased to £14,000 by the issue of 9,000 more shares of £1 each. A prospectus was accordingly issued by the

directors stating the objects of the company and informing the public that applications could be made for 7,000 shares. The prospectus referred to the existence of an agreement between the company and the defendants, but gave no details of such agreement. There is evidence, however, that all the shareholders at the date of the agreement were aware of it, and that of those who took shares after the issue of the prospectus the holders of 6,700 shares were fully cognisant of the agreement, and never raised any objection. Upon this point the learned Judge remarks as follows: "This being an action for damages I have not omitted to consider whether, in view of the facts that the company is really solvent, that this action is not on behalf of creditors, but in effect on behalf of shareholders, that the holders of 6,700 shares out of 7,000 issued to the public acquiesced in the arrangement, and that no shareholder has during a period of four years come forward to contest the contract, the liquidator is not estopped from setting up his claims on the ground that these shareholders cannot under these circumstances be considered to have been damnified. I, however, have come to the conclusion that such an argument is not tenable. The same argument was unsuccessfully advanced in *In re National Bank of Wales* (L.R., 1899, 2 C.D., 629). In that case it was held that the liquidator in winding up can recover from directors dividends improperly paid by them, even though creditors have been satisfied in full." It was not necessary, however, for the decision of that case to go quite so far, nor do the remarks of Wright, J., or of the Judges of the Court of Appeal justify the view that even where all the shareholders have acquiesced in a misfeasance, which is held not to be fraudulent, and the creditors have been paid in full, the liquidator can recover damages for such misfeasance. It was expressly stated by Wright, J., that the suit had been brought by the liquidator, not in the interest of the shareholders, but to recoup another company to which all the assets of the company under liquidation had been assigned, and which had, out of its own funds, satisfied creditors to the amount of £41,000. "The case is in effect," said the learned Judge, "the same as if the liquidator, instead of selling the assets and liabilities of the bank, had borrowed money to pay

off its creditors." Lindley, L.J., in his judgment on appeal, also pointed out that there was a deficiency which the National Bank had to make good, but as the director whose conduct was impeached was held not to have been guilty of breach of trust, it was unnecessary to decide whether, assuming him to have been liable to make good the dividends declared while he was a director, the liquidator, as representing the shareholders in the bank, could have recovered those dividends from him. "We agreed," he added, "with the observations of Cotton, L. J., in *Flitcroft's case* (21, Ch. D., 519) as we understood them, namely, that the Court could and would prevent the liquidator from taking any proceedings which were useless and vexatious, but that this proceeding in the case supposed would be neither the one nor the other." In *Flitcroft's case* Cotton, L. J., said: "If the corporation were suing for the purpose of paying over again to the shareholders what the shareholders had already received, the Court would not allow it. But that is not the case here, the company is insolvent, and there is no objection to allowing it to get back its funds for the purpose of paying debts." Brett, L. J., in the same case, said: "The liquidator represents the company, and is bound to discharge towards the creditors all the duties which the company owes them. It is, therefore, his duty when such a breach of trust as this is discovered to get a return of the assets improperly expended that they may be applied in payment of debts." And even Jessel, M. R., who has gone further than any other English judge in upholding the liability of directors at the suit of the company as distinct from the shareholders composing it, bases his judgment on the fact that there were creditors to be satisfied. "The creditor," he says, "has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has, therefore, a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than

by a winding-up order. It follows then that if directors who are *quasi* trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them. It is no answer to say that the shareholders could not compel them to do so. I am of opinion that the company could, in its corporate capacity, compel them to do so even if there were no winding-up. They are liable to pay, and none the less liable because the liquidator represents, not only shareholders, but creditors. The body of the shareholders no doubt voted for a declaration of dividend on the faith of the misrepresentation of the directors, so that there really was no ratification at all." The case of the *Eddystone Marine Insurance Company* (L.R., 1893, 3, Ch. Div., p. 9) has been relied upon on behalf of the plaintiffs as being on all fours with the present case, but there also the suit was brought by the liquidator, practically on behalf of the creditors only. A passage from *Lindley on Companies* (5th edition, p. 377) has been quoted as showing that where a director has made a profit at the expense of the company the fact that the other directors have sanctioned it, or that the shareholders have acquiesced in it does not relieve the directors from liability where they have applied the funds in a manner which is *ultra vires*. The learned author adds that "a liquidator may impeach transactions on behalf of the creditors which neither the company nor the shareholders can impeach themselves." The difficulty, to my mind, in the present case is that no proceedings were taken in the court below to restrain the plaintiff from proceeding with his action as being vexatious and practically useless. The action was brought by the liquidator on behalf of the company, and if there were any shareholders who have not acquiesced in the misfeasance it is impossible to say that the plaintiff had no cause of action against the defendants. If he had a cause of action the damages to be awarded would be the damages sustained by the company, and not by individual shareholders, and it is impossible, therefore, to disturb the judgment which awards the full damages payable by the defendants to the company. At the same time I am of opinion that, in affirming the judgment, this Court should be careful to reserve to the defendants any right

they might have to restrain the plaintiff from paying any portion of the damages to shareholders, who by their conduct have debarred themselves of the right to recover damages directly from the defendants. In the same way the Court should reserve to the defendants the right to claim a refund of such portion of the damages as is not legally payable to shareholders who have acquiesced. It is to be hoped that this reservation will lead to an arrangement between all parties concerned by which the defendants will be relieved from paying more to the plaintiff than would be sufficient to satisfy the non-acquiescing shareholders. If no such arrangement should be made the Court below would still, in my opinion, have the power to adjust the rights of the shareholders amongst themselves and distribute any surplus that may remain, after payment of the damages, among the parties entitled thereto (see section 117 of the Rhodesian Companies Ordinance, 1895). The appeal must be dismissed, without prejudice, however, to any right the defendants might have (a) to restrain the payment of any portion of the damages to any particular shareholders; (b) to receive back any portion of such damages from the liquidator or from individual shareholders; or (c) to claim a distribution of the damages in such a manner as the Court below shall deem just. As an important reservation has been added to the judgment of the Court below and the case is one of considerable hardship to the defendants, who acted on the advice of their legal adviser, and in perfect good faith, I am of opinion that the costs of appeal should come out of the amount of damages awarded against the defendants, and this object will be attained by ordering that the costs shall be paid by the plaintiff in his capacity as liquidator.

Buchanan, J., and Maasdorp, J., concurred.

[Appellants' Attorneys: Findlay and Tait; Respondents' Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

REHABILITATIONS.

(1902.
1 Dec. 1901h.

Mr. Russell moved for the rehabilitation of Henry Mortimer Hill, whose estate was sequestrated as insolvent on November 13, 1895. The debts proved amounted to £1,515. and the assets realised £410 2s. 6d. Up to the time of his report, the trustee had not been able to get much assistance from the insolvent, who had gone to the then Free State, and when he applied to the insolvent for an explanation, he received no reply. Otherwise, there was nothing unfavourable in the trustee's report.

An order was granted as prayed.

Mr. Alexander moved, under 117th section of the Insolvent Ordinance, for the rehabilitation of Hendrik Willem Lategan, whose estate had been sequestrated during his absence from the Colony. The creditors had been paid in full, and there was a balance of over £300 after paying all expenses.

Order granted as prayed.

Mr. Alexander moved for the rehabilitation of Wilhelmus Christoffel Pulter, whose estate was voluntarily surrendered on September 30, 1896.

Order granted as prayed.

Mr. Benjamin moved, under the 117th section of the Insolvent Ordinance, for the rehabilitation of Jacob van Renen van Niekerk.

Order granted as prayed.

Mr. C. de Villiers moved for the rehabilitation of Pieter Wouter de Wet, whose estate was sequestrated as insolvent on October 13, 1897. The debts proved were £102 15s., while the assets realised £18 11s. 5d., the whole of which went in the payment of costs of administration. There was nothing unfavourable in the trustee's report.

An order was granted as prayed.

Mr. Benjamin moved for the rehabilitation of Charles Gillham, whose estate had been sequestrated on October 9, 1895. The debts proved amounted to £175, while the assets only realised £22 6s. 2d., which was swallowed up in

the expenses of administration. There was nothing unfavourable in the trustee's report.

An order was granted as prayed.

GENERAL MOTIONS.

Ex parte SOTONDOSHE. { 1902.
Dec. 19th.

Mr. Gardiner appeared for the applicant in this matter, and asked that it be postponed until January 12, 1903, a certain replying affidavit having been filed to which the applicant had not yet replied. The motion was for the making absolute of a rule nisi calling upon one Najilo Sotondoshe and others to restore certain cattle.

Mr. Uppington said he had been instructed to oppose the application for postponement. His clients would be prejudiced, because they were being restrained from parting with the cattle or anything. He pointed out that the applicant had had plenty of time to reply to respondent's affidavits.

Mr. Gardiner said he must admit that they had had plenty of time, but unfortunately his client was in gaol awaiting trial for the theft of cattle, which included the cattle concerned in the present case. He submitted that the respondents would not be prejudiced in any way, as they had possession of the cattle, and were only restrained from parting with them.

The Chief Justice asked if there was any desire to part with the cattle.

Mr. Uppington said he was not instructed on that point.

The postponement until January 12 was allowed.

Ex parte HILL. { 1902.
Dec. 19th.

Mr. Russell moved for an order authorising the Registrar of Deeds to issue a certified copy of a certain bond which had been destroyed by the fire in the South African Mutual Buildings in June last.

Order granted as prayed.

Re THE WORCESTER BUTCHERY CO.

Mr. Bucharan presented the report of the liquidator of the above company, and moved for its confirmation, as also for

the settlement of a list of shareholders liable as contributories. The report had as usual lain for the inspection of creditors.

The report showed that the official liquidator (Mr. D. Bland) was appointed by the Court on September 12. The business was carried on until October 4, when the assets were disposed of by public auction as a going concern, and realised £755 for the immovable and £168 15s. 7d. for the movable property, making a total of £923 15s. 7d. The liabilities of the company as far as the liquidator had been able to ascertain were £3,132 16s. 6d., and the assets £2,009 19s. 7d. There was thus a deficiency of £1,122 16s. 11d. Though the nominal capital of the company was £3,000, divided into 3,000 shares of £1 each, only 606 shares were subscribed, and of these 156 were forfeited, leaving 450 shares, on which the sum of £163 16s. was paid. Three shareholders paid their shares in full, while the rest paid off a part of the amount due thereon. As the Court held in the case of *D. J. Maritz*, that no call on the £1 per share had been legally made on the shareholders, the liquidator recommended that the full amount owing on the shares be called up, as even then there would be a deficiency. The liquidator reported that the causes of the failure of the company were that it started operations without sufficient capital, and consequently business was carried on on borrowed money and overdrafts in the bank, for which a high rate of interest had been paid, and then in order to draw customers the stock was disposed of at a very small profit, while the expenses were too heavy in proportion to the net income. Further, the company commenced business in October, 1900, when owing to the circumstances prevailing in the Colony slaughter stock was difficult to procure, and prices were high. Also on August 7 last the Court gave judgment against the company in the case of *D. J. Maritz v. the Company* for £111 12s., and costs, which were estimated at the time to amount to about £500. The report detailed transactions in connection with the estate, and in conclusion the liquidator asked the order of the Court on the following points: (1) To call up the £1 per share payable in respect thereof and to settle the list of contributories; (2) to fix the time within which

the creditors shall prove their claims; (3) to authorise the liquidator to pay off the capital sum of the bond with interest due whereby the property sold by the liquidator was specially hypothecated; (4) to authorise the liquidator employing Messrs. Walker and Jacobsohn, of Cape Town, as his attorneys.

The report was confirmed, the list of shareholders on list A to be settled as contributories, with leave to them to apply on or before January 17 for removal of their names; remainder of the £1 per share to be called up; debts to be proved on or before June 30, 1903; the leave asked in prayers 3 and 4 granted.

Ex parte HATTINGH.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to pass transfer of certain property to petitioner in an estate of which he is the executor.

Order granted as prayed.

Ex parte BAKER.

This was an application for an order authorising the transfer of certain property in Cape Town in which a minor was interested. It appeared that the property was in a most dilapidated condition, and it was to the minor's benefit that it should be sold and another and more suitable property purchased with the proceeds. A sum of £437 10s. had been obtained for the property, and with this money it was proposed to buy another house in Dorp-street, Cape Town.

The Master's report stated that the minor was nearly of age. He recommended that the application be granted, but that the surplus of proceeds of sale due to the minor be paid into the Guardians' Fund.

An order was granted in terms of the Master's report.

Re THE CAPE OF GOOD HOPE BUILDING SOCIETY.

Mr. Schreiner, K.C., moved for an order for the confirmation of the fourth and final report of the official liquidators. He asked that the usual order be made as to inspection.

Order granted as prayed; publication to be made in the "Government Gazette" and in a Cape Town newspaper.

MATHEW V. BERLYN.

Mr. Buchanan moved that the rule nisi granting an interdict against the removal of certain property pending an action to recover rent be made absolute.

Rule made absolute as prayed.

Ex parte COPPENHAGEN.

Mr. Russell moved for leave to the father and natural guardian of certain minor children for leave to sell certain property in which the minors were interested and which, owing to its condition, was bringing in no return. The Master's report was favourable to the application on condition that the proceeds were paid into the Guardian's Fund for the benefit of the minors.

Order granted in terms of the Master's report.

WENTZEL V. WENTZEL.

Mr. Alexander moved for the confirmation of the report of the Official Receiver.

Mr. Benjamin appeared for the respondent to consent.

Order granted as prayed.

Re DE JOND, SONS AND CO.

Mr. Searle, K.C., moved for the confirmation of the report of the official liquidator. It appeared that there had been considerable trouble in connection with the liquidation of this estate, the firm in question having carried on business in Belgium and Natal. The liquidator in his report asked for special remuneration at the rate of 200 guineas, being about 10 per cent. on the value of the assets in this colony.

The Court granted the order asked for in the report.

De Villiers, C.J.: The amount asked as remuneration is very high, but it is certainly a very exceptional liquidation. It is a foreign company, and there seems to have been very complicated accounts and correspondence with Natal and Belgium required. Under these circumstances the Court will authorise the remuneration proposed, but only owing to the very exceptional circumstances of the case.

Ex parte GRIFFITHS.

Mr. Buchanan moved for leave to sell certain property in which minors were interested.

The Master's report was favourable, but he recommended that the proceeds of the property should be paid into the Guardians' Fund until the minor should obtain his majority.

Order granted in terms of the Master's report.

Ex parte HERSELMAN. { 1902.
Dec. 19th.

Minor—Discharge from tutelage.

This was an application for an order authorising the Master to pay out certain moneys.

The petition of Philip Rudolph Herselman, a minor, and a farmer, of Haasfontein, in the division of Tarka, sheweth:

1. That he is a son of the late Johan C. W. C. Herselman, and of his spouse Elizabeth P. Herselman (born Botha).

2. That since June, 1899, he has maintained himself by farming on his own account.

3. That good farms are difficult to obtain within the division of Tarka.

4. That petitioner has acquired by private purchase from Coert Hattingh, a certain piece of quitrent land, being a portion of the quitrent place Sterkfontein, in the division of Tarka.

5. The purchase price of the said ground is £1,850, to which must be added transfer duty, transfer and bond expenses, together with the costs of this application.

6. The completion of this purchase will be for the great benefit of petitioner, and the price of property is likely to be largely increased in this division of the Colony.

7. Petitioner is experienced in farming, and is well able to stock and work the said ground, and he purchased the said property upon the advice of his brother, David H. Herselman, a practical farmer.

8. A sum of £363 12s. 10d. is at present standing to the credit of petitioner in the Guardians' Fund.

9. That one S. B. Webber, one of the petitioner's guardians, also holds in hands the sum of £210.

10. Petitioner has also inherited considerable (specified) landed property from his father and mother, having been to him bequeathed under the condition *ne exeat extra familiam*.

11. Petitioner has sold the said property to his sister, Johanna C. Herselman, for a price far in excess of that paid by his brothers and sisters for their respective shares.

12. To settle the amount of £1,850, the petitioner would, with your Lordship's sanction, use the moneys standing over to his credit in the Guardian Fund, the money in the hands of S. G. Webber aforesaid, and also the sum of money for which he sold his share of the fixed property as above stated, making together a total of £1,173 12s. 0d.

13. In order to pay the balance of purchase price and the costs of transfer, bond and legal process, petitioner wishes to raise a loan against the property purchased by him of £700.

14. Petitioner wishes to acquire the said farm without any delay, and to prosecute farming operations thereon, the said C. Hattingh being ready and willing to give transfer.

15. The petitioner is not in any wise burdened with debts, and is satisfied that it is for his advantage that he should have his own farm without delay. Petitioner's brothers' guardians and those of his friends who are able to judge are of the same view.

Wherefore petitioner prays that your Lordships may be pleased:

(a) To empower the Master of the Supreme Court to pay out to him the money, with interest, standing to his credit.

(b) To empower Samuel G. Webber to pay out to him the moneys, with interest, presently in his hands.

(d) To permit him to mortgage the farm Sterkfontein aforesaid to the extent of £700.

(e) To direct generally or otherwise in the premises as to your Lordships shall seem proper.

The confirmatory affidavits of the petitioner and of H. P. van Heerden were annexed. The R.M. of Tarka, the Presbyterian minister of Tarkastad, and the Dutch Reformed minister of the same town recommended that the petition should be granted.

The Master's report was as follows:—

There have been applications to this Honourable Court of a similar nature.

(a) *Ex parte Cachet* (8 Sheil, 9), where a minor was desirous of carrying on a trading business. In this instance the Court authorised the payment of the

money and declared the minor discharged from tutelage.

(b) *In re Minor Elliott* (Motions, 35 of 1899), authority was given to pay him the money due from his brother's estate, but not the amount due from his grandfather's estate, and he was declared discharged from tutelage.

(c) *In the application of the Minor Hütge* (Motions, 30 of 1900), the father was not in a position to accept the usufruct of property bequeathed to him.

Those who are on the spot, who are acquainted with the minor and have a knowledge of the property, and are consequently in a position to express an opinion, more especially the brother of the minor and his tutors, recommend that the application of petitioner be granted.

I am of opinion that applications of this nature should not be encouraged, but, as the minor is within nine months of his majority, and may lose a property which it is considered to be to his advantage to acquire, I beg to recommend that his application be granted.

The Court, on the motion of Mr. Buchanan, granted an order as prayed. [Applicant's Attorneys, Messrs. Walker and Jacobsohn.]

Ex parte DE WET AND { 1902.
ANOTHER { Dec. 19th.

This was an application for leave to raise money on the mortgage of property in a certain estate.

The petition of François Petrus le Roux de Wet and of Philippus Petrus Deetlefs, in their capacity as tutors testamentary over the minors Jacobus F. de Wet and Peter C. de Wet, all of Worcester, humbly sheweth:—

1. That under the will of the said late Philippus B. de Wet, he bequeathed your petitioner, François P. le R. de Wet, and his brother Philippus B. de Wet, and the said Jacobus F. de Wet and Peter C. de Wet a certain farm called "Aan de Mond van de Haartbeest Rivier," in the district of Worcester for £4,000.

2. The said legatees were also appointed as heirs of the estate of the late Philippus B. de Wet.

3. The said J. F. de Wet and P. C. de Wet are entitled to the sum of £77 17s. 10d. each from the estate of their late mother, C. A. de Wet, and the sum of £170 6s. 2d. each from the estate of their late father, P. B. de Wet, making a total of £248 4s. 0d.

4. The said minors, J. F. de Wet and P. C. de Wet, are each indebted to the estate of the late P. B. de Wet in the sum of £1,000, being quarter of the amount for which the said farm "Aan de Mond van de Haartbeest Rivier" was bequeathed.

5. The said farm is valued for Divisional Council purposes at £4,000, and by sworn appraiser at £5,000.

6. Inasmuch as the said minors intend to earn their living by farming, it will be to their interest to retain their share of the farm instead of having hereafter to expend a far larger sum in buying land on which to farm.

7. The said minors are at present residing on the said farm, and being maintained thereon. If they are deprived of the land they will have no home and no means of maintenance.

8. They are desirous of raising a mortgage of the landed property bequeathed to them, to pay for the said property and all the costs of raising the loan, passing bond, and taking transfer of the said property.

9. In partial liquidation of the amount due for the landed property, petitioners are desirous of using the inheritance due to them as above-mentioned.

Wherefore your petitioners pray for an order of Court:—

(a) Authorising them to use the inheritances due to the minors above-mentioned in payment of the amount due on the landed property, and granting power to any person now in possession of such inheritance to devote it to this purpose.

(b) Authorising your petitioners to raise on mortgage of the landed property bequeathed to the minors such sum of money as the Master of this Honourable Court may certify to be necessary for the payment of the amount due on the said property and all costs in connection therewith.

The Master recommended that the prayer of petitioners be granted on the condition contained in paragraph (b).

On the motion of Mr. Benjamin, the Court granted an order in terms of the Master's report.

[Applicants' Attorney, Mr. T. Peters.]

JACKS V. JACKS.

Mr. Upington moved under the 335th rule of Court for leave to the petitioner to have her evidence taken on commission or by way of affidavit in an

action she is bringing against her husband for divorce. The parties were married in 1899 without ante-nuptial contract, and there was a child of the marriage eleven years old. The respondent had come out to South Africa some time ago and had made no provision for or since contributed to the support of petitioner and the child, and she was now about to sue him for divorce on the ground of malicious desertion.

The Court granted an order authorising petitioner's evidence to be taken by way of affidavit, but pointed out that when the time came that respondent was called upon to show cause why he should not be sued for divorce personal service would have to be effected.

Ex parte BUYS.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to register certain property in petitioner's name in an estate in which he was an executor.

Order granted as prayed.

Ex parte KEMP AND ANOTHER.

Mr. Buchanan moved for an order authorising the transfer to petitioners of certain property from an estate in which they were executors. The heirs were all majors and had agreed to a certain division of the property in the estate, but the petitioners could not take transfer of their shares, being executors, without an order of Court.

An order was granted as prayed.

Ex parte NEL.

Mr. Benjamin moved for an order authorising the purchase of certain property by petitioner.

The Court, after hearing counsel, directed that the matter should stand over, so that the Master could ascertain whether on behalf of the minor children interested there was any objection to the granting of the order asked for.

Ex parte DU PREEZ.

Mr. M. Bisset moved for an order authorising the purchase of certain property by the petitioner from an estate, in which he was executor dative.

An order was granted as prayed.

REX V. DESMOND.

Mr. Schreiner, K.C., moved for special leave to Mr. Desmond to appeal from a conviction at the Worcester Circuit Court. The Attorney-General had now withdrawn his opposition to the application.

The Court granted leave to appeal, subject to the Judge, who presided at the trial reserving a point; the Registrar to ascertain that point from the Judge and the Court would then intimate a day when the matter could be heard.

Ex parte WALSTON.

Mr. Benjamin moved for an order for the cancellation of a certain mortgage bond.

The Court granted a rule calling upon all persons concerned to show cause why the order should not be granted; rule to be published once in "Ons Land."

VAN ZYL V. NEL.

This was an application upon notice calling on respondent to show cause why a judgment by default entered under rule 319 on November 29 should not be set aside, and why the bar should not be removed and applicant allowed to plead. Application was also made for an order on respondent to pay the costs.

On behalf of the applicant it was stated on affidavit that the summons was issued on August 30, and appearance entered on September 19. The declaration was filed on November 1, and notice demanding the plea within 24 hours was served on November 11. On the following day applicant's attorney wrote stating that owing to the difficulty of travelling and postal communication, the defendant had not been able to transmit instructions for the plea. The letter requested time to plead, but no reply was received. The action was in respect of certain mules in the applicant's possession, which plaintiff claimed. Applicant said he had a substantial defence to the claim. The respondent's attorney stated on affidavit that in reply to the letter referred to he verbally notified the applicant that he would be given as much time as possible, but that the case had been set down for trial in the November term.

Mr. Burton (for the applicant) argued that every consideration had been shown to the applicant, and he had had ample time wherein to defend the case,

Mr. Gardiner (for respondent) was not called upon.

The Court refused the application with costs.

De Villiers, C.J., said he did not think this was a case for the interference of the Court. Defendant had had ample time to prepare his defence, and the statements made by the present respondent's attorney were that before the defendant was barred, his attorney had in his possession all the information he required for filing the plea, and that no application was made to remove the bar prior to judgment. His Lordship could not see any prejudice to the applicant; it would be great prejudice to a man who had obtained judgment and had to give up all the benefits of such judgment and go to the expense and trouble of a fresh suit in order to substantiate his claim. The application would be refused with costs.

ESTATE OF THOMAS V. KERR.

Mr. Schreiner, K.C., moved for leave to sue by edictal citation.

Granted, the citation being returnable on January 12.

Ex parte SOEKER.

Mr. Currey moved for leave to sell certain usufructuary property on condition that the proceeds be re-invested in the purchase of other immovable property.

Granted.

Ex parte BAXTER.

Attorney — Admission — L.L.B.
Degree—Articles.

This was an application for an order as to the service of certain articles of clerkship. The applicant held the degrees of M.A. of the University of Aberdeen, and LL.B. of Edinburgh University, and was qualified as a solicitor in Scotland, but had not been enrolled there owing to not having paid fees. It only required that he should formally move the Court for admission, pay stamp duty, and be enrolled in order to be admitted in Scotland. Applicant wished to obtain an order of Court directing that, upon his serving as an articled clerk with a Cape Town attorney for a period of a year, he be admitted as an attorney. Counsel said that, by virtue of holding a degree as a Bachelor of Laws, he was

exempted from passing the examinations.

On the motion of Mr. Buchanan, an order was granted in the terms prayed, subject to applicant passing the final examination.

Ex parte CONSTABLE.

On the motion of Mr. Benjamin, leave was granted to sue, by edictal citation, returnable on January 12, personal service to be effected.

VAN BLERCK V. VAN BLERCK.

This was a motion for personal attachment for contempt of court, the respondent having failed to comply with an order of Court directing him to pay to the applicant the sum of £30, to enable her to proceed against him for divorce.

The Chief Justice pointed out that the service was stated to be served at respondent's dwelling house.

The application was ordered to stand over for personal service.

Ex parte TEMPLEMAN.

Mr. Alexander moved for an order authorising the alteration of the petitioner's name in the Debt registry, where it had in error been incorrectly described.

Granted.

MENDELSSOHN AND CO. V. STERN.

Mr. Russell moved for an order superseding final adjudication of respondent's estate as insolvent. An agreement was brought into Court, said counsel, five minutes after the order for final adjudication, but nothing had been done yet.

Granted.

TOUISSANT V. TOUISSANT.

Mr. Gardiner moved for leave to sue *in forma pauperis*.

A rule was granted.

ROBERTSON V. MOSS.

Receiver—Partnership—Costs.

This was an application for the appointment of an interim receiver in connection with the business of the licensed premises known as the Cafe Royal, Church-street, Cape Town.

In his affidavit, the applicant stated that in October last G. A. Moss got into some trouble in connection with the as-

sault he and a man named Savage were charged with having committed upon Captain Kirby, for which they were committed to take their trial at the Paarl Circuit Court. At this time applicant had a licensed house at Caledon, but this he was induced to give up to enter into partnership with Moss. It was alleged that the partnership was duly entered into, although no formal deed had been signed, and that applicant conducted the business with great success. When Moss returned from the Paarl, after the trial, there was said to be a great change in his manner towards applicant, who was told by Moss that he had only been made use of during the period of trouble. The affidavit contained a number of allegations against Moss in regard to his general conduct, and set forth that the licence of the house was consequently jeopardised. Applicant claimed that he was entitled to half the profits of the business, and therefore asked that an interim receiver should be appointed pending an action to be brought to determine the rights of the parties.

An answering affidavit was read, denying the allegations of the applicant. It was not denied that a partnership had been contemplated, but applicant had failed to comply with the conditions in regard to the money he had to contribute. The change in manner towards the applicant upon Moss's return from the Paarl was attributed to certain hostile remarks Robertson was reported to have made about him during his absence. A distinct denial was given to the other allegations.

After hearing the affidavit of Mr Moss, the Chief Justice intimated that it was not necessary to hear further affidavits.

Mr. Rowson, for applicant; Mr. Schreiner, K.C., for respondent.

Mr. Schreiner said he had 16 other affidavits which completely refuted the applicant's allegations.

Mr. Rowson was heard in argument on the facts as to the appointment of a receiver, and both counsel argued on the question of costs.

The Court refused the application.

De Villiers, C.J.: If the partnership had been clearly established in the present case it seems to me one in which the Court would appoint a receiver, but the difficulty is that the partnership is

not clearly established. There is some evidence in support of it, especially in the affidavit of the respondent, but still it seems to me extremely doubtful whether plaintiff will succeed in his action. More than that I do not wish to say at the present stage. But it would entirely prejudice the case if the Court were now to order the applicant to pay the costs. The Court will therefore refuse the application, but will order the question of costs to stand over.

[Applicant's Attorney, Mr. W. G. Coulton; Respondent's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

REX V WYLIE.

Evidence of accomplice—Ordinance 72 of 1830.

This was an appeal from a conviction by the Assistant Resident Magistrate of Cape Town.

The appellant, James Wylie, was a railway guard, and he along with two others, Boyd and Herrer, was charged with stealing from a railway train between Remount Station, Stellenbosch, and Cape Town, some ostrich feathers and imitation silk handkerchiefs. The goods had been placed along with other similar goods in a parcel, and a portmanteau, and put in the van of the train at the station first-mentioned. The complainant had seen the guard in that van. On arrival at Cape Town complainant found that the parcel and portmanteau had been tampered with, and the goods mentioned stolen. The matter was put in the hands of the police, and although nothing was found in Wylie's possession some of the stolen articles were found in the possession of Herrer and Boyd. Herrer said at first that the silk handkerchief found in his possession had been given him by Boyd, but afterwards he said that he got it from Wylie. Boyd was first found guilty and sentenced to a month's imprisonment. He then went into the witness-box and gave evidence to the effect that he had seen Wylie taking the articles from the parcel and portmanteau.

Mr. Wilkinson for the appellant; Mr. H. Jones for the Crown.

Mr. Wilkinson contended that the evidence against Wylie being that of an accomplice ought to have been very carefully scrutinised.

After hearing Mr. Wilkinson, and without calling upon Mr. Jones for argument, the Court dismissed the appeal.

De Villiers, C.J.: The 12th section of Ordinance 72 of 1830 enacts that it shall be lawful to convict any person on the single evidence of an accomplice. The only limitation upon this general enactment is that such crime or offence shall by competent evidence other than the single and unconfirmed evidence of such accomplice be proved to the satisfaction of such Court or jury respectively to have been actually committed. Notwithstanding this provision, it has always been the practice of judges in directing juries to exercise the greatest caution in accepting the evidence of accomplices, but if after the caution has been given, the jury are satisfied that the accomplice has spoken the truth, the Court cannot then refuse to accept the verdict as being a proper one. I quite agree with learned counsel for the appellant that Magistrates also should exercise similar caution, but there is nothing to show in the present case that the Magistrate who tried the prisoner did not exercise care and caution when accepting the evidence of the accomplice. The latter stated positively the circumstances in detail as to the handing over to him of part of the stolen property by the appellant. There is clear evidence in terms of the proviso of the 12th section that the offence complained of has been committed. Not only that, but there is evidence that the appellant was the guard of the train from which the articles were stolen. Besides this, the man whose goods were stolen says he (prisoner) was in the guard's van into which the goods were put. Well, under such circumstances it would be quite impossible for the Court to disturb the verdict of the Magistrate. He seems to have exercised care in his decision. Boyd was first found guilty. He was then sentenced so that all inducement to throw the guilt on another was removed. He had already been sentenced, and he knew that any evidence he might give would not relieve him from his punishment, and he gave that evidence which the Magistrate accepted as true, and if that evidence was true there is no doubt the appellant was guilty and was properly convicted. The appeal must therefore be dismissed.

[Appellant's Attorney, C. W. Slaughter.]

MOLL V. HOLMES.

Messenger's fees — Proclamation 110 of 1879.

This was an appeal from the decision of the Resident Magistrate of Nqamakwe, in a case in which the appellant was sued for certain messenger's fees. The amount claimed was £9 8s. 2d., which plaintiff, the messenger of the Court, said was due to him by appellant, who is an attorney. It was alleged in the summons that plaintiff attached certain stock on a writ issued by defendant on behalf of another person for £470 3s. 9d. Thereafter defendant instructed him to release the stock. The defendant had paid all fees except £9 8s. 2d., being 2 per cent. on the amount of the writ. An exception to the summons, on the ground that it disclosed no cause of action, was overruled. Defendant pleaded that he had paid all fees due by law, but the Magistrate gave judgment for the plaintiff.

Mr. Gardiner appeared for the appellant; Mr. Buchanan for the respondent.

De Villiers, C.J.: The 29th sec. of the Proclamation No. 110 of 1879 provides that a tariff of fees to be taken by officers of the Court of the Chief Magistrate and of the Courts of Resident Magistrates in the Transkei shall be framed and drawn up by the Chief Magistrate. In accordance with that section, a tariff of fees has been drawn up, and provision is made as to what charges are to be made by the clerk and by the messenger, and the only rule under which any payment could have been made in respect of a proceeding like the present is the 8th. His lordship read the 8th rule, and said that, in the present case, there had been no such payment to the messenger before a sale at all. There had been an attachment, but that was withdrawn. If the case had arisen in the Supreme Court, then, no doubt, by Rule 341, there would have been 2½ per cent. due, but unfortunately for the plaintiff, there was no similar provision under the rules framed for the Magistrate's Court, and he (the Chief Justice) was afraid this Court had no power to supply the omission. If the plaintiff had been entirely without any reward or payment for any part of his services,

then the Court might have considered it as a case of *quantum meruit*, but unfortunately there was provision for payment for these very services rendered by the plaintiff. There were payments for making and signing certain documents. No doubt these payments were not large, but still there were payments for his services, and these would exclude the possibility of allowing any payment as for *quantum meruit*. But then it was said the messenger had to go a considerable distance in order to execute the order of Court, but here also provision was made for horse hire. So that there was a *quantum meruit* fixed. Then the Magistrate, in giving his reasons, said that there was practically a sale; that the property was handed over to a third party at the special instance of the defendant, which was, in his (the Magistrate's) opinion, equivalent to a sale. But even if it were equivalent to a sale, the Magistrate ought to have proceeded under sub-section 9. Then it ought to have been 5 per cent., but the Magistrate said that, inasmuch as the Supreme Court rule provided 2½ per cent., he would give 2 per cent., in accordance with the 8th section which says that where the money is paid to the messenger, 2 per cent. should be paid. It showed that the Magistrate was hovering between different views, and as a kind of rough justice, he took 2 per cent. Unfortunately there was no provision for the payment of this amount, and he (the Chief Justice) thought it might be taken in a case of this kind that in other ways the messenger might be considered to have had sufficient payment for his services, and that it was not intended that he should be given this particular payment. The Court had no power to supply an omission which might be an intentional and not an accidental one on the part of the Legislature. The appeal must be allowed, with costs, and judgment entered for defendant in the Court below, with costs.

SUPREME COURT (IN CHAMBERS).

[Before the Hon. Sir JOHN BUCHANAN.]

ADMISSION. { 1902.
Dec. 23rd.

Mr. Russell moved for the admission of Julius Wertheim as an attorney and notary.

Order granted and the oaths administered.

GENERAL MOTIONS.

REX V. LOUIS VAN COLLER.

Mr. C. de Villiers moved for the release of the applicant, Van Coller, on bail. Van Coller is in prison on a charge of high treason.

Mr. Howel Jones appeared for the Attorney-General, and said there was no objection to the application if the accused found substantial bail in the sum of £2,000 personally, and two sureties of £1,000 each, and provided that he remained in Cape Town until he was committed for trial; further, that the bail bond should guarantee the appearance of accused at any preliminary examination, and that after he was committed for trial he should appear to answer any indictment in any competent court.

An order was granted in terms of the consent of the Attorney-General.

LEE AND BIAL V. ASHTON.

This was an application upon notice given to the respondent calling upon him to show cause why a peremptory order should not be granted requiring him to pay over to the credit of the applicants and himself a sum of £562 17s. 5d., alleged to be wrongfully and unlawfully deposited by him to his own credit in the Standard Bank in breach of his agreement with the applicants and also why he should not pay from such funds the amount necessary to pay the return fares of certain artistes to America during the first week of January, 1903.

Mr. Searle, K.C., appeared for the applicants; Sir Henry Juta, K.C., appeared for the respondent.

From the affidavits it appeared that the applicants brought to this country the company known as the World's En-

tertainers. The respondent, as representing one Williamson, who had advanced money for the purposes of the tour, became a partner in the business. Among the conditions of the contract between them it was agreed that the advances should, along with the hire of theatres, artistes, salaries, etc., be a first charge on the profits, and it was further agreed that all moneys earned on the South African tour should be banked in the joint names of Ashton and Rial. The applicants alleged that by becoming a partner Ashton was also liable to the artistes engaged for salaries, return fare to America at the termination of the engagement, etc. It was alleged that in breach of his agreement Ashton had deposited a sum of £562 17s. 5d. in his own name in the bank instead of in the joint names of himself and Rial, and the applicants said they were afraid this money would be remitted to Williamson in payment of the advances made, and that the artistes employed would be left here without means to pay their return fares to America.

In a replying affidavit the respondent said that £400 of the amount now in his own name had been by joint cheque paid over to him as part of the profits made up to the time of such payment, and this money was in terms of the agreement to go towards the repayment of the loans by Williamson and respondent. He had also under a clause of the contract determined the partnership on December 12 last. He admitted that he might be liable for a portion of the partnership debts then owing, and as these were said to be £200 at that time he had tendered one-third of that amount. He now made an offer to pay a sum of £500 to his solicitors to abide the result of any action which might be brought to decide the rights of the parties. He denied that there was any obligation on his part to provide for the return passages of the artistes to America.

Sir John Buchanan suggested that an official receiver should be appointed who would ascertain the position and liabilities of the parties.

Mr. Searle said that would be the best plan to adopt.

Sir Henry Juta submitted that the point in dispute was in regard to the obligations under the agreement between the parties, and that would be a matter for a court of law to decide and not for an official receiver.

After hearing counsel on the facts, the Court ordered the respondent to pay over the £562 17s. 5d. to the credit of a partnership account in the Standard Bank, payments from this fund, pending a further order of the Court, to be made only on cheques signed by the respondent and the applicants, or such persons as they might appoint. No order was made as to the payment from the fund of the money for the return passages of the artistes to America.

Buchanan, J.: This application is for an order upon the respondent to pay a certain amount of money now in his hands, and which is alleged to belong to a partnership which existed between the applicants and the respondent, into the joint credit of the applicants and the respondent in a bank in Cape Town. The sum of money now in the hands of the respondent is, according to the affidavit, £562 17s. 5d. The applicants in this case are theatrical managers, who started a company of artistes called the World's Entertainers. These artistes they brought from America to Australia. There the applicants entered into a contract with one Williamson, the outcome of which is the agreement in writing with the respondent Ashton, which has been annexed to these proceedings. By this contract it was agreed between the parties that all moneys received on account of the business should be paid into the bank to the account of the partnership, and that all payments out of this account should be paid by cheque signed by one or other of the applicants and the respondent. The agreement goes on to say that the net profits are to be divided equally, but that before such division takes place there should be deducted from the profits certain advances which had been made by Williamson or his agent, Ashton, the respondent. The latter admits that during the existence of the contract he retained a sum of £400, which he says came out of the profits on account of the advances made, but the partnership was not dissolved until December 12, at which date it is now discovered that the business had been carried on at a loss instead of a profit. By the contract Ashton might withdraw at any time from the contract upon giving due notice, but although he withdraws from the partnership he still remains liable for any losses which may

have been incurred during the existence of the partnership. The contracts with the artistes of the company were made between the applicants and the artistes themselves, but Ashton, the respondent, by his agreement was to take the benefit of those contracts. For the present he may not be answerable to the artistes directly, but certainly he will be answerable to the partnership as such for any liabilities incurred under these contracts. Part of the liability to the artistes was that they were to receive a certain weekly salary, and that they should have their passage paid back to America. At the time of the dissolution of the partnership the artistes had not been paid all their salaries, and a certain portion of the passage money had not been provided for. It may be a question to what extent the respondent is liable for the passage moneys. That cannot be settled with the information now before us, but at the time of the dissolution of the partnership Ashton himself admits there were liabilities due by the partnership, and Ashton has said he is willing to pay one-third of £200 towards these liabilities. Whether that is sufficient or not cannot be now determined, but the respondent has in hand this £562 17s. 5d., £400 of which he says was taken out of the profits to repay advances while the balance was moneys received by him at different places. Now the whole of this £562 17s. 5d. is part of the partnership takings, and until the matters in dispute are settled I think it ought to be considered as still part of the partnership property, and, therefore, under the conditions of the contract, it ought to be in

the bank to the credit of the partnership in the joint names of the applicants and the respondent. I have already suggested that as the partnership is now at an end a receiver should be appointed to wind up the partnership, and determine what loss has actually been incurred, and what portion each is liable for, but the parties did not seem to fall in with that suggestion. In the meantime, therefore, without in any way prejudging the rights any of the parties may have to this money, I think that under the contract it ought to be paid into the bank to the credit of the partnership. An order will therefore be made upon the respondent to pay this money into the Standard Bank to the credit of the partnership. Payments from this amount shall, pending the further order of the Court, be made only on cheques signed by the respondent and the applicants, or such persons as they may appoint. As the question cannot now be finally settled, the question of costs will have to stand over unless the parties come to some agreement. As to the further application that the Court should order that out of this money the return passages of the artistes should be paid that the Court is unable to order. That matter will, therefore, have to stand over unless the parties can come to some agreement between themselves. It seems to me that the speediest way would be to have an accountant to go into the accounts or that a receiver should be appointed to wind up the partnership, rather than to have an action.

[Applicant's Attorneys, Van Zyl and Buissinné; Respondent's Attorneys, Fairbridge, Arderne and Lawton.]



APPENDIX.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chiam Josef and others (Plaintiffs Appellants) v. Maria Susanna Mulder and others (Defendants Respondents), from the Supreme Court of the Cape of Good Hope; delivered the 10th February, 1903.

Present at the Hearing:

LORD MACNAGHTEN.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[Delivered by Sir John Bonser.]

This is an appeal from a judgment of the Supreme Court of the Cape of Good Hope dismissing the plaintiffs' action.

The only question involved arises on the construction of a document in the Dutch language. The facts are not in dispute, and are as follows: On the 24th of September, 1881, J. J. Mulder and his wife (who were married in community) executed the document above referred to, of which the following is the translation annexed to the plaintiffs' declaration:

"On the 24th September, 1881, we, the undersigned, declare to have bequeathed to our son Willem Gerhardus Mulder one-sixth share in lot No. 53 of the farm Armord. . . . We bequeath the said share for the sum of £300 sterling with interest at 6 per cent. per annum, but after the death of the first dying of us the interest shall be decreased to 3 per cent. The said ground shall never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs. This bequest shall be attached to the deed of transfer."

The Acting Chief Justice states in his judgment that the penultimate clause might be more correctly translated: "The said ground shall never be sold or disposed of to a stranger, but shall con-

tinue to remain among the heirs," but, as he observes, the difference between the translations is not very material. Although the document uses words appropriate to a will, it seems to have been always treated as a contract for sale. In March, 1882, J. J. Mulder and his son Willem G. Mulder made the declaration required by law to be made by purchasers and sellers respectively and paid the transfer duty, and a portion of land representing one-sixth of the farm was demarcated and taken possession of by Willem G. Mulder. J. J. Mulder died on the 2nd of June, 1890, and in the following month his testamentary executors executed a transfer deed conveying the land to Willem G. Mulder, and containing a recital that J. J. Mulder had sold the land to the transferee in his lifetime and an acknowledgment that the estate had received the purchase money. A contemporaneous arrangement of the same nature was made by J. J. Mulder with each of his other three sons by which like portions of the farm were made over to them respectively. What the object of these arrangements was does not clearly appear. They may have been made with a view of avoiding payment of legacy duty; but, whatever the object, it is clear that the transaction was in the nature of a family arrangement for value, and not a gift nor an ordinary case of sale and purchase. It seems to have been intended that the sons should have immediate possession of their shares, subject to annual payments to be made by them to their parents, but that they should not get a title until the death of their surviving parent.

Willem G. Mulder executed a mortgage bond, dated the 11th of August, 1894, to one Richard Gavin, to secure £500 and interest, and again on 15th of August, 1896, to one Anna Catharina Hester Mulder, to secure £100 and interest; and, thirdly, on the 26th of April, 1897, to the defendant James Alexander Foster, to secure £305 and interest. It is admitted that the mortgagees took their securities with notice of the document of the 24th of September, 1881.

Willem G. Mulder died on the 8th of July, 1899, leaving him surviving seven

children, one of whom, Anna Maria, is the wife of the plaintiff Olivier, and having by his will disposed of his immovable property in favour of his wife and children. Since his death, two of his sons, Johannes Jacobus and Mattheus, have become insolvent, and their interests (if any) in the property described in the document of the 24th of September, 1881, have been purchased in the insolvency proceedings by the plaintiff Chiam Josef, subject to a mortgage created by Mattheus before his insolvency in favour of the plaintiffs, M. Josef and Co.

In this state of things, the present action was instituted. The plaintiffs Chiam Josef and M. Josef and Co. represent between them the interests of the two insolvent sons of Willem G. Mulder, and the plaintiff Olivier represents his wife, one of Willem G. Mulder's children. The defendants are the testamentary executrix of Willem G. Mulder, and the persons in whom the three mortgages created by Willem G. Mulder in his lifetime are now vested.

The action was framed on the theory that the heirs of Willem G. Mulder took vested interests in the property, subject to a life interest in Willem G. Mulder, and the plaintiffs accordingly claimed a declaration that the plaintiff Chiam Josef was entitled to two-sevenths as the purchaser of the interests of the two insolvent sons, and the plaintiff Olivier to another one-seventh in right of his wife. They also asked for an order declaring that the mortgages were null and void, and a direction for their cancellation. It is obvious that the latter part of the claim could not be supported, for the utmost the plaintiffs could possibly be entitled to in any event would be to have the shares claimed by them transferred to them free from and unencumbered by the mortgages.

Their lordships are of opinion that the effect of the document of the 24th of September, 1881, followed by the transfer deed of 1890, was to vest the property in Willem G. Mulder, subject to a prohibition against its alienation either by act *inter vivos* or by will to any person not a member of his family, and that, in the absence of such alienation, no person had any cause of action or any right to complain. The prohibition created what is termed a *fidei-commissum conditionale*, that is to say, a *fidei-*

commisum conditioned to come into existence on a breach of the prohibition (Sande, "De prohibita rerum alienatione," iii., 4, 11). The question whether or not the prohibition was a perpetual one was not discussed, and cannot be decided in the present proceedings. It was not suggested that Willem G. Mulder's will was a contravention of the prohibition, but counsel for the appellants contended that the mortgages made by Willem G. Mulder were alienations and breaches of the prohibition, and gave an immediate right of action to his nearest heirs, which would support the present action as far, at all events, as regards the plaintiff Olivier. They relied on certain passages in the treatise just cited (iii., 4, sections 8 and 11), which state in effect that if the person who is prohibited from alienation alienates in breach of the prohibition, the *dominium* of the property so alienated passes forthwith out of him into the person or persons in whose favour the prohibition was imposed, who can sue at once to vindicate the property without waiting for his death. Although no doubt Sande considers that a mortgage, as being an inchoate and potential alienation, cannot validly be made by a person prohibited from alienation (*op. cit.* iii. 3, 18), yet it does not follow that a mortgage (which is a mere charge not passing the *dominium*) is a breach of the prohibition of the same nature and entailing the same consequences as an Act by which the *dominium* passes, *e.g.*, a sale, donation or testamentary bequest. Their lordships have not been referred to any express authority for such a proposition, and they are not inclined so to hold in the absence of such authority. Indeed, it would appear that if the person prohibited from alienation sells the property with an option of re-purchase which he afterwards exercises, that is not a breach of the prohibition, though it is otherwise where the property is sold absolutely, even though he subsequently re-purchase it (Sande, *op. cit.* iii., 4, 9). The charge imposed by a mortgage can only be enforced by a judicial sale, and until such a sale has been effected the property charged cannot be said to have been "sold or disposed of to a stranger." In the present case no attempt has been made to enforce the mortgages against the property, and such an attempt may never be made, for it may be that the

mortgages have already been or may hereafter be satisfied out of the assets of the mortgagor.

For these reasons their lordships are of opinion that the action was rightly dismissed and will humbly advise His Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

It was suggested that Mrs. Olivier at all events was entitled to a share under Willem G. Mulder's will; but this action was not brought to assert any such claim.

Their lordships, however, think it right to add that the dismissal of the action is to be without prejudice to the plaintiffs' rights whatever they may be under the will of Willem G. Mulder.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of the Attorney-General for the Colony of the Cape of Good Hope v. Van Reenen, and of the Attorney-General for the Colony of the Cape of Good Hope v. Smit, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 9th December, 1903.

Present:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD LINDLEY.
SIR ARTHUR WILSON.

[Delivered by the Lord Chancellor.]

These are appeals from two orders of the Supreme Court of the Colony of the Cape of Good Hope, by which two convictions made under Martial Law were ordered to be quashed, and the sentences set aside.

Their Lordships are of opinion that an error has been committed. The two convictions in question appear to have taken place before a Mr. Broers, who, besides being the Deputy Administrator of Martial Law, was also a Resident

Magistrate. Now what has been called over and over again in the course of these proceedings a "record," was nothing but a written memorandum of what the charge against the respondents was, the charge being in each case, on the face of it, one of contravening certain regulations of martial law. The learned Chief Justice appears to have been under the apprehension that if the memorandum were allowed to stand in the form in which it was drawn up—the printed forms of the Magistrate's Court having been used, the words "ordinary jurisdiction," and "In the Court of Resident Magistrate" were by mistake left standing in the memorandum—the persons who purported to be so convicted might afterwards be subject to some disability or disrepute, or some penal consequences by reason of the form in which the convictions were drawn up; and he appears to have been under the idea that, because this memorandum was a record, and because those irregular words were not deleted from it, some evil consequences might arise to the persons charged. It is only fair to the Chief Justice to say that he pointed out, in very distinct terms, that the Supreme Court had no jurisdiction to deal with, or to affect, the judgments or Martial Law Courts. He says so in terms, both in his original judgment, and in explanation he has subsequently given, and of course the Supreme Court had no such jurisdiction. But it is unfortunate that he thought proper, notwithstanding his own judgment, to say that the Court granted the application, quashed the convictions, and set aside the sentences, which he had no jurisdiction whatever to do. It is difficult, in view of the very clear statement he had made, to understand how the learned Chief Justice came to the conclusion that the Supreme Court had jurisdiction to do this. The truth is that the whole matter rests upon the initial mistake of calling the memorandum a "Record," and treating it as if it were a record of a Court of Justice. There would be no necessity, certainly in point of law, and probably not in practice, to have a written memorandum of each sentence, or judgment, of the Martial Law Court; certainly no such principle applies as is known to the courts of ordinary criminal jurisdiction in respect of records, the record being itself the official and operative Order

which the judgment demands. Their Lordships are of opinion that the convictions were made by Mr. Broers in his capacity of Deputy Administrator of Martial Law, and not in his capacity of Resident Magistrate at all, and they will therefore humbly advise his Majesty to reverse the orders quashing such convictions.

Their Lordships have heard these appeals *ex parte*, but the Attorney-General not asking for his costs, there will be no order against the respondents.

NOTE.

Explanation of Judgment in

VAN REENEN V. REX.

De Villiers, C.J.: In view of the recent decision of the Judicial Committee in this case it is right. But I should take an early opportunity of correcting some misapprehensions regarding the action of this Court in the matter. Unfortunately the respondent was not represented by Counsel in the appeal, and consequently their Lordships seem not to have been informed of the actual nature of the proceedings with which this Court had to deal. This is clear from the remark of the learned Lord Chancellor, in delivering the judgment of the Judicial Committee, that what has been called a "record" was nothing but a written memorandum of what the charge against the respondents was. Further on His Lordship defined a "record" as being "the official and operative order which the judgment demands." The papers laid before this Court were the usual documents sent to the reviewing Judge for his confirmation, or otherwise of the proceedings below. The first of these papers was the ordinary official record stating the Court, the name of the Magistrate, the charge, judgment and sentence, and the particular jurisdiction under which the trial took place. That document contained the official and operative order of

the Magistrate, and without it the papers for review would have been incomplete. It stated that the trial took place under the Magistrate's ordinary jurisdiction, and the numbering of the case shewed what the intention was. It is true that the heading "Martial Law," and the words "Deputy Administrator of Martial Law," were also inserted, but these words were clearly so inserted in addition to and not in substitution for the Magistrate's Court. The Lord Chancellor further made the following remarks: "It is only fair to the Chief Justice to say that he pointed out, in very distinct terms, that the Supreme Court had no jurisdiction to deal with, or to affect, the judgments of the Martial Law Courts.... But it is unfortunate that he thought proper, notwithstanding his own judgment, to say that the Court granted the application." It must have escaped their Lordships notice that the application which was granted was to set aside the proceedings of the Magistrate's Court, and not of a Martial Law Court. This Court made it perfectly clear that it set aside the proceedings only in so far as they purported to be those of a Magistrate's Court. The difference in point of view between the two Courts consists in this. The Supreme Court, finding from the records laid before it, that the respondent had been convicted of the contravention of Martial Law Regulations by a Magistrate of this Colony, presiding in a Court described as a Court of Resident Magistrate as well as a Martial Law Court, quashed the proceedings so far as they purported to be those of the Magistrate's Court. The Privy Council, on the other hand, regarding the documents, so far as they represent the trial to have taken place before the Magistrate, as waste paper, and practically non-existent, deemed it unnecessary to interfere with the proceedings at all. Fortunately, so far as the respondent is concerned, the practical effect of the two points of view is exactly the same, for, after the remarks of the learned Lord Chancellor, it will be impossible hereafter to charge the respondent with having been convicted by a Court of this Colony.

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„ 48 of 1882, <i>see</i> I.D.B. Act ...	543
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„ 9 of 1883, <i>see</i> Cape Town Municipality ...	958
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„ 13 of 1886, <i>see</i> Resident Magistrate ...	396
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„ 6 of 1900, <i>see</i> Warrant ...	259
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<i>Actio redhibitoria</i> — <i>Actio quanti minoris</i> , <i>see</i> Sale and Purchase	628
<i>Actio quanti minoris</i> , <i>see</i> Sale and Purchase ...	701
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Acts of Servant, <i>see</i> Grass Fire ...	166
Acquiescence, <i>see</i> Liquidator ...	1026
Admission, <i>see</i> Attorney	262-431
Adultery.	

The fact that a married man has been seen coming out of a house of ill-fame is not per se proof of adultery.

White v. White ...

Advocate—Admission—Certificate.

An applicant for admission as an advocate of the Supreme Court stated on affidavit that he had been duly admitted as a barrister of the Middle Temple. He produced no certificate of admission, but a member of the Supreme Court Bar deposed on affidavit to having known him as a student of the Middle Temple and to having seen his name in the list of barristers in the English Law List of the current year.

Held, that applicant could not be admitted without production of his certificate.

Re parte Hartogh ... 721

Admission, *see* Advocate ... 721

Agency, *see* Sale and Purchase ... 633

Agency, *see* Landlord and tenant 512

Agent, *see* Right of pre-emption 424

Agent—Mandatory—Negligence—Liability of bailee to insure against fire.

A declaration alleged that the plaintiff delivered certain books

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<i>to the defendants for sale, that they failed to insure the same, that a fire occurred which destroyed the books, and that the plaintiff was entitled to recover the value from the defendants. Held, on exceptions, that the declaration disclosed no cause of action. There is no rule of law imposing on a bailer the duty of insuring goods intrusted to his care or custody.</i>	
Viviers v. Juta and Co. ...	381
Agent—Interdict.	
<i>D. & Sons had been appointed agents to a certain cycle company for all parts of South Africa east of longitude 22° and south of latitude 28°. At a place within these limits respondents opened a shop for the sale of the goods of the aforesaid Company, and represented themselves as the Company's agents. Applicant now sought to have the said respondents interdicted from making these representations, and moreover asked that they should be ordered to furnish an account of sales of the goods aforesaid.</i>	
<i>Held, that as applicants would be prejudiced by respondents continuing to hold themselves out as agents for the said firm—as applicants were such agents and respondents were not—an interdict must be granted as prayed, with costs.</i>	
Davis & Sons v. Patterson and Others...	252
Agent, see Sale ...	270
Alienation — Prohibition of — School Property.	
<i>Where certain parties interested in certain property which had been left for the purpose of a mission school, subject to a</i>	

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<i>prohibition against alienation, asked for leave to sell or mortgage the said property and to devote the proceeds towards the acquisition of other property to be applied to the same uses: the Court granted a rule calling upon all concerned to show cause why the said application should not be granted.</i>	
<i>Ex parte Trustees of Boys' Mission School, Simon's Town ...</i>	436
Alienation of Assets, see Insolvent Ordinance ...	609
Allowance to natural guardian, see Minor ...	275
Alluvion, see Sea Shore ...	96
Alteration of premises, see Landlord and tenant ...	498
Alteration of Record, see Martial Law Regulations ...	710
Amendment of Summons, see Death of party to action ...	835
Antenuptial Contract—Registration.	
<i>The Court granted an order authorizing the Registrar of Deeds to register a certain antenuptial contract into which the spouses had entered previous to their marriage, but which, owing to the default of the notary before whom they had contracted, had not been presented for registration within the time prescribed by Ord. 27 of 1846, Sec. 1 and Sec. 7 of Act 21 of 1875.</i>	
<i>Ex parte Conolly and Another ...</i>	11
Antenuptial Contract—Trustees.	
<i>It being clear that the object of an ante nuptial contract in appointing trustees for the administration of the wife's property was to protect the wife from the husband's influence, and not to debar her from administering</i>	

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<i>her own property after his death, the Court, on her application after her husband's death, allowed her to administer the property free from the trustee's control.</i>	
<i>Nel v. Oliver and Another ...</i>	16
<i>Ante-nuptial Contract, see Transfer of Property ...</i>	972
<i>Antenuptial Contract—Registration.</i>	
<i>Ex parte Barry ...</i>	519
<i>Antenuptial Contract—Trustee.</i>	
<i>Where a man by antenuptial contract settled certain property upon his future wife in trust for her support and for that of any issue of the marriage, and children of the said marriage having since been born, the consorts asked for leave to sell the property and re-invest the proceeds. The Court granted an order authorizing the sale and transfer to purchasers, but directed that the proceeds should be paid over and bonds passed to certain trustees to be appointed by the consorts to be held upon the trusts mentioned in the antenuptial contract.</i>	
<i>Ex parte Waite and another</i>	277
<i>Appeal—Costs—Resident Magistrate's Court—Judicial discretion.</i>	
<i>In an action in a Transkeian Magistrate's Court the plaintiff claimed damages for injury done by a carrier to his cart and harness, and the defendant tendered £7. The Magistrate awarded £23 as damages, but, although he found no fault with the plaintiff's claim as being excessive or with his conduct as being in other respects improper, he ordered that each party should pay his own costs.</i>	

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<i>Held, that this was not a judicial exercise of the magistrate's discretion as to costs.</i>	
<i>McDonald v. Stangu ...</i>	794
<i>Appeal—Credibility—Evidence.</i>	
<i>The decision of a magistrate upon a question of credibility reversed, the Court being of opinion that the discrepancies upon which the magistrate relied were unimportant, that there was no motive for perjury, that there was no justification for the magistrate's holding that a certain document had been falsified, and that the absence of any denial by the defendant of the statements made by the plaintiff's witnesses ought to have induced the magistrate to attach greater weight to those statements.</i>	
<i>Fourie v. Smit ...</i>	613
<i>Appeal—Delay in prosecuting appeal—Security for costs.</i>	
<i>In allowing an appellant to prosecute his appeal from the High Court of Rhodesia, notwithstanding his default in proceeding with the appeal in the proper time, the Supreme Court may make it a condition that he shall give security for costs.</i>	
<i>Maggs v. Tati Concessions ...</i>	615
<i>Appeal—Criminal conviction—Special entry—Question of law reserved—Attorney-General—Act 35 of 1896.</i>	
<i>Where no special entry has been made or question of law reserved at a criminal trial, in terms of the 32nd or 34th sec. of Act 35 of 1896, the Supreme Court will not allow such an entry to be thereafter made, or such a question of law reserved for the purpose of an appeal</i>	

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<i>against a conviction except with the consent of the Attorney-General.</i>	
Rex v. Desmond	877
Appeal—Evidence—Criminal Case.	
<i>The evidence for the defence before a magistrate in a criminal case being found by the Supreme Court to preponderate in clearness, precision and probability over the evidence given for the prosecution, an appeal against the conviction was allowed.</i>	
Rex v. Jansen	906
Appeal — Point reserved — Indictment—Theft—Proof of place where crime was committed.	
<i>The appellant was indicted before the Victoria West Circuit Court for theft of cattle at E., in the district of K., and was convicted of receiving such stolen cattle in the district of G., knowing the same to have been stolen. E. and K. were both within the jurisdiction of the Court.</i>	
<i>Held, in the absence of any proof of prejudice to the prisoner, that the verdict and sentence should not be disturbed.</i>	
Rex v. Van Dyk	1015
Appeal to Chief Magistrate, see Trespass to moveable property	533
Appeal to Privy Council—Interlocutory judgment.	
<i>Where the High Court of Griqualand West had granted a perpetual interdict against the Town Council in favour of the company, which had only asked for a temporary interdict, and the Supreme Court had on appeal reversed the decision of the High Court,</i>	
<i>Held, that as this was not a final judgment leave could not</i>	

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<i>be granted to appeal to the Privy Council.</i>	
Kimberley Waterworks Co., Ltd., v. Kimberley Town Council	205
Appraisement, see Arbitration ...	815
Approval, see Architect's plans ...	478
Approval of lessor, see Lease ...	520
Arbitration—Award—Appraisement — Rule of Court — Excess of authority.	
<i>A deed of submission, the effect of which was to refer the question of the value of the estate of a deceased person to the decision of certain appraisers as arbitrators, having been executed between the executor and heir of the estate, the arbitrators made an award by which a certain sum was found to be due by the executor of the heir.</i>	
<i>Held, that the arbitrators had exceeded their authority in making an award which involved an inquiry not contemplated or provided for by the deed, and that the heir was not entitled to claim that such award should be made a rule of Court.</i>	
Williams v. Estate of Williams	815
Architect's Plans — Approval — Scope of employment—Quantum meruit.	
<i>The defendant employed the plaintiffs as architects to prepare plans for the extension and alteration of the Cape Town Railway Station, undertaking to pay 2½ p.c. on the estimated cost for preparing the necessary drawings, and 2½ p.c. for supervising the construction. Plaintiffs prepared certain plans in accordance with</i>	

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instructions, when they were directed to stop and to prepare plans for a different scheme. After working for some months on the second set of plans they were again stopped, and set to work on plans for a much enlarged scheme. After working for some time they were for the third time stopped, and given directions to prepare plans for a fourth alternative scheme. These last plans were approved of by the defendants, but the whole project was then stopped. The plaintiffs claimed payment on a quantum meruit for all their work, but the defendant tendered only the amount claimed for the last set of plans. Held, that plaintiff's employment did not fall within the rule laid down in <i>De Witt v. The Cape Canning Co.</i> [11 S.C. Rep., p. 116]; and that under the special circumstances they were entitled to be paid a reasonable remuneration for their work and labour on the three previous sets of plans. <i>Ackermann and Adamson v. Colonial Government</i> ... 478	suggestion of his principal, his having acted in the said capacity was no bar to his admission as an attorney of the Supreme Court.
Arrest—8th Rule of Court—Security.	<i>Ex parte Hugo</i> ... 528
Aliwe v. Haddie ... 26	Articles—Suspension—Attorney.
Articled Clerk—Trusteeship.	Where two clerks had been articled to an attorney, who was thereafter suspended for three months, the Court held that the said three months would not constitute a break in their service, but they must serve a similar period after the completion of their articles.
II. (an articled clerk) had acted as a trustee in a certain insolvent estate, and now applied to be admitted as an attorney of the Supreme Court. Held, that although the practice of articled clerks being employed in such capacity was to be strongly reprobated, seeing that the applicant had derived no pecuniary profit from his trusteeship, and that he had assumed the said office on the	<i>Ex parte Rousseau and Naude</i> 791
	Articles, <i>see</i> Attorney ... 678, 1048
	Assignment, <i>see</i> Life Policy ... 850
	Assignment of Lease, <i>see</i> Landlord and Tenant ... 656
	Assignment of premises, <i>see</i> Landlord and tenant ... 291
	Assistance of Husband, <i>see</i> Foreign Marriage ... 66
	Attachment, <i>see</i> Possession ... 586
	Attachment of Person, <i>see</i> Contempt of Court ... 789
	Attachment, <i>see</i> Ship ... 94
	Attachment—Bills of Lading.
	The respondents, intending to institute an action in this Colony against the shippers of butter in Australia, obtained a judge's order for the attachment of the butter <i>ad fundandam jurisdictionem</i> . The Bank, as the holder of the bills of lading made to the order of and witnessed by the shippers, applied for an order to discharge the attachment with the object of reshipping the butter to Australia. The Court being satisfied that the butter was deteriorating in quality, and would realise less in Australia than here, refused to discharge

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<i>the attachment, but in order to protect the rights of all parties concerned authorised the Sheriff to sell the butter through the agency of a broker, and to pay the proceeds to the Registrar of the Court, giving leave to the Bank to intervene as defendant in the action brought by the respondents against the shippers.</i>	
<i>Semble, that if the Bank advanced money, as it appears to have done, on the security of the bills of lading, the shippers retained such an interest in the butter as was properly attachable ad fundandam jurisdictionem.</i>	
Standard Bank v. Caster ; Standard Bank v. McKenzie	525
Attachment, <i>see</i> Possession	... 493
Attachment of property <i>ad fundandam jurisdictionem</i> , <i>see</i> Rebel ...	... 435
Attempt to defeat the ends of justice.	
<i>To attempt by bribes to induce a Crown witness to sign a document falsely stating that a criminal charge made by him was made while he was under the influence of liquor, is an attempt to defeat the ends of justice.</i>	
Rex v. Moss and Another	... 810
Attorney, <i>see</i> Articles	... 791
Attorney — Articles — Service in Scotland.	
<i>F. had served five years under Articles of Clerkship to a Solicitor in Scotland. He had also served other three years in that country, not under Articles, and had there passed two examinations in general knowledge, as prescribed by the Law Agents' (Scotland)</i>	

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<i>Act of 1873. Thereafter he came to this Colony and served with an Attorney of the Supreme Court (but not under Articles) during upwards of three years. He now applied for admission as an Attorney of the Supreme Court. The Court refused the application, but intimated that the applicant would be admitted when he should have served Articles of Clerkship to an Attorney of the Court for the period of one year.</i>	
<i>Ex parte Farquharson</i>	... 678
Attorney—Admission.	
<i>Where an English attorney produced a receipt for payment of his subscription to the funds of the English Law Society. Held, that such receipt could not be accepted in lieu of a certificate for the purpose of admission as an attorney of the Supreme Court.</i>	
<i>Ex parte Greening</i>	... 262
Attorney—Admission.	
<i>Where an Attorney of the High Court, who had been enrolled in 1895, applied to be admitted as an Attorney of the Supreme Court, the Court granted the order prayed for with costs against the Law Society, which had opposed.</i>	
<i>Ex parte McLeod</i>	... 431
Attorney — Admission — L.L.B. Degree—Articles.	
<i>Ex Parte Baxter</i>	... 1048
Attorney—Notary and Conveyancer.	
<i>Where a certain attorney, who had only recently arrived in this Colony, used notepaper announcing that he was also a notary and conveyancer, being under the impression that he did not require to be specially</i>	

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<i>admitted in the two latter capacities, and had, on the matter being brought to his notice, erased the words "notary and conveyancer" from the said paper: the Court refused to grant an order for his suspension as an attorney, but, on the ground that he had shown great negligence, refused to grant him costs.</i>	
Incorporated Law Society v. An Attorney ...	825
Attorney of Supreme Court—Misconduct.	
<i>An attorney of the Supreme Court, being the creditor of a person whose estate had been sequestrated as insolvent, wrote to the insolvent asking for payment of his debt, and threatening the insolvent that if the debt were not paid he would be prosecuted, and that he (the attorney) would spare no trouble to have the insolvent severely punished. The attorney's clerk was subsequently appointed trustee of the insolvent estate.</i>	
<i>Held, that the writing of the letter was such misconduct as to justify the Court in suspending the attorney from practice for a period.</i>	
Law Society v. Michau, D. J.	598
Attorney — Suspension — Misconduct	
<i>The Court suspended indefinitely an Attorney and Notary who had been convicted of high treason, although the Court which convicted him had passed only a nominal sentence. Leave was, however, granted to the respondent to apply at some future time to be reinstated.</i>	
Law Society v. Scholtz ...	809

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Attorney — High Treason — Suspension.	
<i>An attorney who had been convicted of high treason was suspended from practice pending the further order of the Court.</i>	
The Law Society v. Badenhorst ...	124
Auctioneer, <i>see</i> Sale to Executor	727
Award, <i>see</i> Arbitration ...	815
Award, <i>see</i> Salvage ...	191
Bail—Police supervision.	
<i>Where an application was made to the Court for the admission to bail of (amongst others) two minors charged with murder and high treason, and the Crown consented on the condition, inter alia, that the said minors should be placed under police supervision. The Court refused to make any such order, holding that it had no power to do so.</i>	
Ex parte Huysamen and Others ...	714
Bail bond — Security — Sheriff — 15th Rule of Court.	
<i>At the instance of the applicant a certain S. had been arrested under the 8th Rule of Court, and thereupon had given a bail bond to the Sheriff the conditions of which were inter alia "that he should appear to answer to plaintiff's summons, and to perform the judgment of the Court, or render himself to prison in execution thereof." S. had also deposited £80 with the Sheriff as additional security. He had not, however, fulfilled the conditions of the bond. Applicant now claimed from the Sheriff (1) the assignment of the bail bond, (2) the said £80—in terms of Rule of</i>	

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<i>Court 15. The Sheriff was willing to assign the bond, but refused to pay over the money without an order of Court.</i>	
<i>Held, that by Rule 15 the Sheriff was bound at plaintiff's request—not only to assign the bond—but to pay over the money deposited with him by S. As, however, only provisional sentence had been granted against S., the Court ordered the applicant to furnish security de restituendo.</i>	
<i>Fletcher and another v. Shenker</i>	879
Bail bond—Provisional sentence.	
<i>The Court refused to grant provisional sentence on a certain bail bond, on the ground that should the bailee surrender himself to prison the bailor would be relieved from liability.</i>	
<i>Machanik v. Simmons ...</i>	937
Bailee — Lessee of movables — Negligence—Burden of proof.	
<i>The defendant having hired three oxen from the plaintiff for the purpose of taking produce to market, used them for two days and then sent them adrift. The plaintiff found one in the "veld" bleeding at the nose, with the head and eyes swollen, and he did what he could for the animal, which soon after died. No evidence was given as to the cause of death. The defence was that the animal died from "spons-ziekte," but the Court below found that this was not the case. It was proved that the defendant was in liquor during the time the ox was in his possession.</i>	
<i>Held, reversing the Magistrate's decision, that, under the circumstances, the burthen of</i>	

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<i>showing that the ox died from natural causes lay upon the defendant, and that in the absence of any explanation as to the cause of the animal's condition the plaintiff was entitled to damages.</i>	
<i>Mposelo v. Banks</i>	643
Bailment — Watchmaker — Negligence.	
<i>A watchmaker to whom a watch has been entrusted for repairs is bound to exercise ordinary care and diligence in the custody of the watch.</i>	
<i>Maberley v. Seale</i>	987
<i>Barman, see Native</i>	619
<i>Barman, see Liquor Law ...</i>	238
Beacons—Re survey—Divisional Council.	
<i>Kock v. Cape Divisional Council</i>	812
<i>Beneficial Occupation, see Rent</i>	24
<i>Bequest, see Collation</i>	376
Bills of Exchange—Acceptance.	
<i>Prince, Vincent and Co. v. The Grand Junction Railways... ..</i>	288
<i>Bills of Lading, see Attachment</i>	525
<i>" " " see Possession</i>	493
<i>Bills of Lading, see Possession ...</i>	586
Breach of Contract—Damages.	
<i>Sims v. Argus Co.</i>	9—179
Breach of the Peace see Insulting behaviour	907
Broker — Commission — Sale — Condition.	
<i>The defendant employed the plaintiff as broker for the sale of certain hotel premises at a commission of one per cent. The plaintiff effected a sale for £6,000. The only condition of such sale being that the plaintiff should obtain a loan of £5,000 on security of the</i>	

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<i>premises for the purchaser. The plaintiff in endeavouring to obtain such loan found that it would be necessary to pay one per cent. on the amount of such loan, and proposed to the defendant that he should pay it. This the defendant refused to do, but he did not repudiate the sale with the condition attached. The plaintiff then informed the defendant that the matter had been satisfactorily settled, and the defendant said he would see the plaintiff in a few days, but thereafter refused to abide by the sale. The Court having found that a binding sale had been effected through the instrumentality of the plaintiff.</i>		<i>amount of the deposit, did nothing to perform his part of the condition.</i>	
<i>Held, that he was entitled to claim the commission agreed upon.</i>		<i>Held, that the broker was not entitled to claim any remuneration.</i>	
<i>Forde v. Ross</i>	843	<i>Joseph v. Halkett</i>	501
Broker's commission—Conditional Sale — Inchoate contract — Earnest money—False representation.		Brokerage—Viewing Order.	
<i>A broker employed to sell the goodwill of a business obtained a purchaser, the broker's note stating that part of the price was to be paid in cash and the balance in bills, but with the following condition: "deposit of £500 to be paid at once by the purchaser to the broker, to be held in trust by him for both parties against transfer, but to be forfeited by the purchaser should he fail to complete his purchase." The seller was to pay brokerage. The purchaser failed to complete the purchase and did not pay the deposit to the broker, who, beyond asking the purchaser on two occasions for the</i>		<i>Wolters v. Snider</i>	911
		Brokerage.	
		<i>Where a purchaser was introduced by a broker who arranged terms of sale.</i>	
		<i>Held, that the fact of the vendor having himself completed the transaction and secured better terms for himself than those arranged for by the broker did not deprive the broker of his commission.</i>	
		<i>Semble: "If a sale is effected through a broker, he is entitled to his commission, however small his trouble in effecting the sale has been; but if it is not effected through his agency he is not entitled to any commission, however much pains he may have taken to bring the sale about."</i>	
		[<i>Per De Villiers, C. J., in Machonochie's Executrix v. Bidwell-Edwards</i> (2 Sheil. 155).]	
		<i>Fowler v. John</i>	175
		Brothel—Common Law—Nuisance.	
		<i>Appellants had been severally charged in the Magistrate's Court with keeping brothels to the damage and common nuisance of persons residing in their respective neighbourhoods and of those passing thereby. Each of the accused had been sentenced to a term of imprisonment with hard labour.</i>	
		<i>Held (on appeal), that as the keeping of a brothel in such</i>	

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<i>wise as to be a public nuisance is an offence at Common Law, and as the evidence in each of the above cases disclosed that all and several of the houses in question had been so kept, the appeals must be dismissed.</i>	
<i>Rex. v. Cohen, Rex v. Meyer, Rex v. Ferist, Rex v. Lazarus</i>	230
<i>Building Line, see Municipal Regulations</i>	560
<i>Burning of Veld, see Negligence</i>	672
<i>Cancellation of Sale—Motion.</i>	
<i>The Court cancelled a certain sale on an unopposed motion.</i>	
<i>Scott v. Isaacs and Another</i>	791
<i>Cancellation of Sale, see Hotel premises</i>	685
<i>Cape Town Municipality—Election of Councillors — Procedure — Parliamentary elections — Act 9 of 1883, section 4—Act 26 of 1893, section 44—Disqualification of candidate — Notice to electors.</i>	
<i>The procedure for questioning the return of a member of the Town Council of Cape Town should be the same as far as possible as that provided by Act 9 of 1883 for questioning the return of a member of Parliament, and therefore the petition should be presented within forty-two days after the declaration of the result of the poll made in terms of the 44th section of Act 26 of 1893.</i>	
<i>A candidate who succeeds in setting aside the election of a successful candidate on the ground that such successful candidate had not the necessary qualification, cannot claim the seat as being first on the list of unsuccessful candidates unless before or at the time of the</i>	

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<i>election he had brought the disqualification clearly to the notice of the electors.</i>	
<i>Where a person who is disqualified on the ground of his being an unrehabilitated insolvent is elected as a member without any objection or notice of the disqualification to the electors and thereafter resigns, a fresh election may be held, and the person so elected will remain in office for the unexpired term of the person so resigning.</i>	
<i>Norden v. Town Council of Cape Town and Others ...</i>	958
<i>Certificate, see Advocate</i>	721
<i>Charitable Institution, see Donation</i>	29
<i>Charter party—Demurrage—Lay days.</i>	
<i>The owner of a vessel undertook by charter party that she would proceed to Cape Town and there discharge the cargo alongside any craft, store, wharf, pier, arsenal, steamer or depot slip, or elsewhere as ordered, where the vessel can always discharge afloat, and that the cargo would be discharged at a certain rate from the time of her being ready to unload. The day after her arrival in Table Bay the plaintiff, as master, gave notice to the defendant, as charterer, that he was ready to unload, and thereupon the defendant ordered the master to proceed to a suitable berth in the only dock in Cape Town. Owing to the crowded state of the shipping there was considerable delay in obtaining a berth.</i>	
<i>Held, in an action for demurrage that the charter party should be construed as if the Alfred Dock had been named</i>	

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<i>therein as the place of discharge, and that the lay days commenced on the day the vessel was berthed.</i>	
Ellefsen v. Stephan ...	457
Child, loss of, <i>see</i> Negligence ...	455
Chief Magistrate's Court — Review—Gross irregularity.	
<i>In a civil action heard in the Resident Magistrate's Court of Matatiele, after the case had been closed, the defendant applied for absolution from the instance, which was granted. On appeal to the Court of the Chief Magistrate of Griqualand East, he reversed the judgment, and gave judgment for the plaintiff on the ground that upon the plaintiff's evidence he was entitled to succeed.</i>	
<i>Held, that there was no gross irregularity in the proceedings of the Chief Magistrate to justify a review.</i>	
Faro v. Pakkies and Others...	555
Church body—Registered title—Seceding congregation — Ejectment.	
<i>Certain land was duly granted to the Chairman of the Home Missions Committee of the Dutch Reformed Church and registered in his name as such Chairman. On the land a church was built by the committee, and a congregation was established under the spiritual care of a missionary. During the absence of the missionary, who joined the recent rebellion, a majority of the congregation seceded from the Dutch Reformed Church and invited a Congregational minister to take charge of the congregation. The Home Missions Committee thereupon appointed another missionary, but the dissenting</i>	

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<i>majority refused to admit him or to give up possession of the premises.</i>	
<i>Held, that the chairman as the registered owner, was entitled to an order ejecting the seceders and their missionary from the premises.</i>	
Alheit v. Stewart and Others	961
Church Register of Baptisms.	
<i>Applicant had been erroneously entered in the register of S. George's Church as the child of A. and B. She now applied for an order calling upon the authorities of the aforesaid church to rectify this error.</i>	
<i>Held that as the authorities of the said church were not before the Court, and as the register preserved in the said church was a mere private document, the Court could not grant the order as prayed.</i>	
Ex parte Tyler (born Palm)	9
Civil Imprisonment—No Funds.	
<i>Where an applicant who had been civilly imprisoned in consequence of her default in making payment of such instalments of a judgment debt as she was bound by order of Court to make, deposed on oath that she was destitute of means: the Court ordered that the said applicant should be released on her undertaking not to leave the country and that execution of the decree of imprisonment be suspended until further order.</i>	
Naess v. Ward ...	20
Civil Imprisonment—Magistrate's Court—Judgment.	
<i>Where a defendant against whom a return of nulla bona had been made on a Magistrate's Court judgment had</i>	

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<i>subsequently removed into the jurisdiction of another magistrate, the Court granted a decree of civil imprisonment on the judgment aforesaid.</i>	
Sargent v. Mansfield ...	153
Civil Imprisonment — Tender — Variation of Order of Court.	
Brunn v. Tappe & Co. ...	517
Claim in reconvention—Unliquidated demand.	
<i>The plaintiff sued the defendant in a Magistrate's Court on a promissory note for £20, and the defendant claimed in reconvention for breach of warranty in respect of articles bought from the plaintiff.</i>	
<i>Held, on appeal, that the Magistrate was wrong in refusing to entertain the counter claim in an action on a liquid document.</i>	
Roberts v. Allen ...	890
Claim in reconvention, see Contract ...	346
Club — Companies' Act, 1892 — Unregistered company—Winding up.	
<i>A club formed only for social purposes cannot be wound up as an unregistered company under the 216th section of the Companies' Act, 1892, even though one of its regulations provides that the members shall be liable for debts incurred by the committee of the club.</i>	
Re The Cape Town Club ...	727
Codicil—Interpretation.	
<i>Where a certain codicil to a mutual will had been drawn up in ambiguous language, and the surviving testator had become unable owing to weakness of mind to explain its meaning: the Court refused to grant an order at the instance of certain</i>	

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<i>of the heirs declaring their rights under the said codicil.</i>	
Ex parte Vermaak and Others	730
Codicil, see Will ...	792
Collation—Will—Construction—Fidei-commissum—Bequest—Inheritance.	
<i>In the absence of a direction to the contrary in a will, legacies and prelegacies are not brought into collation.</i>	
<i>A testator by his will appointed all his children as his heirs, and by codicil gave prelegacies to several of his children, and burdened the inheritances of his sons, save and except the bequests of money, with a fidei-commissum. By a clause in the codicil he directed "that the sum of £1,000 already advanced by me to my son N. shall be brought into my estate and be deducted from his inheritance, and that the land F shall form part of his fidei-commissary inheritance, but that his present wife shall upon his death have the rent or occupation of the said property so long as she shall remain unmarried." On the death of the testator N. took possession of the land, but as expensive repairs became necessary which he was unable to pay for, the land was, with his consent, ordered by the Court to be sold for £1,040. The sum of £250 was awarded to him as his share of inheritance of the rest of the estate. After his death his wife claimed the right to the interest on the proceeds of the sale of the land for her life without deduction of the £1,000 advanced.</i>	
<i>Held, that this amount should be deducted from N.'s inherit-</i>	

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<i>ance, but that according to the true construction of the codicil, no deduction should be made from the proceeds of the farm specifically bequeathed.</i>	
<i>Meyer v. Estate Meyer</i> ...	376
Collision on road—Negligence—Presumption.	
<i>A horse, driven by defendant's servant, having bolted, run from behind into a bicycle which the plaintiff was riding and injured it.</i>	
<i>Held, on appeal, that there was prima facie proof of negligence, and that such proof not having been rebutted by satisfactory evidence that the horse bolted without negligence on the part of the groom, the Magistrate was justified in finding for the plaintiff notwithstanding that the horse was proved to be a quiet animal.</i>	
<i>Webb v. St. Leger</i> ...	375
Colonial produce—Railway charges.	
<i>Colonial Government v. Coaton and Louw</i> ...	753
Commission—Raising Money on Loan.	
<i>There is no fixed rule that an agent who obtains a loan on mortgage is entitled to a commission of two and a-half per cent. from his principal.</i>	
<i>The plaintiff, a commission agent, having been employed by the defendant to keep his books at a salary, obtained a loan for the defendant, at his request, of £6,000 on mortgage of landed property.</i>	
<i>Held, that one per cent. was a sufficient commission.</i>	
<i>Coley v. Clews</i> ...	331
<i>Commission, see Broker</i> ...	843
Community, Marriage in, see Foreign Marriage ...	66

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Company—Issue of Shares.	
<i>Where certain errors had been made in the numbering and description of the shares issued by a new company, the Court ordered that errors in the company's register should be corrected and the shares re-issued.</i>	
<i>Ex parte Stuttaford and Co., Ltd.</i>	875
Company unregistered, see Club	727
Companies' Act No. 25, 1892, Table A—Unstamped proxies.	
<i>A joint-stock company had adopted the regulations for management contained in Table A in the schedule to the Companies' Act, 1892. These regulations required seven days' notice at least to be given of general meetings. Regulation No. 94 allowed notice to be given by letter through the post, and regulation No. 96 provided that posted notices should be deemed to have been served at the time when the letter would be delivered in the ordinary course of business. At a general meeting of shareholders called after more than seven days' notice a resolution to wind up voluntarily was framed, which was confirmed at a subsequent meeting. Application was now made to set aside the resolution on the ground that shareholders in England had not received notice, but the Court refused to interfere.</i>	
<i>Unstamped proxies tendered after the proper time had been rejected at the meeting.</i>	
<i>Held, that the applicants could not compel the acceptance of such incomplete proxies.</i>	
<i>Stockham and Others v. Colonial Building Corporation</i>	740

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Company's Agent — Service of Summons.	
<i>Where, after certain correspondence as to quitrent between the attorneys of the Colonial Government and the Manager of a certain Company, the Government issued summons against the Manager N.O. and had it served upon him.</i>	
<i>Held, that although a member of a certain firm of attorneys held a general power as the Company's representative, the aforesaid service was good, as the General Agents had, with full knowledge that summons would be issued, lain by and not informed the Government of the position in which he stood towards the Company.</i>	
<i>Gethin (in his capacity of Manager of the Southern Lands Company, Ltd.) v. Colonial Government</i> ...	116
Compensation, <i>see</i> Municipal Regulations ...	560
Concealment of Goods, <i>see</i> Import Duty ...	222
Condictio sine causa—Failure of consideration—Interest.	
<i>Where a mortgagor who has paid interest in advance on his mortgage debt voluntarily repays the capital sum of the debt before it is due, without stipulating that interest shall be refunded to him, he cannot claim back interest accruing between the date of payment and the date when the debt became payable.</i>	
<i>Wiley v. Mundinch & Co.</i> ...	828
Conditional Sale, <i>see</i> Broker's commission ...	501
Conditions of Sale—Provisional sentence.	
<i>Gelb v. Isaacs</i> ...	709

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Conditions of Sale, <i>see</i> Sale and Purchase ...	637
Consideration, <i>see</i> Restraint of trade ...	368
Consolidation of Actions, <i>see</i> Salvage ...	367
Construction, <i>see</i> Will ...	300
„ <i>see</i> Collation ...	376
„ of Municipal Acts, <i>see</i> Municipalities ...	373
Construction of Agreement, <i>see</i> Interdict ...	33
Contempt of Court—Alimony.	
<i>Coetzer v. Coetzer</i> ...	
Contempt of Court—Attachment of person—Custody of Child.	
<i>Finlayson v. Finlayson</i> ...	789
Contempt of Court—Personal Attachment.	
<i>Brophy v. Brophy</i> ...	203
Contract—Conveyance of mails—Impossibility of performance—Payment—Note of capture owing to war.	
<i>The plaintiff, a post contractor for the conveyance of mails between A. and B., was not called upon for six months during the currency of the contract to convey such mails owing to part of the country between A. and B. being occupied by the enemy during a time of war. The instructions from Government to the local postmaster were that the plaintiff was to be bound to carry mails when called upon, but that he was to be paid only for those months during which he had carried the mails once at least, although the contract provided for monthly payments for a year. It was proved that although there was great risk of the mails being captured there was always a possibility</i>	

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<i>of their being carried through during the six months in question.</i>		<i>ground, and they now claimed damages for want of occupation based on this prospective value of the property.</i>	
<i>Held, that the plaintiff was entitled to payment for the six months.</i>		<i>Held, that any such damages were too remote, and that such damages only could be recovered for breach of contract as might reasonably be supposed to have been in contemplation of the parties as naturally arising out of the transaction, and that as the present value of the property was not shown to be more than £15 a month, a tender at the rate of £25 a month must be deemed sufficient.</i>	
<i>Estate Muller v. Colonial Government</i>	947	<i>Trustees of the Wesleyan Church v. Eayrs ...</i>	
Contract—Location—Letting and hiring—Wages—Rent.		<i>Kaiser Bros. v. The Trustees of the Wesleyan Church</i>	147
<i>The defendant, having engaged the services of the plaintiff as manager of an eating-room at a rate of remuneration to be thereafter arranged when the profits should have been ascertained, afterwards informed the plaintiff that his services would not be required.</i>		Contract of service—Unlawful dismissal.	
<i>Held, that until the rate of wages was agreed upon there was no contract, and that the plaintiff was not entitled to claim damages.</i>		<i>R. had been engaged by the defendants at a monthly wage of £15, the said engagement to be terminable on one month's notice. Subsequently the defendants varied the contract by making it a weekly contract. It was held by the Court that there was no satisfactory evidence that R. had consented to this new arrangement. Thereafter defendants gave R. a week's notice which he refused to accept.</i>	
<i>Brown v. Hicks</i>	537	<i>Held, in an action for damages for unlawful dismissal, that as the defendants were bound by their original contract of monthly service, R. was entitled to wages in lieu of due notice, and costs.</i>	
Contract—Ejectment—Claim in Reconvention.		<i>Reiser v. African and United Colonies Cold Storage and Supply Co., Limited ...</i>	854
<i>Rayner v. Mutzenbach ...</i>	346	Contract, see Interdict	338
Contract of Sale of Land—Measure of Damages due to purchaser for want of occupation.			
<i>Certain Church Trustees had sold a piece of land to K. Bros. undertaking to give possession by a certain fixed date. This they failed to do for more than 3½ months after the date agreed upon, in consequence of having previously to erect a person who claimed to have a yearly lease. The present premises on the ground were stated to be worth £14 a month though let at £7. The purchasers had informed the vendors that they proposed erecting buildings worth £8,000 on this</i>			

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Contributory negligence.	
<i>Contributory negligence, to disentitle a plaintiff to recover damages for injuries sustained must be such as, but for such negligence the mischief would not have happened and where the defendant could not by the exercise of proper care have avoided the consequences of plaintiff's negligence.</i>	
Terhoven v. Colonial Government	56
Stephan v. Colonial Government	56
Conveyance of Mails, <i>see</i> Contract	947
Costs—Judicial discretion.	
<i>The Supreme Court will not, as a rule, interfere with the discretion of a Court of first instance on a question of costs unless there has been a reckless exercise of its discretion.</i>	
Crosbie v. Rautenbach	163
Costs, <i>see</i> Accountant	155
Costs, <i>see</i> Dock Agent	42
Costs—Taxation—Material Witnesses.	
<i>The mere fact that a witness has not been called at a trial is not a sufficient reason for disallowing his expenses against the opposite side, for if he was a material witness but was not called by reason of the breakdown of the case for the opposite side, his expenses would form part of the costs of the case.</i>	
Raner v. Mutzenbach	615
Costs, Security for, <i>see</i> Appeal ...	570
Costs of transfer — Diagram—Expenses of survey.	
<i>The owner of land sold certain lots being portion thereof, one of the terms of the contract of sale being that the buyer should pay all expenses in connection with the completing of transfer,</i>	

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<i>Held, that the charge of the surveyor for preparing the necessary diagram formed part of such expenses, but that the costs of a survey made before the date of the sale for the purpose of a general subdivision and not for the special purpose of giving effect to the sale, did not form part of such expenses.</i>	
Van Wyk v. Smith and Co.	509
Costs—Shortage of goods delivered—Malcolmess and Co. v. McKenzie and Co.	398
Costs, <i>see</i> Interdict	366
„ <i>see</i> Notice of Motion	406
Costs, <i>see</i> Appeal	794
Costs, <i>see</i> Proof of debts	590
Costs, <i>see</i> Spoliation	575
Costs, <i>see</i> Executor	952
Counterclaim, <i>see</i> Promissory Note	662
Credibility, <i>see</i> Appeal	613
Criminal Conviction, <i>see</i> Appeal	877
Crown Land, <i>see</i> Pounds Act ...	412
Curator Bonis, <i>see</i> Transfer of Property	972
Damages, <i>see</i> Breach of Contract	9, 179
„ <i>see</i> Injury	668
„ <i>see</i> Injuria	530
„ <i>see</i> Interdict	394
„ <i>see</i> Landing Agent	664
„ <i>see</i> Landlord and tenant	444
„ <i>see</i> Lease	323
„ <i>see</i> Libel	932
„ <i>see</i> Negligence	672
„ <i>see</i> Ownership	206
„ <i>see</i> Ship	94
„ <i>see</i> Transfer of property	972
Death of party to action—Power of Attorney—Amendment of summons.	
<i>A plaintiff in an action in a Resident Magistrate's Court died before the case was concluded, and the agent who had been appointed by the plaintiff</i>	

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<i>proposed to proceed with the case without a fresh power from the executor. The defendant's agent objected to this course, and the magistrate gave absolution from the instance.</i>		<i>Held, that as the attention of plaintiff had not been called to the notice at the head of the document he had signed, and that as defendants' servant's attention had been called to the fact that the package subsequently lost was specially valuable, defendants were fully liable to plaintiffs for the amount claimed.</i>	
<i>Held, that as the agent persisted in proceeding without a fresh power, and without applying for an amendment of the summons, the magistrate was justified in granting absolution.</i>		Kelly and Wife v. Mackenzie & Co.	106
Groenewald v. van Schoor ...	835	Delivery of Goods, <i>see</i> Ship ...	94
Debentures, <i>see</i> Town Council ...	287	Delivery, <i>see</i> Possession	493
<i>De Communi Dividundo</i> —Minors.		Delivery, <i>see</i> Sale and Purchase... ..	701
<i>Re</i> Estate of the late Van Vuuren	733	Delivery, <i>see</i> Sale and Purchase... ..	620
Deed of Assignment—Duplicate original— <i>Re</i> Estate, Heydenreich and Co., <i>ex parte</i> Backshell	404	Demurrage, <i>see</i> Charter party ...	457
Defamation—Abuse—Verbal Injury.		" <i>see</i> Freight	358
<i>Words of meaningless abuse, not affecting the character of the person about whom they are spoken, such as saying that a person is a "low-life fellow," are not actionable.</i>		Derelict Land, <i>see</i> Municipality	119
Mann v. Booker	784	Diagram, <i>see</i> Deed of Transfer 582, 996	
Defective Lift, <i>see</i> Landlord and Tenant	681	Diagram, <i>see</i> Costs of Transfer ...	509
Delay, <i>see</i> Executor	952	Distribution of Capital <i>see</i> Will	533
Delay, <i>see</i> Ship	94	Divisional Council <i>see</i> Beacon ...	812
Delivery Agent—Limitation of Liability.		Divisional Councils' Act—Voters' Roll — Court for hearing claims and objections —Fraud —Mistake.	
<i>Plaintiffs were passengers by steamer from England to Cape Town, and when they landed they delivered certain baggage to the defendants, who were landing and delivery agents. Defendants admitted the loss of a portion of this baggage, but contended that they had contracted themselves out of any liability in excess of £5 per package lost.</i>		<i>In the absence of fraud, a person whose name appeared on the voters' roll, but was struck off by a Court held under the 21st and 22nd sections of Act 40 of 1889, although no objection had been made, held entitled to have his name restored.</i>	
		<i>Ex parte</i> Lourens and Others	201
		Divorce, <i>see</i> Jurisdiction	299
		Divorce—Jurisdiction—Domicile.	
		Sklaar and Sklaar	584
		Dock agent—Shortage—Costs.	
		<i>Defendant, acting as a dock agent had received 2,474 bales of hay on behalf of plaintiff. Of these the Court found that</i>	

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plaintiffs received delivery of 2,257 bales ; though plaintiffs contended that there was a shortage of 237 bales. Plaintiffs left a considerable quantity of loose forage lying about. The Court found that 12 bales in all were unaccounted for. It was admitted that 12 bales fell into the sea, but there was no evidence to show how, or at what stage of landing this happened.

Held, that defendants were liable to plaintiffs for these 12 bales, valued at £6 12s.

Held further, that though plaintiffs had sued defendants for the value of 237 bales (£130 7s.) as no tender had been made ; the judgment must carry costs and seeing that the case was not clearly one for a Magistrate's Court, that costs must be allowed on the Supreme Court scale.

Calder & Co. v. McKenzie & Co. ... 42

Domicile, see Divorce ... 584

Domicile, see Jurisdiction ... 299

Domicile—Jurisdiction.

Defendant, who was domiciled in the Transvaal, had there incurred a debt to plaintiff. Thereafter defendant was driven out of the Transvaal by the King's enemies and took refuge in the Cape Colony.

Held, that as he had not thereby acquired a domicile in this Colony, and as the debt had been contracted outside the Colony, the Colonial Courts had no jurisdiction in the matter.

Lotter v. Salamon ... 232

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Donation—Charitable institution.

S. had undertaken to pay certain moneys to B. in consideration of B. foregoing an action for slander against S. S. had also on the same consideration promised to pay £10 towards the funds of a certain charitable institution. None of the above named moneys had been paid and B. now sued for payment.

Held, that final judgment must be entered against S. for the moneys due to B. but that with respect to the money promised to the said charitable institution no order could be made save on application by the trustees.

Byworth v. Stevenson ... 29

Donatio mortis causa—Will.

C., being seriously ill, signed a document, which was duly attested as a testamentary writing by two witnesses, by which she made a gift as a donatio mortis causa to the plaintiff, who accepted the gift. A few days afterwards C. made a will by which, inter alia, she confirmed the gift to the plaintiff ; and thereupon H., who held C.'s general power of attorney, and had the custody of the deed of donation, destroyed the deed. Upon the death of C. a few days afterwards it was found that the will had not been duly attested, and was consequently invalid.

Held, that the plaintiff was entitled to the benefit of the donatio mortis causa.

Clarke v. Executors of Castray ... 917

Dowry Cattle, see Native Custom 545

Dowry, see Native Customs ... 596

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Drunkenness in Public Place— Sec. 28, Act 25 of 1891. <i>In order to justify the exercise of the extended jurisdiction conferred by Act 25 of 1891, Sec. 28, on Resident Magistrates, four previous convictions must have been recorded within one year of the fifth.</i>		<i>until, at all events, one half of such enhanced value was paid to her.</i>	
Rex v. Bellnagg 254		Held, that the jurisdiction was ousted by virtue of the last proviso of Sec. 10 of Act 20 of 1856.	
Earnest Money <i>see</i> Broker's Commission 501		Phisante v. Cape Marine Suburbs, Ltd. 777	
Ejectment — Motion — Action — Tender—Waiver. <i>Under the terms of a lease the lessor was entitled to put an end to the lease if the rent due for any month was not paid on or before the 25th of the following month. On the 25th of February negotiations were passing between the parties for a voluntary cancellation of the lease, and accordingly the lessee omitted to tender the rent for January. The parties not being able to agree as to the terms of cancellation, the lessee on the 28th of February tendered the rent, but the lessor insisted on his right to put an end to the lease for non-payment of rent; and sought, by motion, to eject the lessee.</i>		Ejectment, <i>see</i> Contract 346	
Seale v. Thompson 255		Ejectment on motion, <i>see</i> Landlord and tenant 291	
Ejectment — Magistrate's jurisdiction. <i>In an action for ejectment in a Resident Magistrate's Court the defendant proved that she was the widow of a person to whom the then registered owner had given the land and on which he had built houses of the value of £300, and that she had a claim to retain the land</i>		Ejectment, <i>see</i> Church Body ... 961	
		Election of Councillors <i>see</i> Cape Town Municipality 958	
		Entertainment (public), <i>see</i> Lord's Day Observance 240	
		Escape from Prison, <i>see</i> Martial Law 648	
		Escape from gaol, <i>see</i> Warrant ... 259	
		Evidence, <i>see</i> Appeal 613	
		Evidence of Trap, <i>see</i> Act 48 of 1882 543	
		Evidence, <i>see</i> Lease 520	
		Excess of Authority, <i>see</i> Arbitration 815	
		Exception—Plea in abatement—Joint-stock company—Power to sue—Managing director. <i>It is not a good ground of exception to a summons issued on behalf of a joint-stock company in a Resident Magistrate's Court that the power to sue is signed by the managing director of the company. If the right of the managing director to sue on behalf of the company is denied this should be done by plea in abatement, in which case evidence, such as the production of the Articles of Association, should be taken as to the managing director's powers.</i>	
		Stableford and Co. v. Brady 891	

Exception, *see* Prescription ... 660

Exceptions—Pleading—Executors
—Servitude—Municipality.

To a declaration in an action brought by an executor to interdict the Town Council of P. from preventing the sale of certain land belonging to the estate in lots according to a certain general plan, the Council pleaded that the land had been reserved by the previous executor as an open space for municipal purposes. To this plea the defendant excepted that it was bad in law in that there is no law in this Colony authorizing an executor to reserve as an open space for municipal purposes ground forming an asset in the estate of which he was executor. The exception was overruled.

Estate Gardiner v. Town
Council of Port Elizabeth
831, 850, 905, 926

Executable Property—Judgment
for Interest.

The Court will not declare mortgaged property executable immediately on giving judgment for interest due in respect thereof.

Colonial Government v.
Gericke ... 187

Executor—Account—Delay—
Costs.

In an action against an executor for an account it was proved that for six months from the time when letters of administration were granted to him he was deported from his district under martial law without any apparent default on his part, and was unable, except with the greatest difficulty, to communicate by letter with the debtors or creditors of the estate.

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Held, that there was no unreasonable delay in not filing the account within six months.

Grove v. Estate Grove ... 952

Executor—Purchase of Property
—Fair value.

The mere fact that property in an estate has been purchased by an executor at a public auction does not oblige the Court to grant leave to transfer such property. An affidavit of value should always accompany such applications for leave to transfer.

Ex parte Kotze ... 727

Executor, *see* Option of purchase 269

„ *see* Sale of land ... 384

Executor Dative—Joint Will—

Payments made into the
estate by the surviving spouse.

Cramer v. Estate Cramer ... 851

Executors—Duties—Foreign heirs.

A testator who died within this Colony directed that his executors should upon his death pay the whole of the available funds in their hands to any one of his brothers for distribution among testator's heirs resident in Sweden, and that the receipt given by such brother should be a sufficient discharge of the executors. The testator appointed the Board of Executors as executors and administrators of the estate.

Held, that as it was the duty of the executors to ascertain the heirs and to apportion the estate, and also to provide for the payment of succession duty, they could not comply with the above provision of the will until they had performed these duties.

Anderson, v. The Board of
Executors ... 738

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Executor and tutor—Purchase of property in the estate.	
<i>Where an executor in an estate who was also tutor dative to the minor children of deceased had purchased certain property in deceased's estate at a public auction and for a fair value, the Court confirmed the sale.</i>	
<i>Ex parte Roux</i>	67
Executors, see Exceptions 831, 850, 905,	926
Expenses of survey, see Costs of transfer	509
Expropriation—Railways.	
<i>The Government is not entitled to enter upon land for purposes of railway construction under Sec. 3 of Act 19 of 1874 without previous notice to the proprietor, in terms of the last proviso of Act 9 of 1858.</i>	
<i>Such notice should definitely state for what purpose the land is required, and whether and to what extent it is intended to expropriate part thereof.</i>	
<i>The Town Council of Cape Town v. Table Bay Harbour Board</i>	159
False representation, see Broker's commission	501
<i>Fidei commissum, see Collation</i> ...	376
Fidei Commissary Property, Leave to sell	881
Fire insurance — Policy — Warranty—Condition.	
<i>The plaintiff, on applying to the defendant company for an insurance on goods, left unanswered a question in the proposal form whether any risk of his had been declined or cancelled by any other company. In the body of the policy issued to and accepted by him were the words, in conspicuous letters,</i>	

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<i>"not insured in or declined by any other company."</i>	
<i>Held, that these words constitute a warranty binding on the plaintiff, notwithstanding that he was a foreigner not well versed in the English language, and that, on proof by the defendant company that another company had shortly before the date of the policy declined to insure the same goods, the plaintiff was not entitled to recover for the destruction of the goods by fire.</i>	
<i>Johns v. North British and Mercantile Insurance Co....</i>	771
Foreign executor—Mortgage bond —Cession.	
<i>A mortgager of land in this Colony was domiciled in England where he died. His English executor, after obtaining cession in his own favour, ceded it to the mortgagor's wife. The land having been sold she consented to the cancellation of the bond.</i>	
<i>Held, that although the bond was in England at the time of the death of the mortgagor, the debt was an asset of his estate situated in this Colony, and that the Registrar of Deeds could not be ordered to cancel the bond without the consent of an executor appointed or confirmed by letters of administration granted in this Colony.</i>	
<i>Eaton v. Registrar of Deeds (7 Juta, 249) followed.</i>	
<i>Newdigate v. Registrar of Deeds</i>	434
Foreign Heirs, see Executors ...	738
Foreign marriage—Community—Property of Wife—Transfer —Assistance of husband.	
<i>Where a wife married in Germany and afterwards be-</i>	

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<i>came domiciled in this Colony together with her husband had been deserted by him, and had thereafter acquired with her own money certain immoveable property. The Court made an order allowing her to pass transfer of this property to a purchaser without her husband's assistance.</i>		<i>the freight (including the half for the cargo lost), (2) certain charges for demurrage.</i>	
<i>Ex parte Stork</i>	66	<i>Held, (1) that no claim could be sustained in respect of freight for the cargo lost; (2) that as the custom of the port in respect of the discharge of cargoes of timber had not been sufficiently proved, the Court would grant absolution from the instance in respect of the second claim.</i>	
Forgery—Production of Forged Document.		<i>Master of the "Teresa" v. Purcell, Yallop and Everett</i>	358
<i>Held, that if a forged document can be traced to the possession of a person accused of forging it, and that person fails to produce it on notice, a conviction may be sustained notwithstanding its non-production.</i>		Funeral Expenses — Mourning Clothing for Widow.	
<i>Rex v. Radziwill</i>	281	<i>Defendant had purchased from plaintiff's certain mourning clothing on the death of her husband, in her own name and without the sanction of the executors of her late husband's estate.</i>	
Fraud, <i>see</i> Sale and Purchase ...	592	<i>Held, on appeal, that she and not the estate of the deceased was liable for the said clothing.</i>	
Fraud, <i>see</i> Divisional Councils' Act	201	<i>Wilson & Others v. Bruton</i>	234
Fraudulent alienation, <i>see</i> Insolvency	262	Goods, <i>see</i> Landing Agent ...	110
Freedom of Testamentary disposition, <i>see</i> Mutual Will ...	719	Government Notice No. 241, <i>see</i> Liquor Law	238
Freight—Lost Cargo—Demurrage.		Government Notice No. 854 of October 1st, 1901, <i>see</i> Public Health Act No. 23 of 1897 ...	383
<i>The "Teresa", had been chartered to load a certain cargo for Table Bay. One portion of the said cargo was to be a "deck cargo" and the other was to be carried "between decks." Two-thirds of the rate charged for the latter was to be paid per ton for the former. Half the entire freight was to be paid in cash on signing bills of lading, and the remainder on delivery of the said cargo at Table Bay. In the course of the voyage the deck cargo was lost.</i>		Grass fire—Acts of Servant—Negligence.	
<i>The owners of the "Teresa" now claimed (1) the balance of</i>		<i>Where a shepherd acting for the benefit of his master and in the ordinary course of his employment negligently set fire to brushwood in order to improve the pasturage, the master was held responsible for damage done to his neighbour's farm by the spreading of the fire.</i>	
		<i>Lotter v. Rhodes</i>	166
		Guarantee, <i>see</i> Security	188

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Harbour Board—Voters List—		conducted, the licence was	
Firm—Election of member—		jeopardized, and the lessors	
Act 36 of 1896—Partnership		insisted upon W. disposing of	
—Authority in writing—		the goodwill. This he did to	
Telegram.		the plaintiff for £750, but the	
<i>A member of a firm which ap-</i>		Licensing Court refused to	
<i>pears on the voters' list framed</i>		grant transfer, and plaintiff	
<i>in terms of the 11th section of</i>		now sued W. for the return of	
<i>Act 36 of 1896, is eligible to be</i>		this money.	
<i>elected as a member of the</i>		Held, that W. having failed	
<i>Harbour Board in terms of the</i>		to fulfil his contract to trans-	
<i>15th section, even although he</i>		fer the licence to plaintiff, who	
<i>has not been nominated by the</i>		had received no consideration,	
<i>firm in terms of the 14th section,</i>		the sale must be declared can-	
<i>to appear and vote on behalf of</i>		celled and judgment given for	
<i>such firm, and although he</i>		the plaintiff for £750, with	
<i>joined the firm after the 30th</i>		costs.	
<i>of June last preceding the</i>		Chamberlain v. Wilson ...	685
<i>election.</i>		Husband, <i>see</i> Married Woman ...	14
<i>An agreement that a person</i>		Ignorance, <i>see</i> Lease ...	323
<i>admitted as a member of a firm</i>		I.D.B. Act (No. 48 of 1882)—	
<i>shall share the profits of the</i>		Evidence of Trap—Corro-	
<i>firm amounts prima facie to an</i>		borative Evidence of Detec-	
<i>agreement that he shall share</i>		tive.	
<i>losses also.</i>		Rex v. Brann... ..	543
<i>A telegram or cablegram ad-</i>		Import Duty—Concealment of	
<i>dressed by a voter to the collector</i>		goods—Security for costs in	
<i>or sub-collector of customs</i>		action against Comptroller of	
<i>authorizing some person to vote</i>		Customs—Act 10 of 1872,	
<i>on behalf of such voter is a</i>		sec. 51 and 67.	
<i>sufficient authority in writing</i>		M. was a passenger from	
<i>in terms of the 10th section of</i>		England to Cape Town, and on	
<i>the Act.</i>		his arrival there found that a	
Fish v. Price and another ...	956	trunk containing a certain	
High Treason, <i>see</i> Attorney ...	124	quantity of jewellery had been	
Hotel-keeper—Traveller.		seized by the Customs' authori-	
<i>A hotel-keeper, who has let a</i>		ties. On the authorities afore-	
<i>room to a traveller, is not</i>		said refusing to give up	
<i>justified in turning him off the</i>		the trunk and instituting an	
<i>premises without lawful cause.</i>		action in the Supreme Court	
Bennett v. Shaw	450	for the forfeiture of the said	
Hotel premises—Misconduct of		jewellery, applicant attempted	
lessee—Sale of goodwill—		to enter appearance to defend	
Cancellation of sale—Con-		the said action. The Registrar	
sideration.		of the Court, however, refused	
<i>W. had leased from Ohlsson</i>		to accept such appearance un-	
<i>& Co. a certain hotel. Owing</i>		less applicant furnished secu-	
<i>to the business being improperly</i>		rity in the sum of £100, in	
		terms of Sec. 67, Act 10 of	

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1872. <i>Petitioner applied for leave to enter appearance, and defend the action without compliance with this condition.</i>	
<i>Held, that the Court had no discretion as to the demand for security, but only as to the amount, and that under the circumstances the security demanded was not excessive.</i>	
<i>Miraine v. The Controller of Customs</i>	222
<i>Inchoate contract, see Broker's commission</i>	501
<i>Indictment—62nd rule of Court—Point reserved.</i>	
<i>Where two or more persons have been jointly indicted for the same offence and one of them only is convicted, the person so convicted cannot claim, merely by reason of his having been so joined with others, that his conviction shall be set aside.</i>	
<i>Rex v. Hales and another</i> ...	1016
<i>Indictment, see Appeal</i> ...	1015
<i>Inheritance, see Collation</i> ...	376
<i>Inheritance, see Married Woman</i> ...	14
<i>Injuria—Libel—Damages.</i>	

An untrue statement in a letter to the press that the plaintiff had tampered with a meter for measuring the electric light supplied to him by Municipal Electric Lightworks held to be a libel. The plaintiff, having seen it stated in a newspaper that the defendant had reported to the Municipal Council that he (the plaintiff) had stopped the meter, published in a subsequent issue of the paper a letter saying that the statement was a lie. The statement was, in fact, untrue.

Held, that although the defendant may have believed the statement to be true, the plaintiff, who could not have known

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<i>what the defendant's belief was, was not guilty of a libel in saying that the statement was a lie.</i>	
<i>Johnson v. Parham</i>	530
<i>Injury—Negligence—Damages.</i>	
<i>A traction engine belonging to the defendants struck a house of which the first floor was let to the plaintiff, who kept a boarding-house therein. Only the dining-room was risibly injured, but some of the boarders left because they considered some of the other rooms to be dangerous to live in. In the absence of any proof that the rooms were dangerous to live in, Held, that the plaintiff was not entitled to claim damages for the loss sustained by him by reason of the boarders leaving.</i>	
<i>Perlstein v. Table Bay Harbour Board</i>	668
<i>Injury to person and property, see Negligence</i>	698
<i>Insolvency Fraudulent alienation.</i>	

Defendant had sold certain two shops, and a few days thereafter his estate was compulsorily sequestrated. As the bona fides of these sales was questioned by certain of defendant's creditors, the Master of the Supreme Court had attached the goods in these shops under Section 13 of the Insolvent Ordinance. Defendant now applied to have this attachment removed.

The Court ordered the attachment to be continued until six weeks after a trustee had been appointed in the insolvent estate, that he might be able to take action to set aside the sale of the shops if so advised. The purchasers of the shops were

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<i>ordered to pay the costs of opposition, with leave to include them in any claim for damages they might have in reconvention.</i>		<i>Hall as the person entitled to the sole right of presentation in South Africa, the respondent alleging that the applicant had sold to him such right.</i>	
Lawrence & Co. v. Khan ...	262	Edwardes v. Mouillot and Another ...	994
Insolvency—Proof of Debt—Prescription—Judicial Interpellation.		Interdict—Security for rent.	
<i>A debt barred by prescription cannot be proved against an insolvent estate.</i>		Nel v. Lategan ...	848
<i>The sequestration of a debtor's estate does not prevent prescription from running in respect of debts which have not been proved.</i>		Interdict, <i>see</i> Lease ...	323
<i>Proof of debt by a creditor has the full effect of a judicial interpellation.</i>		„ <i>see</i> Restraint of Trade ...	368
Naude's Executor v. Maritz and Others ...	216	„ <i>see</i> Town Council ...	287
Insolvency — Rehabilitation — Keeping of proper books.		„ <i>see</i> Municipal Regulations ...	560
<i>Ex parte</i> McEwan ...	714	„ <i>see</i> Municipal Council ...	758
Insolvent Estate, <i>see</i> Proof of debts	590	„ <i>see</i> Lessor and Lessee ...	903
Insolvent Ordinance, section 83—Alienation of assets— <i>Bona fides</i> .		„ <i>see</i> Tramway Company ...	136
<i>An insolvent having sold his business and goodwill at the time when his liabilities exceeded his assets,</i>		„ <i>see</i> Agent ...	252
<i>Held, in an action against the purchasers, under the 83rd section of the Insolvent Ordinance, that the burden of proving good faith and valuable consideration lay upon them.</i>		Interdict—Application to Parliament—Construction of agreement.	
Estate Khan v. Khan and Another ...	609	<i>By agreement between a Municipal Corporation and a Waterworks Company it was provided that the latter should construct certain waterworks to supply the inhabitants with water, that after the completion of the works the former should have the right to purchase them at a price to be mutually agreed upon and that should no such purchase be made, the company should have the sole right to supply the inhabitants with water from rivers for a period of twenty-five years and the Council “bind themselves and their successors in office during the subsistence of the contract and until the works shall be purchased and paid for by them, not to construct or promote or assist in the construction or promotion of waterworks, or permit any other waterworks having for its</i>	
Insolvent estate, <i>see</i> Master of Supreme Court ...	268		
Interpretation, <i>see</i> Codicil ...	730		
Interdict—Play.			
<i>Interdict to present a play refused, although the applicant was registered in Stationers'</i>			

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<i>object the introduction or supply of water to the township." No purchase was effected, and four years before the expiration of the period of twenty-five years agreed upon, the Corporation being advised that the construction of new waterworks would require not less than four years, gave notice to the ratepayers of a meeting for taking steps to obtain authority by a private bill to construct such works; but not with the intention of supplying the township with water before the expiration of the twenty-five years.</i>	
<i>Held, that it was not a case for an interdict to restrain the taking of such steps by the Council.</i>	
<i>Town Council of Kimberley v. Kimberley Water Works Co.</i>	33
Interdict—Account of profits—Damages.	
<i>Where an applicant sought to interdict the respondent from performing certain plays within Cape Colony and failed to satisfy the Court of his exclusive right to such performances; the Court refused either to grant an interdict or to order respondent to keep an account of profits, as respondent was known to be a man of sufficient means to satisfy the applicant in any action for damages he might be advised to bring.</i>	
<i>Edwardes v. De Jong ...</i>	394
Interdict — Action — Motion — Costs.	
<i>Provisional interdict granted on motion to restrain the lessee of a quarry and sandhill from taking stones from land situated</i>	

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<i>some distance from the quarry, but the respondent alleging that the portion from which he took the stones was within the boundaries pointed out to him by the applicant before the lease was made, the latter, who denied the allegation, was ordered to bring an action within a limited time, and the question of costs was reserved.</i>	
<i>Salt River Cement Works v. Rabbick</i>	366
Interdict—Contract.	
<i>Respondent had contracted with the Colonial Government to construct certain railways under conditions which bound him, inter alia, to employ competent employes and to use suitable plant, and gave power to the Government engineer, in the event of the incompetency of any employes or unsuitability of the plant used, to give notice to the contractors requiring them to remove such incompetent persons or such unsuitable plant, and replace them or it. Should the contractors disregard such notice, the engineer was to have power to remove such persons or plant, and to engage or hire others at the cost of the said contractors. The contractors being unable to continue the work, the Government now applied for an order authorizing them to resume or take possession of these lines under construction, and to call upon the respondent to show cause why he should not be interdicted from obstructing the Government in the prosecution of the said works.</i>	
<i>The Court granted an order authorizing the Government engineer to remove the persons and plant complained of</i>	

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<i>at the cost of the contractors, and to employ such other engineers, &c., as he might deem necessary.</i>	
Colonial Government v. Hills	338
Insulting, abusive, or threatening behaviour—Breach of the peace.	
<i>The wearing of a hat with a red puggaree does not constitute insulting, abusive, or threatening behaviour, merely because it formed part of the headgear, along with other distinctive badges, of a rebel commando.</i>	
Rex v. Smith	907
Issue of Shares, <i>see</i> Company	875
Joint Stock Company, <i>see</i> Exception	891
Joint Will, <i>see</i> Executor Dative	851
Judgment for Interest, <i>see</i> Executable Property	187
Judicial Discretion, <i>see</i> Costs	163
Judicial Interpellation, <i>see</i> Insolvency	216
Jurisdiction, <i>see</i> Divorce	584
Jurisdiction—Domicile—Divorce	
<i>Mrs. B. applied for leave to sue her husband by edictal citation for divorce on the ground of his malicious desertion. Applicant was resident within this Colony, but her husband had never left England.</i>	
<i>Held, that the Court had no jurisdiction in the matter.</i>	
<i>Ex parte</i> Bright	299
Jurisdiction, <i>see</i> Domicile	232
Jurisdiction, <i>see</i> Domicile	232
Jurisdiction — Resident Magistrate's Court.	
<i>In an action in a Resident Magistrate's Court for the recovery of the price of goods sold and delivered in excess of £20, the Resident Magistrate has no jurisdiction if the de-</i>	

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<i>fendant pleads a bona fide claim in recourention for a liquidated debt in excess of the plaintiff's claim.</i>	
Oblewitz v. Curtis	235
Jurisdiction, <i>see</i> Resident Magistrate	393
Jurisdiction, <i>see</i> Resident Magistrate's Court Acts	662
Kafir law—Torts committed by son.	
<i>The mother and the brother of a Kafir girl, domiciled within the Colony proper, had, as mutual guardians of the girl, sued Ncontsi in the Magistrate's Court for damages for seduction committed by his son.</i>	
<i>Held (on appeal), that as according to our law a father cannot be held liable for the torts of his son, and as the parties were domiciled within the Colony, such action could not be sustained.</i>	
Ncontsi v. Nolenti and Another	776
Koophbrief—Transfer—Cancellation.	
Van der Byl v. Estate of Faure	476
Land—Action for transfer.	
Mossop v. Cooke	172
Landing Agent — Charges for heavy goods.	
Tunnell, Duncan & Co. v. Jackson, Ltd.	744
Landing agent — Mis-delivery — Damages—Negligence.	
<i>The defendants having been employed as plaintiff's agents to land 300 bags of bran from a vessel, landed the same, and thereafter, in their capacity as delivery agents for M., mis-delivered 225 bags to M,</i>	

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Held, that the defendants were liable in damages to the plaintiff for such mis-delivery.	
McKay v. McKenzie & Co ...	664
Landing Agent—Responsibility for goods.	
When a landing agent has placed the goods entrusted to his custody in the warehouse of the Harbour Board he is functus officio, and is therefore no longer responsible for such goods.	
Cook & Sons v. McKenzie & Co. ...	110
Landlord and tenant—Defective lift—Personal injury—Damages.	
Smith v. Pattison & Morris	681
Landlord and tenant — Assignment of lease—Option of purchase.	
Under a written agreement of lease of a farm the lessee had the right to purchase the farm at a certain price before the expiration of the lease on giving notice in writing to the lessor. The lesser assigned his rights under the lease to the defendant, who was accepted as tenant in lieu of the lessee by the lessor (the plaintiff), and paid rent to her. Before the expiration of the lease the lessee informed the plaintiff that he did not wish to purchase the farm himself as he had assigned his rights to the defendant, and the defendant gave notice in writing to the plaintiff of his (the defendant's) intention to purchase the farm at the price agreed upon.	
Held, that the defendant was entitled to completion of the purchase and transfer of the farm.	
Hart v. Wilson ...	656

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Landlord and tenant—Alterations of premises—Occupation.	
Burns v. De Vries & Co. ...	498
Landlord and Tenant—Assignment of Premises—Liquor Licence—Ejectment on Motion.	
Respondent had purchased the good-will of a certain hotel from one Martienssen. The agreement provided that respondent's tenancy should be terminable on a month's notice given in writing by the landlord, and that he should then be bound to transfer his licence to the landlord or to the nominee of the landlord. Subsequently Martienssen assigned all his rights over the said premises and all his interests therein to the present applicants, and respondent thereafter paid rent to them and discussed with them the terms of his lease. Applicants had given him a month's notice in writing, but he refused to quit the premises, and contended that even if ejected he was not bound to transfer his licence to the applicants. Applicants now asked for an order of ejectment.	
Held, that as Martienssen had assigned all his rights in respect of the said premises to applicants, and as respondent had by his acts accepted them as his landlords, he was bound to accept a month's notice from them, and that he was under the same obligation of thereupon transferring to them his licence by which he had been previously bound to Martienssen.	
Semble, that though the Court will not ordinarily grant ejectment upon motion, it will do so	

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(1) in cases of urgency and (2) where no facts are in dispute.	
The South African Breweries v. Barritt	291
Landlord and tenant—Lease— Rent—Agency.	
<i>A farm had been let to three tenants, one of whom afterwards surrendered his share to the lessor. The defendant took over from the lessor this share, and also the share of another of the tenants, with the lessor's approval. By the contract the rent was payable on the 25th April at the office of the lessor's agent. The lessor on the 15th April, before the due date of the rent, took out a summons for the rent due on the third share taken over directly from him by the defendant. On the due date the defendant paid all the rent due by him at the agent's office in terms of the lease. The agency had never been revoked.</i>	
<i>Held, that this was a good payment.</i>	
Van der Spuy v. Van der Spuy	512
Landlord and Tenant—Rent— Malicious damage by tenant.	
Kennedy v. Glatston Bros.	515
Landlord and Tenant—Sub letting— <i>Mala fides</i> —Damages.	
Thompson v. Seale	444
Landlord and tenant—Damages.	
Menzel and Company v. McNaughton	913
Lay-days, <i>see</i> Charter party ...	457
Lease, <i>see</i> Landlord and tenant ...	512
„ <i>see</i> Sale of land	384
Lease—Option of purchase—Sale Interdict.	
<i>A lessee had the option of pur- chase during his tenancy. The</i>	

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<i>lessor sold the land to a third person who had no knowledge of the lessee's option, which had not in fact been exercised.</i>	
<i>Held, that as the lessee had no better right to the assistance of of the Court than the purchaser, the Court should not interdict the lessor from transferring the land to the purchaser, and that the lessee's only remedy was by action for damages against the lessor.</i>	
Kohling v. McKenzie	517
Lease — Specific Performance — Damages—Ignorance.	
<i>Where the defendant had failed to fulfil a certain contract of lease entered into with the plaintiff, and had in violation thereof let the premises which were the subject of the said contract to another tenant; damages were awarded to plaintiff, and defendant was ordered to give plaintiff pos- session of the premises within twenty-five days.</i>	
<i>Semble, The Court will set aside a written lease on the ground of fraud, if it can be clearly shown that one of the parties thereto being a man of defective education was de- ceived as to the contents of the lease he had signed, even though he might be able to read it.</i>	
Schiffman v. Carelse	323
Lease to partners—Covenant not to assign — Cancellation of Lease—Ejectment.	
<i>A declaration alleged that the plaintiff had let certain pre- mises for a term of five years to the defendant and one C., carrying on business in partner- ship, that one of the conditions</i>	

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<i>was that one of the lessees should not assign or sublet without the plaintiff's written consent, that thereafter the partnership was dissolved and the defendant alone carried on the business and remained in possession of the premises and that the plaintiff never consented to any assignment.</i>	
<i>Held, that the declaration did not disclose sufficient grounds for the cancellation of the lease or for the ejectment of the defendant.</i>	
McNair v. Faehse ...	1020
Lease—Option to purchase— Notice of exercise of option —Purchase for cash.	
<i>G. and H. leased certain farms to the defendant with a condition that "at the expiration of the lease, or at any time during the existence thereof, the lessee shall have the right of purchasing from the lessors, who shall be bound to sell to him the property leased for the sum of £1,400, payable one half in cash and one half in six months."</i>	
<i>Before the expiration of the lease G. died, and no executor was appointed to his estate. H. went to England, and the defendant, wishing to exercise his option, gave notice by letter, addressed to the only address of H. which he had been able to ascertain. Sixteen days after the expiration of the lease the lessor's attorneys gave notice to the defendant that as he had not paid £700 in cash, the option was at an end. The letter addressed to H. was returned from the dead letter office.</i>	
<i>Held, reversing the decision of the Magistrate, that there</i>	

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<i>had, under the circumstances, been a sufficient notice of the defendant's intention to purchase, and that the non-payment of the £700 was not a sufficient ground for cancelling the option.</i>	
Naude v. Estate Malcolm ...	885
Lease—Sub-letting—Approval of lessor—Evidence.	
<i>The lease of certain urban premises contained the following clause:—"The lessee is not entitled to sub-let the premises or any part of them except to such tenants and for such purposes as the lessor may approve."</i>	
<i>Held, that the lessor was entitled to object to any sub-tenant proposed by the lessee without assigning any reasons. A letter written by the lessee to the lessor some time before the signing of the contract of lease and not referred to in such contract is not admissible as evidence to vary the contract.</i>	
Thompson v. Seale ...	520
Lease of Quarry.	
Salt River Cement Work v. Rabbick ...	766
Lessee of Movables, <i>see</i> Bailee ...	643
Leave to sue in <i>forma pauperis</i> .	
<i>Held, that the Court will not grant leave to sue in forma pauperis where the applicant is capable of earning sufficient money to pay legal expenses.</i>	
Epstein v. Epstein ...	255
Leave to sell, <i>see</i> Fidei Commissary property ...	881
Lessor and lessee—Rent—Interdict.	
<i>It was agreed between a lessor and a lessee that in case the former should sell the land, he might put an end to the lease,</i>	

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<i>and that in such case the lessee should receive half the profits of the sale. Among the benefits enjoyed by the lessee was that of removing stones and clay from the land. The lessor having sold the property, gave notice of such sale to the lessee, but permitted him to remain three months longer, he continuing to pay rent during that period.</i>	
<i>Held, that the lessee could not be interdicted, pending the expiration of the three months, from removing stones and gravel.</i>	
Levin v. Braun	903
Letting and hiring, <i>see</i> Contract	537
<i>Lex Fori</i> { <i>see</i> Private	
<i>Lex Loci Contractus</i> { Internat'l	
Law ...	154
Liability, <i>see</i> Ostensible partner	282
Liability of bailee, <i>see</i> Agent	381
Libel, <i>see</i> Injuria	530
Libel—Damages.	
Michau v. Ashe	932
Liberty of subject, <i>see</i> Warrant...	259
Lien—Retention—Debt.	
<i>In the absence of agreement to that effect an ordinary creditor is not entitled to retain an article belonging to the debtor, which happens to be in the possession of the creditor, as a security for the debt.</i>	
Enslin v. Ford	645
Life policy—Assignment—Cession to another beneficiary.	
<i>B. had taken out a certain life policy and assigned all benefits therefrom to a minor niece. Within three years thereafter he married and by ante-nuptial contract settled the benefits of the said policy on his wife. The guardian of the minor ceded the policy to B., who then</i>	

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<i>ceded it to his wife; but the Insurance Company refused to recognize these cessions without an order of Court, for which B. now prayed.</i>	
<i>Held, that as B. had received no consideration from his niece for the policy and was under no obligation to pay the premiums, and that as it had no surrender value at the time B. ceded it to his wife, an order should be granted as prayed.</i>	
<i>Ex parte Barnard</i>	850
Limitation of Carrier's Liability.	
<i>see</i> Contract	472
Liquidator—Winding up of Company—Misfeasance of directors—Rhodesian Companies Ordinance, 1893—Acquiescence.	
<i>The directors of a company, some of whom had been instrumental, before the formation of the company, in obtaining an important concession—which was transferred to the company after its formation without any stipulation as to remuneration for such transfer—decided upon floating another company with the view of providing fresh capital for the purpose, among other things, of remunerating the directors for their trouble in obtaining the concession. They were advised, however, by their solicitor that the same object could be attained by increasing the capital of the company and they accordingly entered into a contract with five of their number, being the defendants, by which it was agreed that in consideration of their services 4,000 new shares should be allotted to them and the sum of £3,000 paid to them in cash out of the increas-</i>	

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ed capital. The directors advertised for applications for 7000 additional shares, and in their prospectus mentioned the existence of the contract but did not specify its nature or tenour. These 7000 shares were allotted to different applicants of whom the holders of 6,700 shares were cognizant of the nature and tenour of the contract. The company was subsequently ordered to be wound up, and although there were sufficient assets to pay the debts of the company, the liquidators sued the defendants in the High Court of Southern Rhodesia for damages for misfeasance. The High Court held that the defendants had acted openly and honestly but that, as there had been a misfeasance on their part in allotting the shares and cash to themselves without valid consideration, they were bound to pay the liquidators the sum of £7,000, being the sum of £3,000 allotted, to them in cash and the sum of £4,000 which might have been realised by the issue of the 4000 shares. On appeal the judgment was affirmed, but with a reservation of any right the defendants might have (a) to restrain the payment of any portion of the damages to any particular shareholders who may have acquiesced or (b) to receive back any portion of such damages from the liquidator or from individual shareholders or (c) to claim a distribution of the damages in such a manner as the Court below shall deem just.

Forbes and others v. the Liquidators of the Timber Supply Company, Ltd. ...1026

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Liquid Demand, see Magistrate's Jurisdiction ... 237

Liquid document, see Provisional sentence ... 284

Liquor Law—Government Notice No. 241—Aboriginal Native—Barman.

A person whose general appearance presents the leading characteristics of an Aboriginal Native must be taken for such, and as such falls under the provisions of Government Notice No. 241, even though it may be shown that there are traces of European blood in such person.

A barman selling to a Native can be convicted under the regulations, assuming that they are not ultra vires a question not decided.

Rex v. Willet ... 238

Liquor Licence ... 619

Liquor licence—Native—Condition.

J. was licensed to sell liquor, but a condition was attached to although not actually indorsed in his licence "that no liquor shall be sold to any native unless under written authority from a field-cornet or magistrate." He was charged with selling liquor in contravention of section 73 of Act 28 of 1883, as amended by Act 28 of 1898. Held (1), that as there was a contravention of the Act of 1898, the fact that the Act of 1883 was mentioned did not invalidate the charge; (2), that the evidence that the defendant had sold to a native was sufficient without further proof as to the particular tribe of natives to which the purchaser belonged; (3), that as the defendant had knowledge of the condition

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<i>attached to the licence, the non-indorsement of the condition on the licence in terms of the Act of 1898 did not relieve him from liability to prosecution.</i>		<i>names of those who had signed both memorials from both memorials, with the result that there was not a majority in favour of the new licence.</i>	
Rex v. Joplin, Rex v. Weber 909		Held, that the Licensing Board was justified by the terms of section 13, sub-section 3, of Act 25 of 1891, in treating the first memorial as if eighteen names had been struck out therefrom.	
Liquor Licensing Acts—Permitting drunkenness.		Fotheringham v. George	
<i>The appellant—holder of a liquor licence—served several soldiers, who were in an excited condition and verging on intoxication, with liquor, with the result that a quarrel and fight ensued between the soldiers and another customer.</i>		Licencing Court ... 967	
Held, on appeal, that although the appellant endeavoured to stop the fight by removing the other customer, he was guilty of a contravention of the 1st sub-section of section 73, Act 28 of 1883, by permitting drunkenness.		L.L.B. degree, see Attorney ... 1048	
Rex v. Norman ... 336		Local option, see Liquor Licensing Acts ... 967	
Liquor licence, see Landlord and tenant ... 291		Location, see Contract ... 537	
Liquor Licensing Acts—Local option—Memorials for and against new licence—Striking out names.		Locomotive, see Police Offences Act ... 334	
<i>The applicant, desiring to have a new licence, obtained a memorial in favour of such licence signed by a majority of the voters registered in the municipality of G. Several of those who had signed thereafter signed another memorial objecting to the issue of the licence. Both memorials were lodged with the Resident Magistrate, but at the sitting of the Licensing Court eighteen of those who had signed both memorials desired to have their names omitted from the memorial objecting to the issue of the licence. The Licensing Court struck out the</i>		Lord's Day Observance—Act 19 of 1895—Public Entertainment—Charge for admission.	
		<i>Where certain persons, having previously obtained the permission of the Town Council of Cape Town, subject to the provisions of Act 19 of 1895, thereafter proceeded to give a number of Sunday evening concerts in a place of public entertainment, at which no fee was ostensibly charged for admission, but 1/- was charged for programmes, and notice issued stated that "admission was by voluntary contribution, the right to refuse admission being reserved."</i>	
		Held, on appeal, that the holding of such concerts was a contravention of Act 19 of 1895.	
		Rex v. Charlton ... 240	
		Lost cargo, see Freight ... 358	
		Lost luggage—Delivery agent—Postponement of trial.	
		Barratt v. McKenzie and Co. 930	
		Magistrate's Court, see Civil Imprisonment ... 153	

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Magistrate's Court, <i>see</i> Jurisdiction	235
Magistrate's Court, <i>see</i> Appeal ...	794
Magistrate's Jurisdiction, <i>see</i> Ejectment	777
Magistrate's Jurisdiction—Liquid Demand—Counterclaim. <i>S. had sued T. in the Magis- trate's Court for £17 5s. 6d., work done under a written contract. T. had set up a counterclaim, composed of several items, of £78 3s. As the Magistrate found that two of these items, viz.: £17 18s. paid to a third person to remedy the defective work of S., and £5 5s., surveyor's fees, were liquidated, he held that his jurisdiction was ousted, and dismissed the case.</i> <i>Held, on appeal, that as the said items of the counter claim were by way of damages, and were therefore not liquidated, the appeal must be allowed, and the case remitted back to the Magistrate on the merits.</i> <i>Sey v. Thomas</i>	237
Magistrates' jurisdiction—Surety. <i>A Resident Magistrate has no jurisdiction in an action on a guarantee of suretyship, even though the guarantee has been given for the payment of the price of movable goods, where the sum sued for exceeds £20.</i> <i>Hotz v. Shapiro</i>	895
Maintenance, <i>see</i> Minor	275
<i>Mala fides, see</i> Landlord and tenant	444
Malicious prosecution—Malice— Want of reasonable and pro- bable cause. <i>In an action for malicious pro- secution for perjury it was proved that the plaintiff had been acquitted, but that he had in fact sworn falsely in regard to a matter which was not</i>	

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<i>material to the issue on which the evidence was given. It was further proved that the defen- dants honestly believed at the time of the prosecution that the plaintiff was guilty on all the charges of perjury.</i> <i>Held that, although there was proof of malice on the part of the defendants, the plaintiff was not entitled to succeed.</i> <i>Hotz v. Shapiro and another</i> ...	989
Managing Director, <i>see</i> Exception	891
Mandatory, <i>see</i> Agent	381
Marriage—Breach of Promise. <i>Jooste v. Van der Merwe</i> ...	130
Marriage, <i>see</i> Native Customs ...	596
Married woman—Husband—Ab- sence from the Colony—In- heritance. <i>The Court ordered half the amount of an inheritance to be paid to a woman married in community whose husband had left the Colony for German West Africa, and as to the other half granted a rule nisi calling upon him to show cause why it should not be paid to his wife for her maintenance and that of the children of the marriage.</i> <i>Ex parte Botha</i>	14
Martial Law—Escape from prison —Act 23 of 1888. <i>A civilian who has been tried and sentenced to imprisonment by a Court Martial cannot be convicted under Sec. 29 of Act 23 of 1888.</i> <i>Rex v. Deppenaar</i>	648
Martial law — Expunction of names from Criminal record. <i>Where certain persons had been tried before a Resident Magis- trate in his capacity as a deputy administrator of martial law</i>	

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<i>and convicted, and the proceedings were recorded in the ordinary criminal record: the Court granted a rule nisi on the said magistrate, calling upon him to show cause why the said proceedings should not be expunged from the record.</i>		Martial law—Resident Magistrate.	
<i>Ex parte Gagiano and others</i>	969	<i>A trial by a Resident Magistrate for a contravention of martial law regulations is not rendered valid by the fact that the charge sheet on which the proceedings are recorded is headed "Martial Law jurisdiction," or that the magistrate was specially deputed by the commandant to try such case.</i>	
Martial Law—Inferior Court—Review.		<i>Rex v. van Vuuren ...</i>	902
<i>The applicants were tried "in the Court of the Deputy Administrator of Martial Law at D" for contravention of certain Martial Law regulations, and sentenced to six weeks imprisonment with hard labour.</i>		Martial Law—Resident Magistrate's Court—Gross Irregularity.	
<i>Held, that such Court was not a Court whose proceedings the Supreme Court could review, whatever other remedy the applicants might have.</i>		<i>Rex v. Walters ...</i>	803
<i>While undergoing their sentence the applicants were tried "in the "Court of the Resident Magistrate and Deputy Administrator of Martial Law at M" for practically the same offence, and were sentenced to imprisonment with hard labour for two weeks and to pay a fine of £50, failing payment of which to further imprisonment with hard labour for three months.</i>		Martial Law—Resident Magistrate—Review.	
<i>Held, that the Supreme Court had jurisdiction to review the proceedings, and that as the offence was unknown to the law, and the punishment was one which the Magistrate's Court had no power to award, the proceedings should be quashed on the ground of gross irregularity.</i>		<i>Rex v. Kalp and others ...</i>	1008
<i>Rex v. Van Reenan and Others ...</i>	557	Martial law — R. M. Court — Secondary evidence.	
		<i>The Court quashed a conviction for contravening Martial Law Regulations obtained in a Resident Magistrate's Court on the ground that the offence of which the accused was convicted was not known to our law. As the military authorities neglected or refused to produce the record, the Court admitted secondary evidence thereof.</i>	
		<i>Rex. v. van der Merwe ...</i>	805
		Martial Law—Seizure and sale of property by the Military.	
		<i>Where the military authorities had seized, declared confiscate, and proposed to sell certain moveable property of certain British subjects, such seizure having been effected after peace had been proclaimed between His Majesty's Government and the South African Republics: the Court granted a rule nisi calling upon the officer commanding the troops in the dis-</i>	

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<i>trict where the said seizure had been made, to show cause on August 21st why he should not be interdicted from proceeding with the contemplated sale.</i>	
<i>Ex parte Botha and Others...</i>	612
Martial Law, <i>see</i> Prison Breaking	144
Martial law, <i>see</i> Warrant	... 259
Martial law, <i>see</i> Vindication	... 893
Martial law regulations — Resident Magistrate's Court — Record—Alteration of record.	
<i>The accused were charged "in the Court of Resident Magistrate and Deputy Administrator of Martial Law for Malmesbury" with contravention of certain Martial Law Regulations and convicted. Subsequently the so-called Administrator of Martial Law for the district directed the Chief Constable to alter the record by striking out the words "Court of Resident Magistrate," which was done.</i>	
<i>Held, that only an alteration did not affect the right of the accused to have the proceedings quashed on the ground that the Court in which the trial purported to take place had no right to entertain the charges.</i>	
<i>Rex v. Van Reenan and Others</i>	... 710
Master of the Supreme Court Insolvent estate—Trustee—Realization of assets.	
<i>Where no creditors in an insolvent estate have attended any meeting, and no trustee has consequently been elected, the Master of the Supreme Court has no power under the Insolvent Ordinance to liquidate the estate even so far as may be</i>	

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<i>necessary in order to pay the costs of sequestration.</i>	
<i>Brady v. The Master of the Supreme Court...</i>	... 268
Master of Supreme Court—Minor children—Re-marriage.	
<i>M. and his late wife had executed a joint will whereby their children were instituted heirs to their immoveable property, subject to a legacy of the life usufruct to the survivor. M. being now desirous of contracting a second marriage, the Master insisted that, before doing so, he should in some way secure the children's inheritances. The Court ordered M. to file a record in the Deed's Office of all immoveable property due to the children on his death.</i>	
<i>Meiring v. The Master of the Supreme Court</i>	... 655
Measure of Damages, <i>see</i> Contract of Sale of Land	... 147
Messenger's fees — Proclamation 110 of 1879.	
<i>Moll v. Holmes</i>	... 1050
Mining facilities.	
<i>The plaintiff, by agreement with the L. & S.A.E. Company, acquired from the said Company certain mining claims at some distance from Du Toit's Pan Mine, and the L. & S.A.E. Company undertook to give him "ordinary mining facilities." Held, on appeal, that this undertaking did not entitle the plaintiff to claim from the E. Company, in derogation of the rights of claim-holders in that mine, any portion of the reserve of that mine outside the statutory reserve as a depositing site for ground from his claims, although the only other avail-</i>	

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<i>able land tendered to him for that purpose was two miles distant from his claim.</i>	
<i>At the time of the agreement the defendant Company held claims in the Du Toit's Pan mine and after the date of the agreement purchased all the assets of the E. Company, and became liable to fulfil its obligations.</i>	
<i>Held, that the plaintiff had no greater rights against the defendant Company than it had against the E. Company, notwithstanding that the defendant Company was the chief claimholder.</i>	
De Beers Mines v. McCarthy	436
Minor—Maintenance—Allowance to Natural Guardian.	
<i>S. had by an uncitnessed holograph will left the life usufruct of his estate to his wife and the corpus to his child (still a minor). The Court having previously decided that the widow could not claim benefits under this will, had authorized the administrators of the estate to pay £250 annually for the maintenance of the child. The widow now asked for the life usufruct of the whole estate to enable her to maintain the child more suitably, and as a recompense for any expense and trouble she might be put to in so doing. The income from the estate was £1,000.</i>	
<i>The Court ordered that, pending a further order of Court, £500 per annum should be paid to the mother for the use of the child and to meet any extra expense she might incur on the child's account.</i>	
Re Estate of late Sluiter	... 275

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Minors' contingent interest, see	
Option of purchase 269
Minors, see De Communi dividundo	733
Minors' property—Option of purchase.	
<i>A division of certain property having been made, it was discovered that the portion assigned to certain minor heirs had been leased with an option of purchase to the lessee. The lessee now insisted on his option, and the trustee for the said minors asked for an order authorizing the sale, or, in the alternative, setting aside the option as ultra vires. The Master recommended the confirmation of the sale.</i>	
<i>The Court granted an order authorizing the sale of the property.</i>	
Re Minors Waddell, ex parte Currey, N.O.	... 274
Misconduct, see Attorney	598, 809
Misdelivery, see Landing Agent...	664
Misfeasance of Directors, see	
Liquidator ...	... 1026
Mistake, see Transfer Deed	... 996
Mortgage bond—Cancellation.	
Re Estate of late De Witt	... 456
Mortgage bond, see Foreign executor	... 434
Motion, see Cancellation of Sale...	791
Motion, see Ejectment	... 255
Motion, see Interdict	... 366
Mourning Clothing, see Funeral Expenses	... 234
Municipalities — Regulations —	
New buildings—Construction of Municipal Acts.	
<i>The 5th section of Act 22 of 1893 empowers municipalities to frame regulations for prohibiting the erection of objectionable buildings. The 4th section of Act 20 of 1896</i>	

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<i>greatly enlarges their powers. The later Act was not extended to the municipality of Mafeking until in 1897 and after its passing, but before it was so extended that municipality framed detailed regulations for municipal approval of the plans for new buildings. In 1901 the appellant, after obtaining municipal approval of certain plans, deviated from those plans in the construction of the building, and was convicted of a contravention of the regulations; but the summons did not allege and the evidence did not prove that the building as constructed was objectionable.</i>	
<i>Held, that the liability of the defendant must be decided under the Act of 1893, and that the summons was bad.</i>	
Dada v. Municipality of Mafeking	373
Municipality—Derelict land—Sale—Arrear rates—Transfer.	
<i>Ex parte Brinkman, N.O.</i> ...	119
Municipality, <i>see</i> Exceptions 831, 850, 905, 926	
Municipal Building Regulations.	
<i>The provisions of the 4th clause of the Municipal Building Regulations of Cape Town requiring streets to be of a width of 40 feet cannot be made to apply to a street laid out before the regulations came into force.</i>	
Town Council of Cape Town v. Shenker	120
Municipal Council—Waterworks— <i>Ultra vires</i> —Interdict—Application to Parliament.	
<i>The Municipal Council of K. had power to grant leave to any company to lay down pipes or</i>	

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<i>to execute any other like works for supplying the inhabitants with water.</i>	
<i>Held, that it was not ultra vires of the Council to give a monopoly for the supply of water to the inhabitants for a period of twenty-five years to a company undertaking, in consideration of such monopoly, to construct the necessary waterworks, but that it would be ultra vires for the Council to bind itself to take no steps for supplying water to the inhabitants after the expiration of twenty-five years until the Council shall have purchased from the company the works constructed by the company.</i>	
<i>Held further, that a public body cannot be interdicted from applying to Parliament for power to construct works for the benefit of the inhabitants.</i>	
Kimberley Waterworks Co. v. Kimberley Borough Council	758
Municipal regulations—Building line—Air space— <i>Ultra vires</i> —Compensation—Interdict.	
<i>The respondent, intending to build on his own land adjoining a road, which had been laid out forty-two years previously with a width of about eighteen feet, complied with all the requirements of the municipal engineer, except that he refused to put the building back to a distance of twenty feet from the centre of the road, in terms of a municipal regulation which prohibits the erection without the consent of the Municipal Council of any building within twenty feet from the centre of a road. The building was not proposed to be extended beyond the line of frontage.</i>	

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Held, that the regulation, in so far as it prevents the enjoyment by the owner of a substantial portion of his property adjoining a road which was in existence before the framing of the regulations, without compensation to the owner, is ultra vires, and that, as the Municipal Council was not justified in insisting upon a setting back without compensation, the respondent should not be interdicted from proceeding with the erection of the building.		providing that the survivor should enjoy the life usufruct of their joint estate, and that at his or her death the property should be divided equally among the brothers and sisters of the testator and testatrix, the children of predeceased brothers or sisters to succeed by representation. All the brothers and sisters had waived their rights under the will; there were certain minor nephews and nieces, and applicant now asked for an order authorizing him to dispose of the corpus of the inheritance on certain terms. The Court refused to make any order.	
Green and Sea Point Municipality v. Kramer ...	560	Ex parte Walker ...	719
Municipal regulations—Ultra vires—Making bricks—Nuisance—Municipal Act 45 of 1882.		Native, see Liquor License ...	909
The Municipal Act, 1882, authorizes Municipal Councils to make regulations for restraining noisome and offensive trades.		Native—Liquor Licence—Barman—Secs. 29-30 of Proclam. 255 of 1900.	
Held, that a person making bricks from clay found on his own land for the purpose of building houses on such land does not carry on the trade of brickmaking, and that a regulation preventing such a person from making such bricks without the consent of the Council is ultra vires of the Council.		Rex v. James ...	619
Held further, that if any nuisance is caused by such brickmaking it may be interdicted at the suit of the Council or of any person injured by such nuisance.		Native custom—Dowry cattle—Attachment.	
Green and Sea Point Municipality v. Egnal & Co. ...	651	The respondent, a native in the Transkei, delivered certain dowry cattle to the father of his intended bride in anticipation of the intended marriage, but she afterwards refused to marry him, and he thereupon claimed back the dowry cattle from the father, who had in the meantime sold some of the cattle to the appellant. The respondent obtained judgment against the father for the cattle or their value and, in execution of the judgment, the messenger attached the cattle which had been sold to the appellant.	
Mutual will—Freedom of testamentary disposition.		Held, confirming the judgment of the Chief Magistrate, that by native custom the property in the cattle did not pass to the father until marriage, and that	
The applicant and his late wife had executed a mutual will,			

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<i>the cattle had been properly attached.</i>		Notary and Conveyancer, <i>see</i>	
Peacock v. Ben Rango ...	545	Attorney	825
Native customs — Marriage —		Notary public—Service of articles	
Dowry — Seizure of dowry		—Act 12 of 1858.	
cattle.		<i>B. had been admitted as an</i>	
<i>A native being engaged to be</i>		<i>attorney, and had passed the</i>	
<i>married to a native girl de-</i>		<i>examination required to qualify</i>	
<i>livered certain dowry cattle to</i>		<i>him as a notary public. The</i>	
<i>the father of the girl, but after-</i>		<i>firm of attorneys, however, to</i>	
<i>wards broke the engagement</i>		<i>which he had been articled as a</i>	
<i>without any fault on her part,</i>		<i>clerk were not notaries.</i>	
<i>and took possession of the</i>		Held, that as the applicant	
<i>cattle.</i>		<i>had been admitted as an</i>	
Held, on appeal, that the father		<i>attorney, and had passed the</i>	
<i>was entitled to recover back</i>		<i>notaries' examination, he might</i>	
<i>the cattle or their value.</i>		<i>be admitted as a notary public.</i>	
Nombombo v. Stofile ...	596	<i>Ex parte Boyes</i>	820
Native location, <i>see</i> Public Health		Notice of motion—Costs.	
Act	383	<i>A notice of motion to deliver</i>	
Negligence—Burning of veld—		<i>up an agreement of lease was</i>	
Damages.		<i>served on the respondent, but</i>	
<i>A fire having originated on</i>		<i>before such service he had sent</i>	
<i>defendant's farm, and having,</i>		<i>the agreement by post to the</i>	
<i>as the Court found, been</i>		<i>applicant, who did not receive</i>	
<i>kindled by defendant's ser-</i>		<i>it until after the notice of mo-</i>	
<i>vants, spread to the adjoining</i>		<i>tion had been issued and</i>	
<i>land of the plaintiff.</i>		<i>served.</i>	
Held, that as the spreading of		Held, that if there was such a	
<i>the fire was due to the negli-</i>		<i>delay as would justify the</i>	
<i>gence of defendant's servants,</i>		<i>motion at the time it was</i>	
<i>he was liable to the plaintiff</i>		<i>issued, the respondent should</i>	
<i>in damages.</i>		<i>pay the costs.</i>	
Van der Byl v. Lategan ...	672	Beale v. Carre	406
Negligence—Injury to person and		Notice, <i>see</i> Right of pre-emption	424
property.		Notice of Withdrawal, <i>see</i> Partner-	
Levy v. The Table Bay Har-		ship	73
bour Board	698	Nuisance—Abatement—Extension	
Negligence, <i>see</i> Agent	381	of time.	
Negligence, <i>see</i> Bailee	643	<i>Where the Court had ordered</i>	
Negligence, <i>see</i> Bailment ...	987	<i>a nuisance to be abated within</i>	
„ <i>see</i> Collision on road ...	375	<i>a month from the date of its</i>	
Negligence, <i>see</i> Grass Fire ...	166	<i>judgment, and the defendants</i>	
Negligence, <i>see</i> Injury	668	<i>subsequently applied for an</i>	
Negligence, <i>see</i> Landing Agent ...	664	<i>extension of time, the Court</i>	
New buildings, <i>see</i> Municipalities	373	<i>refused the application.</i>	
		Mowbray Municipality v.	
		Colonial Government ...	156
		Nuisance, <i>see</i> Brothel	230

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Nuisance, <i>see</i> Municipal Regulations	651
Occupation, <i>see</i> Landlord and tenant... ..	498
Occupier, <i>see</i> Pounds Act	412
Onus probandi, <i>see</i> Sale and Purchase	637
Option of purchase—Executor—Minors' contingent interest. <i>The late J. B. had let certain property to the firm of J. B. & Co., with the option of purchase at his death, for £7,700. J. B. & Co. did not attempt to exercise this option until six years after J. B.'s death, but continued to pay rent. They had greatly improved the property, both in J. B.'s life-time and after his death. One of the partners in J. B. & Co. was also one of J. B.'s executors. He and his co-executor now asked for an order (1) directing the Registrar of Deeds to pass transfer of the said property to J. B. & Co. for the purchase price of £7,700, and (2) to direct that duty should be paid on transfer as though a sale had been effected six months after J. B.'s death. Certain minor children had a remotely contingent interest in the property. The Court granted the first prayer of the petition, but refused the second.</i>	
<i>Re Estate Brister</i>	269
Option of purchase, <i>see</i> Lease 517, 885	
" " " <i>see</i> Minors' property	274
Option of purchase, <i>see</i> Landlord and tenant	656
Ordinance 6 of 1843, <i>see</i> Insolvent Ordinance	609
Ordinance 6 of 1843, <i>see</i> Proof of debts	590

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Ordinary jurisdiction of Resident Magistrate.	
<i>Rex v. Carl</i>	752
Ostensible Partner—Liability.	
<i>Held, that where a man has ceased to be a partner in a firm, but has given no public notice of his withdrawal therefrom, and has thereafter held himself out as a partner, he is estopped from denying his liability on a promissory note given by the firm subsequent to his withdrawal therefrom and accepted in consequence of his having held himself out to still be a partner.</i>	
<i>McKenzie v. Dreyer & Co.</i>	282
Ownership—Theft— <i>Rei vindicatio</i> —Damages.	
<i>During the plaintiff's absence from the Colony, his cart, which he had entrusted to a livery stable keeper for safe custody, was stolen and given by the thief to an auctioneer for sale by public auction.</i>	
<i>Held, that in the absence of negligent conduct on the plaintiff's part tending to mislead the public, the plaintiff was entitled to recover the cart or its value.</i>	
<i>Held further, that the plaintiff was entitled to damages for the detention of the cart after the defendant knew that the plaintiff claimed it as the owner.</i>	
<i>Berry v. Barron</i>	206
Ownership, <i>see</i> Vindication	893
Pacts, <i>see</i> Restraint of trade	368
<i>Pactum Adjectum</i> , <i>see</i> Purchase and Sale	781
<i>Pactum de non petendo.</i>	
<i>S. had signed a certain acknowledgment of debt in favour of R. The defence was that R. had by a contem-</i>	

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<i>poraneous document engaged not to press for payment until two months after a certain future event should have happened.</i>	
<i>Held, that as the event in question had not yet happened plaintiff was bound by his pactum de non petendo, even though there was some evidence that defendant was not without funds and that provisional sentence must be refused.</i>	
<i>Ritson v. Sieradzki ...</i>	28
<i>Parliament, see Interdict ...</i>	33
Partnership.	
<i>The plaintiff, a grocer, sued the defendant, a commercial traveller, for £150, made up of balance of account against the defendant and of money advanced to him by plaintiff. On being pressed by the plaintiff for payment of his debt, the defendant claimed the £150 as due to him in consideration of his having retired from an alleged partnership entered into by him with the plaintiff. The Court, finding on the evidence that no contract of partnership had ever been completed, gave judgment for plaintiff with costs</i>	
<i>Craik v. Robertson ...</i>	491
<i>Partnership, see Harbour Board</i>	956
Partnership — Retired partner—Liability—Notice of Withdrawal.	
<i>On being sued by plaintiff as a member of the firm of D. & Co., defendant set up the defence that at the time the debt in question was contracted by the said firm he had ceased to be a member thereof.</i>	
<i>Held, that even if this were the case, as he had continued to hold himself out as a partner by not having given notice of</i>	

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<i>his withdrawal to the customers of the firm, and by allowing the remaining partner to continue to use business paper on which his name appeared, he was liable in respect of the partnership debt in question.</i>	
<i>McKenzie v. Irvine ...</i>	784
Patent Rights—Phonographs.	
<i>Where an interdict was prayed restraining the respondents from selling or dealing in certain phonographs and their accessories.</i>	
<i>Held, that as the affidavit of applicant did not disclose in what way the instruments sold by respondents infringed his patent rights, and as no specimens of the phonographs in dispute had been submitted to the Court, the evidence in applicant's favour was too weak to justify the Court in granting the interdict aforesaid. The Court, however, directed that respondents should keep an account of all sales of the goods in question effected by them.</i>	
<i>The Edison-Bell Phonograph Co., Ltd., v. W. F. Brittain & Co. ...</i>	220
<i>Permitting Drunkenness, see Liquor Licensing Acts...</i>	336
<i>Personal Injury, see Landlord and Tenant ...</i>	681
<i>Phonographs, see Patent rights ...</i>	220
<i>Place of Delivery, see Sale and Purchase ...</i>	646
<i>Play, see Interdict ...</i>	994
<i>Plea, in abatement, see Exception</i>	891
<i>Pleading, see Exceptions</i>	831, 850, 905, 926
Pledge of movables — Sale of goods pledged.	
<i>Where respondent had pledged certain goods without making delivery thereof, and after-</i>	

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<i>wards sold them by public auction; the Court granted a rule calling upon respondent to show cause why the auctioneers should not be restrained from paying over the proceeds of the sale to the respondent: the said rule to operate as an interim interdict, but with leave to any third person to apply for a discharge of the said rule.</i>		<i>the bills of lading for the goods as security for advances thereon, and had given the bills of lading to H.'s agent at Port Elizabeth to enable him to land the goods, was entitled to an order for the discharge of the attachment.</i>	
<i>Ex parte Craik</i>	371	<i>Colonial Government v. Holt & Holt</i>	586
Point reserved, <i>see</i> Appeal ...	1015	Possession — Delivery — Bills of lading—Attachment.	
Police Offences Act, 1882, Sect. 7, Sub-section 6—Locomotive.		<i>By agreement between the Government and certain railway contractors the former advanced to the latter large sums of money against certain railway sleepers bought by the contractors in England, the bills of lading for the conveyance of which to this Colony were to the order of and indorsed by the shippers and given to the Government as security. On arrival of the sleepers the bills of lading were given to the contractors' agent for the purpose of receiving delivery and landing the sleepers. The agent handed them for safe keeping to a warehouseman, who afterwards, by order of the contractors, delivered them to the Government.</i>	
<i>Where a vehicle has been drawn into a public street by a locomotive and left standing there without the locomotive and without any horse or animal harnessed to the vehicle, the person who so left it is guilty of a contravention of Sub sec 6 of Sec. 7 of the Police Offences Act of 1882.</i>		<i>Held, that even if the Government lost its right of pledge while the goods were in the possession of the agent or of the warehouseman, the right revived upon the goods being redelivered to the Government, and that an attachment by other execution creditors after such redelivery cannot prevail against the prior pledge.</i>	
<i>Rex v. Lewis</i>	334	<i>Colonial Government v. Holt and Holt and others</i> ...	493
Police Supervision, <i>see</i> Bail ...	714	Possession, <i>see</i> Vindication ...	893
Possession — Bills of Lading — Security—Attachment.			
<i>Goods belonging to H. having been deposited with the Harbour Board of Port Elizabeth, the Secretary of the Harbour Board, acting under instructions from H., informed the Railway Department that he had been instructed to hand over the goods to them. The Railway Engineer, in reply, requested that the goods be stored for him, and the goods accordingly remained in the custody of the Harbour Board. The respondents, as execution creditors of H., attached the goods.</i>			
<i>Held, that the Railway Department, which had received</i>			

Postponement of Trial—Absence of Witnesses—Practice.

Application for the postponement of a criminal trial on the ground of the absence of material witnesses refused in the absence of any affidavit stating the names of the witnesses, and in what respect their evidence was material.

Rex v. Radziwill ... 279

Pounds Act, 1892 — Rescue — Proprietor — Crown Land — Occupier.

A native in the occupation of a plot of Crown land which has been allotted but not yet transferred to him may, under the 25th section of the Pounds Act, 1892, impound cattle trespassing on such plot, and any person rescuing cattle so impounded is liable to prosecution under the 30th section of the Act.

Rex v. Atlonga ... 412

Power of Attorney, see Death of Party to Action ... 835

Practice, see Postponement of Trial 279

Prescription — Exception — Attorneys' fees and disbursements.

To a claim by an attorney in a Magistrate's Court for fees and disbursements the defendant pleaded prescription on the ground that three years had passed since the dates of the different items. It not appearing from the evidence at what date judgment had been given by the Court in which the attorney had been employed, the Supreme Court remitted the case to the Magistrate's Court for further evidence on this point.

Prescription runs from the time when proceedings for the

recovery of fees could be taken, and not from the date when the costs were actually taxed.

Walker v. Fenele ... 660

Prescription, see Sale and purchase 628

Prescription, see Insolvency ... 216

Prescription—Attorney's costs—Judgment.

Where an attorney has been engaged for the conduct of an action to its final determination and has not been superseded in the meantime, the cause of action for his fees and disbursements accrues when judgment is given in respect of costs, and therefore prescription only begins to run from the date of such judgment.

Walker v. Fenele ... 871

Presumption of death—Executor—Curator.

Ex parte Wright and others ... 970

Presumption, see Collision on road 375

Previous Conviction—Act 39 of 1885.

A conviction under sec. 27 of Act 39 of 1885 cannot be regarded as a previous conviction in the case of a woman convicted under sec. 17.

Rex v. Arnolds ... 337

Prison Breaking—Martial Law—Civil Warrant.

The Court will not uphold a conviction for prison breaking where the prisoner who had escaped from custody was not imprisoned under any Civil Warrant but merely by order of the military authorities.

Rex V. Link and Wenner 144

Private International Law—Lex Fori—Lex Loci Contractus.

Where plaintiff sued defendant for provisional sentence on two liquid documents made 12½

	PAGE		PAGE
<i>years ago in a foreign country the statute laws of which did not recognise prescription, plaintiff being at present beyond the jurisdiction.</i>		Proof of debts—Insolvent estate	
<i>Held, that the case must be decided by the lex fori, under Act 6 of 1861, and hence that the debt aforesaid was barred by prescription.</i>		—Costs—27th Section of Insolvent Ordinance.	
Alexander v. Parker... ..	154	<i>On an application to admit a proof of debt on an insolvent estate which had been rejected by the magistrate, it appeared that the assets of the estate were sufficient to pay all the debts which had been proved, including the applicant's claim. The Court held that the proof was a bona fide one, and as the respondents had persisted in their opposition to the application after they were aware of the sufficiency of the assets, they were ordered to pay the costs of opposition.</i>	
Probate, <i>see</i> Will	792	Zondagh v. Fichat and Others	590
Procedure, <i>see</i> Cape Town Municipality	958	Proof of Debt, <i>see</i> Insolvency ...	216
Proclamation 255 of 1900, <i>see</i> Native... ..	619	Proprietor, <i>see</i> Pounds Act ...	412
Production of forged document, <i>see</i> Forgery	281	Prospectors—Written agreement	
Prohibition, <i>see</i> Alienation ...	436	—Net proceeds of sale.	
Prohibition against alienation, <i>see</i> Will	718	<i>A company promoter agreed in writing with certain prospectors to transfer to them a third interest in certain cases treated by them, and on sale of such claims to pay them one-third of the net proceeds. The written agreement did not contain the whole of the contract between the parties, and there was evidence to show that the intention of the parties was to throw on the company promoter the obligation to keep the claims alive.</i>	
Promissory note—Indorser—Presentment for payment.		<i>Held, affirming the judgment of the High Court of Southern Rhodesia, that the company promoter was entitled to deduct from the proceeds of the sale the expenses connected with such sale, but not the licence fees and other expenses of keeping the claims alive.</i>	
<i>A promissory note was made payable at the office of W. and was indorsed by the defendant. At the due date W., who was an attorney and notary, was employed by the holder to present the note for payment, and recover the amount from the parties thereto. W. presented the note at his own office to himself, and replied, as the fact was, that there was no funds to meet the same.</i>		Haddon v. Horton	939
<i>Held, that there was a valid presentment for payment.</i>			
Schenke v. Goddard... ..	889		
Promissory note, <i>see</i> Provisional sentence	284		
Promissory note — Counterclaim —Weight of evidence.			
Levin v. Manaschowitz ...	662		

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Provisional sentence—Mortgage
bond—Repayment of Instal-
ments—Evidence.

One G. had advanced to L. £100 for which sum L. gave a promissory note. Thereafter L. paid to G. certain instalments of this £100, thereby reducing his debt to £69. These instalments were indorsed on the note by G. Thereafter G. ceded the said note to M. and L. granted a power of attorney to pass a mortgage bond in favour of M. for £75, L.'s note being thereupon returned to him. The bond was, however, passed for £100. Plaintiff now asked for provisional sentence for interest on the said £100.

Held, that as the bond had been given in settlement of the promissory note, and as payments of the aforesaid instalments were indorsed on this note, apparently at the time they were paid, provisional sentence for interest on £75 only should be granted.

McLeod v. Le Grange ... 1005

Provisional Sentence — Promis-
sory Note—Liquid document.

F. and G. had signed certain promissory notes in favour of M. by making themselves jointly and severally liable. F. had paid these notes after they became due, and now asked for provisional sentence against G. for the entire amount, alleging that they were for G.'s accommodation, and that he (F.) had received no consideration.

Held, that as these notes did not show *ex facie* that G. was indebted to F., provisional sentence must be refused.

SEMPLE, *provisional sentence cannot be given upon a bill alleged to be an accommodation bill.*

Frost v. Geddes ... 284

Provisional sentence, *see* Condi-
tions of sale ... 709

Provisional sentence—Signature
denied.

Applicant had been summoned for provisional sentence on a promissory note, the summons being returnable on 13th October, 1901. The case was postponed till November 1, 1901, when defendant's signature was denied, and proof of the signature was fixed for February 1, 1902. The first defendant now asked for further postponement and for the appointment of a Commission to take evidence in England.

Held, that no reasons had been given for the above application, and no intimation made as to what these witnesses in England were to prove: and further, that as only provisional sentence could be granted against defendant on February 1, the application must be refused with costs.

In *re* Louw v. Rhodes and
Radziwill ... 12

Provisional sentence, *see* Bail
Bond ... 937

Public Health Act—Government
regulations—*Ultra vires.*

In the absence of evidence to show that a regulation prohibiting the sale of liquor to aboriginal natives would not prevent, check or eradicate bubonic plague.

Held, that a regulation to that effect published in the terms of the 15th section of the Public

	PAGE		PAGE
<i>Health Act is not ultra vires, but that such a regulation should be repealed when the necessity for its continuance ceased to exist.</i>		Purchase and Sale—Re-opening settlement.	
<i>Rex v. Stern, Rex v. Rosenberg</i>	1012	<i>The defendant sold his brewery premises, goodwill and all property connected therewith, to the plaintiffs, stipulating that the amounts to be paid for stock-in-trade and for outstanding debts were to be reckoned according to the actual value of the stock and to the debts taken over as good by the purchasers. Part of the property sold consisted of two hotels. The defendant had previously disposed of the goodwills of the businesses carried on in these hotels to the tenants, but had not received the whole of the purchase price. The balances due were brought up at the adjustment of accounts between plaintiffs and defendant, but were not taken over as good outstanding debts. A final settlement then took place between the parties. Defendant afterwards recovered from the debtors, and the plaintiffs now claimed the amounts so recovered on the grounds that the goodwills were included in the property sold. The Court, however, refused to re-open the settlement, there not being any fraud or concealment or mistake of fact.</i>	
Public Health — Municipality — Regulations—Ultra vires.		<i>S.A. Breweries v. Martienssen</i>	465
<i>Under the Public Health Amendment Act, 1897, every urban local authority may make regulations for regulating the trade in articles intended for the food of man. The Municipal Council of M. made a regulation prohibiting the keeping of food in any shop, room or other place used as a sleeping apartment, or directly connected with any sleeping place or any sanitary convenience. The appellant was tried before the Resident Magistrate of M. for a contravention of the regulation by keeping bread in a shop which was directly connected by a door with a sleeping apartment used as such by the inmates, and evidence was given that the rush of foul air into the shop from the bedroom would have a deleterious effect on the food.</i>		Purchase and sale—Condition—	
<i>Held (in the absence of any conclusive evidence to the contrary) that the regulation was not ultra vires.</i>		Recission of sale—Damages — Pactum adjectum.	
<i>Rex v. Kadir... ..</i>	983	<i>The defendants bought from the plaintiff and left in his possession a waggon and ten donkeys on the understanding that he should not use them while in his possession. The plaintiff did use them on journeys of some length, but there</i>	
Public Health Act—Government Notice No. 854 of Oct. 1st, 1901—Native Location—Certificate of residence.			
<i>Rex v. Radas... ..</i>	383		
Public place, see Abusive language	394		
Public policy, see Restraint of trade	368		

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<i>was no evidence of injury done to them by reason of such use.</i>	
<i>Held, that the defendants were not justified in repudiating the sale, and that their remedy was for damages for the use of things sold contrary to the agreement.</i>	
<i>Held further, that upon the defendants refusing to take delivery of the things sold, the plaintiff was entitled, instead of insisting upon payment of the purchase price, to retain the things sold and recover damages for the defendants' breach of contract, the measure of damages being the difference between their contract price and the market value.</i>	
Kramer v. Van der Merwe and Another	781
Purchase of property, <i>see</i> Executor	727
Purchase of Minor's property, <i>see</i> Executor and Tutor	67
Quantum meruit, <i>see</i> Architect's plans	478
Railways, <i>see</i> Expropriation ...	159
Railways—Act 19 of 1900.	
Colonial Government v. Hills	519
Railway charges, <i>see</i> Colonial produce	753
Railway siding—Interdict—Act 20 of 1857.	
<i>The Government having constructed at Maitland, in connection with the Cape Town to Wellington Railway, a siding which crossed the main road, the Divisional Council applied for an interdict to restrain the use of the siding, and for an order for its removal.</i>	
<i>Held that, in the absence of proof that construction of such siding was not within the power of the company originally</i>	

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<i>formed for construction of the line under Act 20 of 1857, the interdict and order should not be granted.</i>	
Cape Divisional Council v. the Colonial Government	970
Raising money, <i>see</i> Commission...	331
Rebel—Attachment of property <i>ad fundandam jurisdictionem.</i>	
Colonial Government v. Vos	435
Receiver—Partnership—Costs.	
Robertson v. Moss	1048
Rescission of Sale, <i>see</i> Purchase and sale	781
Registration of land—Mistake in transfer—Acquiescence—Act 28 of 1881.	
<i>A. being the owner of $\frac{1}{8}$th share of a farm, sold such $\frac{1}{8}$th share to B. and gave him possession, but by mistake he transferred to him $\frac{1}{4}$th of a portion only, viz., of $\frac{1}{4}$th of the farm. B. sold his share to C., who applied to the Court for transfer under Act 28 of 1881. D., one of A.'s sons objected on the ground that at the time of the sale in 1874 A., being the surviving spouse of D.'s mother, to whom A. had been married in community and who had died intestate, could only dispose of one-half of his $\frac{1}{8}$th share, viz., $\frac{1}{16}$th of the farm. It appeared that before the sale by A he had taken over his deceased wife's share in the farm from her executor at a valuation, and had paid out her heirs upon the basis of such valuation, that no objection was made by those children who were of age at the time of the sale or by those who became of age afterwards, and that for 27 years the children had raised no objection although they knew</i>	

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<i>that strangers were in possession of the land.</i>		<i>the said premises under the lease aforesaid.</i>	
<i>Held, that even if the children could have objected to the sale at the time it was effected, their acquiescence debarred them from now objecting to the transfer of the full interest purchased by B. and by him sold to C.</i>		<i>Held, that as defendants had leased the said premises with full knowledge of the risk they were running owing to military operations, the Roman Dutch authorities as to want of beneficial occupation did not apply.</i>	
<i>Ex parte Leygonie</i>	583	<i>Foulger v. Liebermann, Bellstedt & Co....</i>	24
Registered Title, <i>see</i> Church Body	961	Rents, <i>see</i> Sale	207
Registration, <i>see</i> Trade Mark	6	Rent, <i>see</i> Lessor and Lessee	903
Registration, <i>see</i> Transfer of Property	972	Rent, <i>see</i> Contract	537
Regulations, <i>see</i> Municipalities...	373	.. <i>see</i> Landlord and tenant	512, 515
Rehabilitation, <i>see</i> Insolvency	714	Re-opening settlement, <i>see</i> Purchase and sale	465
<i>Rei vindicatio</i> , <i>see</i> Ownership	206	Rescue, <i>see</i> Pounds Act	412
Re-marriage, <i>see</i> Master of Supreme Court	655	Reservatory Clause, <i>see</i> Will	792
Removal of interdict.		Resident Magistrate — Jurisdiction—Act 13 of 1886.	
<i>Where a husband has been ordered by the Court to pay over to his wife £25 to enable her to sue him for divorce and had been interdicted from alienating certain of the common property : the Court after the lapse of more than two years removed the interdict as the wife had failed to bring her action within that time.</i>		<i>Where a charge of contravening sec. 2 of Act 13 of 1886 had been tried by a magistrate, and he had imposed a fine of £25 with an alternative of three months' imprisonment, which sentence was within the limit of punishment fixed by the Act : the fine was reduced to £10 as the charge had been tried under the ordinary jurisdiction of the magistrate.</i>	
<i>Hackenberg v. Hackenberg</i> ...	68	<i>Rex v. Saschlosky</i>	393
Rent—Beneficial occupation.		Resident Magistrates' Court, <i>see</i> Martial Law regulations	710
<i>Defendants had hired certain hotel premises situate in the Orange Free State from plaintiff, subsequent to the outbreak of hostilities between that State and Great Britain. Defendant's tenant of said premises having been deported, without any fault of his own, by the British Military Authorities, defendants now denied that they were liable for the rent of</i>		Resident Magistrates' Court Acts—Jurisdiction—Title to land.	
		<i>Where, owing to the form of an action in a Resident Magistrate's Court, it is impossible to do justice between the parties without deciding a question of title to land between them, the Magistrate is justified in allowing an exception to his jurisdiction.</i>	
		<i>De Jager v. Noordwyk</i> ...	662

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Restraint of trade—Public policy — Consideration — Pacts or covenants—Interdict. <i>In the absence of proof that the applicant is seeking to ob- tain an unfair advantage, the Court will, by interdict, enforce a covenant in reasonable re- straint of trade if there is bona fide consideration for such covenant.</i> Edgcome v. Hodgson ... 368	
Retention, see Lien ... 645	
Retired partner, see Partnership 734	
Review, see Chief Magistrate's Court ... 555	
Review, see Martial Law ... 557	
Rhodesian Companies Ordinance, see Liquidator ... 1026	
Right of pre-emption—Notice— Agent. Cohen v. Schiebe ... 424	
Right of renewal, see Sale of land 384	
Risk and Profits before Transfer, see Sale ... 207	
Robbery—Insolvency of Robber. <i>One Goldstein had been con- victed of robbing one Glass of a watch, chain, &c., and of certain moneys. Meanwhile Goldstein's estate had been sequestered as insolvent. Glass now claimed the property of which he had been robbed, and the Colonial Orphan Chamber, as trustee of the insolvent estate, also laid claim thereto. Glass asked for a postponement of the case in order that further affidavits might be filed.</i> <i>Held that certain effects then in the hands of the gaoler, Cape Town, which had been stolen from Glass must be re- stored to him, and that the rest of the application must stand over for further affi- davits.</i> Ex parte Steytler, N.O. ... 12	

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Rule 15, see Bail bond ... 879	
„ 62, see Indictment ... 1016	
Rule 319—Evidence—Interdict. Kariem v. Janson ... 628	
Sale—Risk and Profits before transfer—Rents—Agent. <i>Where land is sold for cash on transfer and the purchaser is prepared from the date of the sale to pay cash, he is en- titled, as against the vendor, to any rents received in respect of the intervening period between the date of sale and the date of transfer.</i> <i>At the time of the sale of certain land, the purchaser appointed an agent to collect rents gene- rally for him. The agent, who was also agent for the vendor, received rents from tenants of the property sold and, knowing that the rents for the period intervening between sale and transfer were claimed by the purchaser, paid the same to the vendor as being, in his opinion, entitled to the rents.</i> <i>Held, affirming the judgment of the High Court of Griqua- land West, that such payment was no defence to an action brought by the purchaser against the agent for the amount of rent received by him.</i> De Kock and Others v. Fincham ... 207	
Sale, see Broker ... 843	
Sale, see Lease ... 517	
Sale to executors. Ex parte Executors of late Nolte ... 519	
Sale to executor—Auctioneer. <i>Where certain property had been sold by public auction for a fair price to one of the execu- tors, the Court granted an order to pass transfer though the</i>	

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<i>auctioneer who sold the property was in partnership with the applicant.</i>		Sale and Purchase—Delivery.	
<i>Re Estate of the late Probart</i>	727	<i>B. had purchased from H. & Co. certain potatoes, to be delivered at Worcester. The evidence was weak as to the soundness of the potatoes when they were despatched to Worcester, and there was no evidence as to their condition when the Railway Department were prepared to deliver them. After lying some days at the station B. took delivery and, finding them unsound, refused them. H. & Co. now sued B. for the value of the said potatoes. The Court gave judgment for the defendant with costs.</i>	
Sale and purchase—Articles to be manufactured—Place of delivery.		<i>B. Buirski & Son v. Hammer-schlag & Co. 620</i>	
<i>The defendant, a manufacturer of cigarette boxes, undertook to supply the plaintiff with a certain number at a certain price. The plaintiff took delivery of some at the place of manufacture. After some delay on the part of the defendant in supplying the remaining boxes, the plaintiff demanded delivery of them at his own residence. The defendant offered to deliver them at the place of manufacture. Held, that the defendant was entitled to recover the price upon delivery at the place of manufacture.</i>		Sale and purchase—Warranty—Actio redhibitoria—Actio quanti minoris—Delay—Prescription.	
<i>Goldblatt v. Merwe 646</i>	646	<i>The defendant, on a sale by him of a cart to the plaintiff, warranted it to be in a good and sound condition. After three months, during which plaintiff had seldom used the cart, he discovered that the wheels were not in a good and sound condition, upon which the defendant undertook to put in new wheels. The defendant having failed to carry out this undertaking.</i>	
Sale and purchase—Agency—Evidence.		<i>Held, that the plaintiff was entitled to a refund of the price, he tendering to redeliver the cart.</i>	
<i>Clemen v. Feltman 633</i>	633	<i>The actio redhibitoria should be brought within six months after the sale, unless good and sufficient cause be shown for a further delay.</i>	
Sale and purchase—Conditions of sale—Onus probandi—Admission.		<i>Christie v. Etheridge ... 628</i>	
<i>The onus of proving that the conditions of purchase have been fulfilled rests upon the purchaser, but such onus is discharged by the admission of the vendor, made in presence of credible witnesses, even though he may afterwards deny that he has made such admission, and the evidence may suggest a doubt as to whether it was not false in point of fact and made for a fraudulent purpose.</i>			
<i>Khan v. Arend 637</i>	637		
Sale and purchase—Delivery—Actio quanti minoris.			
<i>Ripley & Balfour v. Porter 701</i>	701		

Sale and Purchase—Time.

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Where a vendor sells perishable goods to a purchaser, who does not take delivery at the time specified in the contract of purchase and sale, the vendor is justified in selling the said goods to a third person, but is bound to account to the original purchaser for any profits he may have made over and above the price paid by such purchaser. Should the vendor lose on such transaction,

Semble, he would have a right to claim from the original purchaser the difference between the price such purchaser agreed to pay and that which was actually realized.

Jacobs v. Maree ... 228

Sale and purchase—Warranty—
Fraud—Voetstoots.

At a sale by auction of certain kilns of bricks the auctioneer stated that he sold them "as a lot" and not by number, and the seller being asked by the auctioneer how many he estimated them to be, said "about 80,000." The purchaser on receiving delivery found there were only about 50,000, and on being sued for the price claimed a pro rata reduction.

Held, that there was no warranty of quantity, and that, in the absence of bad faith on the part of the seller, he was entitled to claim the full price at which the kilns had been sold.

Elliott v. McKillop ... 592

Sale of goods pledged, *see* Pledge
of moveables ... 371

Sale of goodwill, *see* Hotel
premises ... 685

Sale of land—Lease—Right of
renewal—Executor — "Hire
goes before sale."

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During the absence from the Colony of H., his wife, under his general power of attorney, purchased certain premises, part of which had to her knowledge been leased to the defendants for a year at a monthly rental, with a right of renewal at the expiration for 7, 14 or 21 years, and the land was duly transferred to H. Notice was then given by the seller to the defendants to pay the rent to Mrs. H., to whom the written agreement of lease had been given. H. died in England, and the plaintiff took out letters of administration in this Colony as executor. He allowed Mrs. H. to remain in possession of the premises as the usufructuary of the estate under H.'s will, and she continued to receive the rent of the leased portion from the defendants. Before the expiration of the first year the defendants, who believed Mrs. H. to be the owner, and had never heard of her having a husband, gave her notice of their intention to renew for 21 years, and she raised no objection. No renewal was executed, but the defendants remained in occupation as tenants and paid the monthly rent as it fell due to Mrs. H. After her death the plaintiff, as executor, sought to eject the defendants.

Held, (1) That the rule "hire before sale" applies only to leases in existence, and which, if unregistered, do not extend beyond ten years and not to a right to renew; (2) That if, however, the purchaser adopted

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<i>the lease and accepted the lessee as his tenant, the purchaser may be compelled to execute a lease for such renewal, which if it exceeds ten years must be duly registered: (3) That under the circumstances of the present case the notice given by the defendants to Mrs. H., whom the plaintiff as executor had allowed to appear as the ostensible owner, and whom the defendants believed to be the real owner, was a sufficient notice to the plaintiff of their intention to renew the lease.</i>	Sale of Fideicommissory property—Burdened Estate.
Executor of Hite v. Jones ... 384	<i>Ex parte Groenewald ... 849</i>
Sale by auction—Sub-division of lots—General plan—Open space for public purposes—Executor—Registration.	Salvage—Award.
<i>An executor caused a piece of land falling within the Municipality of P. and forming part of the estate to be sub-divided and sold by auction in lots according to a general plan which was displayed at the sale. The plan showed among the lots an "open space for municipal purposes." The executor died and another executor was appointed, who proposed to sell the open space in lots, and asked the Municipal Council of P. for its consent, which was refused.</i>	<i>The C., a vessel worth about £5,500, laden with a cargo of coal, had been abandoned about 100 miles from Algoa Bay in consequence of her cargo having caught fire. She was found in a burning state by the S.S. Politician, a vessel worth (with her cargo of horses) about £146,000. Some of the Politician's crew were, at great risk, placed on board the derelict, and she was towed into Algoa Bay. Two tugs, the property of the first plaintiffs, and worth £9,000 and £6,000 respectively, rendered assistance in extinguishing the fire, and were so engaged during in all 14 days, their owners meanwhile incurring out of pocket expenses to the extent of £627.</i>
Held, in an action by the executor against the Municipal Council and some of the purchasers of lots at the sale, that the plaintiff was bound by the acts of the previous executor, and was not entitled to an order compelling the Council to give its consent.	Held, that each of the salvors must be awarded $\frac{1}{4}$ of the value of the ship saved.
Estate Gardner v. Town Council of Port Elizabeth ... 926	Semble: It is impossible to lay down any hard and fast rule as to the awards in salvage cases, but the peril of the property saved and the value of the ship rendering the salvage services must always be among the elements to be considered by the Court.
	Messina Bros. and Master of the "Politician" v. Master of the "Cromartyshire" ... 191
	School property, see Alienation ... 436
	Scope of employment, see Architect's plans ... 478
	Sea-shore, the—Lands reclaimed from the sea—Alluvion—Act 26 of 1893.
	<i>Land reclaimed from the sea intentionally and by artificial</i>

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<i>means belongs to the Crown, and cannot be claimed as an accession by alluvion by the owner of land adjoining that portion of the sea which has been so reclaimed.</i>	
<i>Where the Town Council of Cape Town has so reclaimed land it is not entitled to the ownership unless it has obtained the consent of the Colonial Government and of the Table Bay Harbour Board to such reclamation, for the purpose of acquiring the ownership under the 154th Section of Act 26 of 1893.</i>	
Colonial Government v. Town Council of Cape Town ...	96
Security, <i>see</i> Arrest ...	26
Security, <i>see</i> Bail Bond ...	879
Security for rent, <i>see</i> Interdict ...	848
Security, <i>see</i> Possession ...	586
Security—Guarantee.	
<i>R. had given to one W. a guarantee that he (R.) would be responsible for any claims one S. might have against him (W.) in respect of the production of a certain play. R., being now about to quit this Colony, was called upon by W. to give security to meet any such claims, and to pay costs of any action in respect of the above matter should judgment be given against W.</i>	
<i>Held, that the application must be refused, but that applicant be authorized to pay into Court some £250, moneys due by him to respondent as security for costs in any such action as the above which might be brought against him, costs of the present application to stand over.</i>	
Wheeler v. Rankin ...	188

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Security for Costs, <i>see</i> Import Duty ...	222
Seizure of Dowry Cattle, <i>see</i> Native Customs ...	596
Sentence—Irregularity.	
<i>Where an Assistant Resident Magistrate had convicted a prisoner and pronounced the following sentence "reprimanded and discharged."</i>	
<i>Held that such sentence was irregular inasmuch as it deprived the prisoner of his right to appeal to a superior Court, and that as the Crown refused to consent to the whole finding being set aside the matter must be remitted to the Magistrate to pass a sentence from which an appeal could be heard.</i>	
Rex. v. Norman ...	4
Service of Articles in Scotland, <i>see</i> Attorney ...	678
Service of Summons.	
<i>Where summons had been served by affixing a copy thereof to the floor of a tent. Such service was held good.</i>	
Colonial Government v. Swanepoel ...	335
Service of Summons, <i>see</i> Company's Agent ...	116
Servitude—Merger—Registration.	
<i>In 1893 S. sold to B. certain premises. The deed of transfer stated that the said property extended as per deed of transfer passed in 1830 in favour of one M., and was subject to the conditions thereof. In this latter deed a certain passage, between the property of the purchaser and the remaining extent, was reserved as common to the two properties. Between 1830 and 1893 the properties had been merged under one and the same owner, and during the period</i>	

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of this merger the aforesaid passage had ceased to exist. In 1893 the property was again sub-divided and sold to different purchasers. No servitude had been registered on any of the successive transfers of the property, and it was proved that there had been no user of this said passage since 1874. B. now claimed from S. the use of a passage as it existed in 1830. Held, that as no servitude had been registered, B. was not entitled to judgment, but that as S. might have a good defence to any action for registration of a servitude which B. might be advised to bring, absolution from the instance should be granted with costs.	Held, that there was no ground for the interference of the Court.
Richards v. Nash (1 Juta, 312) distinguished.	Steer v. Town Council of Cape Town ... 873
Steffens v. Bam ... 1000	Servitude, <i>see</i> Exceptions 831, 850, 905, 926
Servitude — Road — Municipal Council.	Sheriff, <i>see</i> Bail Bond ... 879
The Municipal Council of C. transferred certain lots of land to a purchaser on condition that the Council should lay out a road between the lots and the beach. The diagram attached to the transfer showed a "proposed road" running parallel to the lots, but with a narrow strip between such lots and the proposed road. Thereafter the Council constructed a carriage road between the lots and the beach, but somewhat further from the lots than the "proposed road" as appearing on the diagram. After this carriage road had been in existence for over forty years the applicants bought the lots and sought to compel the Council to lay out the road where it was originally proposed to be.	Ship — Attachment — Delivery of Goods — Delay — Damages. <i>In re</i> the Barque "Marga" ... 94
	Shortage, <i>see</i> Dock Agent ... 42
	Spare diet — Cumulative sentence. Where a prisoner had been sentenced by a magistrate to six weeks' imprisonment with spare diet on twenty-one specified days, and had been sentenced on the same day to ten months' imprisonment, to take effect at the expiration of his former sentence: the judge of the week struck out the sentence as to spare diet (1) because only 19 days spare diet would be imposed under the Attorney-General's circular of 1893: (2) because no sentence of spare diet may be imposed where the period of imprisonment exceeds three months, and in such cases as the present the two sentences must be regarded as one, in view of this punishment.
	Rex v. Present ... 775
	Special entry, <i>see</i> Appeal ... 877
	Specific fidei-commissary bequest — Failure of fidei-commissarius — Insolvency of heir. A. had made a special testamentary bequest in favour of B. subject to fidei commissum in favour of B.'s lawful issue, if any. B., who left no issue, became insolvent. Held, that on failure of issue the bequest vested absolutely in B.

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<i>Held further, that on her insolvency it rested in her trustees, but as all her creditors had been paid in full, the bequest must be paid over to her executrix.</i>	
<i>Ex parte D'oliveira</i>	985
Specific performance, <i>see</i> Lease ...	323
Spoliation, <i>see</i> Trespass to moveable property... ..	533
Spoliation—Interdict.	
De Villiers v. Holloway and Another	566
Spoliation—Trespass—Costs.	
<i>The respondents, without the permission of the applicant, who had bought a certain house and had obtained possession but not transfer, entered upon the premises and continued to occupy the house although requested to vacate the same. They refused to leave on the ground that the property had belonged to an ancestor of theirs, through whom they were entitled to succeed to the property.</i>	
<i>Held, that even if their claim was a bona fide one, their remedy was by action. That by taking the law into their own hands they were guilty of spoliation, and that they should be ejected, and pay the costs of the application to eject them before any further proceedings were taken.</i>	
Boyd v. Olsen and Another	575
Statement of Account, <i>see</i> Trustee	802
Statute—Ordinance—Release of <i>fidei commissum</i> .	
<i>An ordinance passed in 1826 by the then Governor, with the advice of his Council, after reciting that the petition for the release of a certain estate from fidei commissum had been referred to the Court of Justice</i>	

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<i>who had heard the parties interested, and with their consent recommended a compliance with the prayer, proceeded to enact that the estate should be freed from the entail imposed by will.</i>	
<i>Held, that the ordinance was valid, and that the descendants of the beneficiaries under the will are not entitled to claim the estate from the present registered owners.</i>	
Olsen and another v. Boyd and others	963
Sub-letting, <i>see</i> Landlord and tenant... ..	444
Sub-letting, <i>see</i> Lease	520
Surveyor, <i>see</i> Transfer Deed ...	996
Suspension, <i>see</i> Articles	791
Suspension, <i>see</i> Attorney	809
Taxation, <i>see</i> Costs	615
Tender, <i>see</i> Civil Imprisonment...	517
Tender, <i>see</i> Ejectment	255
Theft—Treason—Rebel.	
<i>During the recent war the prisoner formed part of a rebel commando which attacked Sheldon Station. The prisoner, without the knowledge or authority of his superior officer, took the watch of a railway guard and appropriated it to his own use. Although the prisoner was described in the charge sheet before the Resident Magistrate as a "convicted rebel," there was no plea or evidence of his having been convicted of treason.</i>	
<i>Held, that the prisoner was rightly convicted of theft of the watch.</i>	
Rex v. Burns	882
Theft, <i>see</i> Ownership	206
Theft, <i>see</i> Appeal	1015

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Threatening, abusive or insulting behaviour—Breach of the peace—Act 27 of 1882, section 10.		Held, that until the said interdict was removed the Court could make no order inconsistent therewith.	
<i>The wearing in a public place of a hat with the colours of the late South African Republic, or with the name of an ex-general of that Republic, or with a coin of that Republic, or with ostrich feathers and a puggaree, or with a badge of the Royal Artillery, does not necessarily and per se constitute threatening, abusive or insulting behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.</i>		Mostert v. Woodstock Municipality 287	
Rex v. Le Roux : Rex v. Van der Merwe and Grove 865		Trade Mark—Rival claimants—Registration—Duty of Registrar.	
Title to land, <i>see</i> Resident Magistrate's Court Acts 662		<i>Where two trade-marks closely resembling each other are tendered for registration it is the duty of the registrar to determine which of the marks he will register, leaving it to the party aggrieved to apply to the court for relief if so advised.</i>	
Town Council—Debentures—Interdict.		De Jond v. Adler 6	
<i>A Municipal Council had issued certain debentures in order to provide funds for the carrying out of a certain water scheme. As this scheme had not been undertaken under statutory powers, and as the provisions of neither the General Municipal Act nor of the Public Health Act had been complied with, the Supreme Court had, at the instance of certain ratepayers, interdicted the said Council from paying interest on these debentures until the provisions of one or other of these Acts aforesaid had been observed. One of the debenture holders now asked for provisional sentence against the Council for interest due on certain of the said debentures held by him.</i>		Trade mark—Registration—Act 12 of 1895.	
		<i>The word "Lightfoot" as applied to a certain special make of boots and shoes was held (1, not to be an invented word, and 2, to be a word having reference to the character or quality of the goods, and hence not to be registrable as a trade mark under Act 12 of 1895.</i>	
		Southall and Co. v. Cuthbert and Co. 837	
		Tramway Company—Non-compliance with the terms of their private Act—Waiver by Town Council—Interdict.	
		<i>The C. B. Tramway Company were bound (inter alia) by their private Act to give 14 days notice to the Town Council of their intention to enter upon and break up any of the Council's roads in pursuance of the powers conferred upon them by the said Act, for the purpose of constructing their line. They gave such notice, but without specifying, as they were bound to do, the day on</i>	

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which they proposed to make entry. The Town Council, however, accepted this notice, and approved of the plans thereunto annexed. The Town Council now applied for an interdict restraining the respondent company from proceeding with their works until they should have supplied such further information as by their Act they were bound to give, and until they should also have again sent into the Council their original specifications.

Held, that as affidavits filed on behalf of the Tramway Company showed that they were not proceeding with their works and were having plans and specifications prepared, the Council could not demand to be again furnished with the original plans and specifications, and that the application for an interdict must be refused with costs.

Semble, (1) the Company might have been interdicted had they attempted to continue their works before supplying the Council with the information which it was under the Act aforesaid entitled to demand. (2) Had the Council not waived their rights they might have objected that the aforesaid notice of entry was void by reason of non-compliance with the terms of the said Company's Act.

The Town Council of Cape Town v. The Camp's Bay Tramway Company, Ltd. 136

Transfer deed — Diagram — Surveyor — Mistake.

A land surveyor, appointed to make a survey of land for the purpose of sub-division, framed

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a diagram which included a road not falling within the land, and such diagram was attached to the transfer of the sub-divided portion given to the plaintiff.

Held, that the mistake of the land surveyor could not effect the rights of the defendant as the owner of the adjoining land within which such road was situated.

Myburgh v. Phillips and Co. 996

Transfer of property — Ante-nuptial contract — Registration — Curator bonis — Damages.

McG. had passed several mortgage bonds over his immovable property, and had executed an irrevocable power of attorney in favour of A., B. and C. The said attorneys had raised a certain sum of money on a further mortgage on the property of McG. to meet certain pressing claims against the estate, on condition that the mortgagee (the present plaintiff) should have the right to purchase a portion of the property within two and a half years for a specified sum considerably in excess of the then estimated value of the said property. McG. consented to this arrangement. Subsequently a curator bonis was appointed to McG.'s estate, and plaintiff in the exercise of his option tendered payment and claimed transfer of the property. B., however, after filing his plea, discovered that McG. had been married by ante-nuptial contract.

The Court found as facts (1) that the arrangement entered into by A., B. and C. with plaintiff was in the best interest of McG.; (2) that the plaintiff had no notice of the alleged

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<i>mental incapacity of McG. at the time he assented to this arrangement; (3) that at that time McG. was capable of managing his own affairs. The Court therefore ordered B. to pass transfer to plaintiff of the aforesaid portion of McG.'s property; but as B. had reasonable grounds for defending the action in his capacity as curator refused to grant costs against him de bonis propriis, but ordered the costs to be paid out of the estate. The Court refused to allow plaintiff's claim for damages as he had only sustained nominal damages, and B. had only done his duty in endeavouring to protect McG.'s interests.</i>	
<i>Greenslade v. Estate McGrath</i>	972
<i>Transfer, see Koopbrief</i>	... 476
<i>Transfer of property, see Foreign Marriage</i>	... 66
<i>Transkeian proclamation No. 110, see Trespass to moveable property</i>	... 533
<i>Traveller, see Hotel Keeper</i>	... 450
<i>Trespass, see Spoliation</i>	... 575
<i>Trespass to moveable property—Spoliation appeal to Chief Magistrate—Transkeian Proclamation No. 110—Act 40 of 1882, section 21—Act 26 of 1894—Act 32 of 1898.</i>	
<i>By Acts 40 of 1882 and 26 of 1894 an appeal lies in all cases in which natives only are interested from the Court of a Resident Magistrate in the Transkei to that of the Chief Magistrate, but not to any Superior Court. In cases to which a European is a party Act 32 of 1898 allows an appeal from the Court of the Chief Magistrate to the Supreme Court,</i>	

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<i>If a man, by subterfuge or violence, becomes possessed of an article which was previously in the possession of another, acting in the belief that it is his own, he is guilty of a trespass, and the onus is cast upon him of proving beyond all reasonable doubt that he is the lawful owner of the property.</i>	
<i>Reed v. Gumenke</i>	... 533
<i>Trustee, see Antenuptial contract</i>	277
<i>" see Master of the Supreme Court</i>	... 268
<i>Trustee—Statement of account.</i>	
<i>Willemse v. Thomas</i>	... 802
<i>Trusteeship, see Articled Clerk</i>	... 528
<i>Ultra vires, see Municipal Council</i>	758
<i>Ultra vires, see Municipal Regulations</i>	... 560
<i>Ultra vires, see Municipal Regulations</i>	... 651
<i>Unlawful arrest.</i>	
<i>Plaintiffs in the Court below had been accused by defendant, a native constable, of stealing two horses, which answered the description of certain stolen horses he had been ordered to trace. He directed the plaintiffs to go and see the police sergeant at Indire, who sent them to see a man at dordrecht, from whom they had received good discharges from the Military Intelligence Department, and who was alleged to have sold the horses to the first plaintiff. The police, being satisfied that the horses were not stolen, allowed the plaintiffs to go.</i>	
<i>Held (on appeal), that the plaintiffs had not been arrested, and that they therefore had no cause of action against defendant.</i>	
<i>Booi and Another v. Kloho</i>	779

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Unlawful Dismissal, <i>see</i> Contract of Service	854
Unliquidated demand, <i>see</i> Claim in reconvention	890
Variation of Order of Court, <i>see</i> Civil Imprisonment	517
Verbal Injury, <i>see</i> Defamation ...	784
Village Management Board — Election of member—Act 29 of 1881.	
<i>L., who was not a registered voter within the area of the Village Management Board of D., and not qualified to be such as he did not reside within such area, was elected as a member of the Board</i>	
<i>W., being a member of the Board, was appointed foreman of works at a salary, and was afterwards re-elected as member of the Board while holding such appointment.</i>	
<i>Held, that both such elections must be set aside.</i>	
Sapiers and Others v. Lipschitz and Another ...	617
Vindication—Ownership—Possession—Martial law.	
<i>A summons in a Resident Magistrate's Court alleged that the plaintiff was the owner of a horse which during the existence of martial law was placed under the protection of the military authorities, and afterwards came into the possession of the defendant.</i>	
<i>Held, that the summons disclosed a good ground of action, and that the existence of martial law during the period intervening between the delivery of the horse to the military and its coming into the defendant's possession did not affect the plaintiff's right of ownership.</i>	
Vorster v. Hodgson	893

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Voetstoots, <i>see</i> Sale and purchase	592
Voters' List, <i>see</i> Harbour Board	956
Voters' Roll, <i>see</i> Divisional Councils' Act	201
Wages, <i>see</i> Contract	537
Waiver, <i>see</i> Tramway Company...	136
Waiver, <i>see</i> Ejectment	255
Warrant—Escape from gaol—Martial Law — Liberty of subject — Act 6 of 1900.	
<i>Where the Attorney-General directs that the case of a person charged with high treason shall be dealt with by the Commissioners referred to in chap. 3 of Act 6 of 1900, the accused is entitled to be released from custody.</i>	
<i>A person confined in gaol by order of the military without a proper warrant cannot, for escaping from gaol, be committed under the Colonial Act of 1888.</i>	
Rex v. Malan & Bruyns ...	250
Warrant, <i>see</i> Prison Breaking ...	144
Warrant, <i>see</i> Fire Insurance ...	771
Warranty, <i>see</i> Sale and purchase	628
Watchmaker, <i>see</i> Bailment ...	987
Water — Railway purposes — Acquisition of water rights under contract.	
<i>The Colonial Government had expropriated a portion of a certain farm for railway purposes. Thereafter they entered into certain contracts with the then owners of the remaining extent whereby they were authorized to take such water as they might require from the said remaining extent, but not more than 15,000 gallons a day. The Government had sunk a well on the farm, and shortly after they had entered into the afore-said contract the plaintiff bought the remaining extent and sunk</i>	

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